ARTICLES

Abstract

The growth of the "law industry" and the escalation of litigiousness are characteristics of contemporary American life. Hyperactivity in legal behavior and the emergence of a "law ridden" society need to be understood within the broad context of social change. After considering the processes and trends leading to the increasing legalization of conflict management, the paper documents and analyzes the progressive encroachment of the judiciary into academe as a ligitimate means of conflict resolution. An investigation of both the impetus for these conflicts and the resulting types of lawsuits predominant in contemporary academe serves as an antecedent to the consideration of the implications of these developments for the future of American postsecondary education.

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Law as a Method of Conflict Resolution in Academe

In recent years the growing use of law as a method of conflict resolution and dispute settlement in academe has become a matter of concern and debate in the United States.[1] The progressive intrusion of law into academe as a means of conflict resolution resulted as the former paternalistic and particularistic style of control broke down. This process, of relatively recent origin, is particularly widespread in America. It is part of a series of broad societal changes and is composed of a variety of interrelated processes.

Legal developments are not arbitrary happenstance - the intrusion of law into any setting has its own logic and nature (Selznick, 1969: 32). The potential for increased litigiousness in academe or in any institution lies within the social dynamics of the institution itself, including its interrelationship with a larger social context. The object of this paper is to identify and analyze the social processes that have contributed to the use of legal mechanisms as a method of grievance settlement and to examine the origin and nature of the types of law suits predominant in contemporary academe.

An Historical and Cross-Cultural Note

The beginnings of the modern university can be traced back to the twelfth century in Paris, Bologna, and Oxford. The early universities began as church schools. By the mid twelfth and early thirteenth centuries they had attained their characteristic form, a formal association of teachers and scholars forming a corporate whole with considerable freedom from political authorities, and with at least freedom of status within the ecclesiastical organization (Duryea, 1973: 16-17). As

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early as 1200 the University of Paris was granted its first charter of privileges which included immunity from civil authorities and autonomy for the University. Similar privileges of immunity and autonomy were granted to other European universities through royal decrees and papal bulls (Radcliff-Umstead, 1973).

By 1550 there were over fifty universities in western Europe enjoying a considerable degree of sovereign immunity. Like the church in the middle ages, universities have enjoyed a particular and peculiar status in medieval Europe and were considered as "bastians of truth" not subject to mundane or stately interferences. To be a member of the academic community was a privilege of considerable magnitude. Internal disputes usually were handled without recourse to external judicial bodies. The university was a sanctuary from the law and in many instances considered itself above the law. Because of this unique and, at that time, functional status of European universities, although jurisprudence made up a substantial part of the curriculm, law was not considered as a desirable or acceptable method of endogeneous conflict resolution.

The influence of this traditional model on the development of the American university is apparent. As President Reed of the University of California proposed a century ago, "The atmosphere of college life shall be as pure and as invigorating as that of the best homes" (Otten, 1970: 18). In many of the elite universities undergraduates were not considered students but "gentlemen." Teaching was largely tutorial and generally only those from upper class backgrounds were admitted. In this setting, resorting to lawsuits to redress academic grievances was considered inappropriate for a "gentleman" (Kearney, 1970: 174-178).

Primarily as a consequence of widespread political unrest, especially visible in the student movements of the late 1960's, the traditional autocratic and autonomous structure of the university was threatened. The political turbulence and the resulting social changes culminated in attempts to democratize within as well as equalize access to institutions of higher learning. The diverse interests and conflicting perspectives so characteristic of contemporary institutions of higher learning contributed to the weakening of the traditional internal mechanisms of grievance settlement. Organizationally and structurally the traditional university was ill-equipped to handle the new demands effectively.

Out of this milieu the increasing legalization of relationships in academe unfolded. The transformation from the pre-legal to the legal world involves the emergence of authoritative rules including the development of "secondary rules" which elevate unofficial norms to a legal status by explicitly formalizing the scope and applicability of the norms (Selznick, 1969: 34). This legal creativity implies a growing concern for decreasing the arbitrariness of decision making and for recognizing the rights of all participants. The fundamental impulses for this legalization include: bureaucratization as a basic social process, self-assertion by the legally underprivileged, the desire to more efficiently utilize human resources and a general responsiveness to socio-cultural change. These forces are themselves, however, not sufficient to produce the legalization of academe. Following Selznick's lead, we add a political dimension- the desire for recognition and power and the demand for new types of participation and new foundations of authority - to our analysis of the emergence of law as a means of conflict resolution in academe (Selznick, 1969: 121).

In analyzing the intrusion of law and a legalistic perspective into ever widening spheres of social life, including academe in particular, we review the current implications and future consequences of the legalization of academic life.

Precipitating Conditions for the Proliferation of Law in Contemporary Society

The growth of cities and the urbanization of the world is one of the most significant developments of modern time. The understanding of this massive transformation is an important prerequisite for comprehending many fundamental social changes, including the growing litigiousness in modern society. The transformation of traditional lifeways involving the substitution of secondary for primary relations, the weakening bonds of kinship, the declining significance of the family, the church, and the neighborhood, as well as increasing physical and social mobility are all basic features of urbanization and modernization. With the decline of communal solidarity the traditional style of control broke down with rational-legal authority replacing it and new patterns of control following. The seemingly inexorable process of rationalization and the inevitable journey into the law ridden modern world is marked by the separation of home, sentiment, and politics from work, calculation, and administration (Hearn, 1978: 38).

Conventional social thought has identified bureaucracy as the most pervasive social expression of rationality. For Max Weber, the emergence of large-scale bureaucratic organizations is the dominant feature of the times. Given their far-reaching implications, large-scale bureaucratic organizations are extra-ordinarily recent phenomenon. Weber was especially concerned with how organizational power will be constrained. The contemporary university is one setting where this question is being raised.

In addition to the rationalization and subsequent bureaucratization of the modern world, the increasing massification and diversification of contemporary society are significant developments. The contemporary Western world, as a pluralistic setting, has, with startling swiftness, split into a variety of divergent perspectives and directions. As Austin T. Turk (1978: 217-218) observes:

> As the scale and complexity of social relatedness increase so does the diversity of human experiences. The more diverse the experiences people have had, the more diverse their perceptions and evaluations of behavioral and relational alternatives may be. The greater the diversity of perceptions and evaluations, the greater may be the variability in what is perceived as justice in the specific terms of everyday life.

Implicated in this pluralistic setting and related to the widening opportunities to construct differing realities is the heightened emphasis on individualism and the increasingly widespread assertion of individual rights. As Bernard Barber (1973: 415) puts it, "This is the age of civil rights," an age of increasing concern for the protection of individual rights against any institutional encroachment and abuse. Individual rights are increasingly the starting point of legal analysis in modern society. Within this context the concept of, and appeals to, "legal entitlement" emerge.

The rise of social advocacy has been a principal impetus for the increasing judicial activism in recent American history. Some observers of recent legal history, such as Nonet (1978: 71), conclude advocacy has come to rival ajudication as the modern paradigm of legal action. Under the prodding of both individuals and groups, public and private, the legal process has become an alternative mode of political participation. Litigation becomes a form of political expression. The thrust of this judicial intervention is given added energy by the bourgeoning assertiveness of individual rights including the encouragement of participatory decision making and the ability of individuals to publicly criticize authority. Advocacy broadens access to legal institutions and enlarges the scope of legal inquiry.

Well over two generations ago, Weber foresaw a trend of continued and pervasive secularization of, and disenchantment with, modern institutions. The contemporary "secularization of authority" results in a situation where authority no longer carries any moral or sacred pretense. Authority in contemporary society is basically functional, not moral, its legitimacy derives from the services it performs (Otten, 1970: 199). This delegitimation of authority has provided further impetus for the expansion of the deepening mistrust of growing number of contemporary institutions.

The contributions of these and other social changes to the growth of law in the modern world is undeniable. In turn, legal resources are more readily available in modern society. A variety of organizations such as unions, fraternal groups and consumer groups are subscribing to pre-paid legal insurance. This extensive availability of legal resources is also evident in academe. Students who often perceive themselves as buyers or consumers of a product - education - are increasingly availing themselves of pre-paid legal services through a variety of student organizations. At the University of Minnesota, for example, students are assessed a quarterly fee for a form of prepaid legal assistance.[2]

A cursory review of these programs indicates that where they have been instituted they have grown rapidly. One might speculate that the lines in the student legal service center may some day rival those in the student health service center. Legal resources are also readily available to faculty. The AAUP, for example, in a recent recruitment letter (September, 1978) stated, "We are working with a major insurance carrier to develop a liability insurance policy that is tailored to the needs of faculty and that is part of the membership package."

University administrators have not been immune to these socio-legal developments. The recent creation of the National Association of College and University Attorneys is indicative of this trend. The growth of this association, designed to coordinate legal resources and expertise among its member institutions, has been rapid. Since its inception about five years ago the association has functioned as a clearing house for research in the specialized area of law in academe. In addition, the number of lawyers employed directly by universities or on a retainer basis has escalated.[3]

As a result of these developments, many events that would have seemed inconceivable as legal matters a few years ago are finding their way into the courts.

> The availability of legal resources is in itself an impetus to social conflict, as conflicting or potentially conflicting parties cannot risk the possible costs of not having the law - or at least some law - on their side (Turk, 1978: 222-224).

The availability of legal facilities decreases the pressure upon conflicting parties to resolve disputes in terms of non-legal resources they can mobilize. However, as Turk notes, "To a considerable extent, law is oriented to regulating the symptoms of conflict without getting at the more intractable problems of removing the sources of conflict" (Turk, 1978: 225). From this perspective, the utilization of law as a means of conflict resolution can be interpreted as contributing to the self perpetuating character of certain social conflicts.

The impact of these and other social changes on law as a social institution is undeniable. As a recent *Newsweek* article stated, "Law as a growth industry is little short of spectacular: There are over 425,000 attorneys in the United States today compared to 250,000 just twenty years ago" *(Newsweek,* 1977: 45). Every year over 30,000 new attorneys are entering the legal profession. Legislation providing

the greatest expansion ever in the federal judiciary - 152 new judgeships or an increase of almost one third - will soon be on President Carter's desk *(U. S. News and World Report,* 1978: 54). The profound growth of the legal establishment is also reflected in the growing number and variety of lawsuits in America. The number of civil suits filed in federal courts has doubled since 1960. The volume of damage suits has been increasing five times as fast as the population. The number of trials held in U. S. District Courts has risen from 7,977 in 1950 to 19,580 in 1976, and the number of cases commenced in the U. S. Courts of Appeal has increased from 2,830 to 18,208 for the same time period *(U. S. Bureau of the Census,* 1977: 184). As the *Newsweek* (1978: 42) article concluded:

> The mounting influence of law and lawyers on modern American life constitutes one of the great unnoticed revolutions in U. S. history: the ever increasing willingness, even eagerness, on the part of elected officials and private citizens to let the courts settle matters that were once settled by legislators, executives, parents, teachers, or chance.

Contemporary academe has not been immune to the effects of these significant socio-historical changes. In turn, several developments within academe contributed to the escalating involvement of law in contemporary academe. The increasing diversity and frequency of lawsuits involving participants in academe are indicative of these developments.

The Impetus for Conflict in Academe

The twentieth century has witnessed a phenomenal growth in the number of institutions of higher learning in the United States, from some 300 to over 1,900 four year liberal arts colleges and universities, in addition to a large number of junior colleges and professional schools. A series of important trends in academe accompanied this rapid growth including the massification, democratization, bureaucratization, professionalism, unionization, and competitive nature which characterize contemporary American higher education. We shall preface our comments on these developments with a brief discussion on the nature of legalization in contemporary academe.

The growing legalization of the modern university reflects an increasing concern for reducing the arbitrariness of rule making and administering as well as an effort to explicitly recognize the constitutional and contractual rights of faculty and students. Both the expanding self assertion by students and faculty as well as the bureaucratic responsiveness to social change contribute to these developments (Selznick, 1969: 28-29). The force to create a legal order is, in the first instance, a practical one. From the standpoint of the rulers, power is made more secure when it is legitimate. For those ruled, administrative discretion is limited and fears of oppression allayed. As will become apparent in our discussion of types of lawsuits in academe, with the promulgation of a legal order questions of due process arise.

Concomitant with population growth and industrialization, the demand for a more literate and skilled work force contributed to the expansion of public education. In addition to its latent function as an agent of social control, education functioned as an instrument of social mobility and was perceived as a major avenue for the acculturation as well as upward mobility of immigrants. This tendency toward the massification of higher education apparently reached its zenith in recent years with approximately half of all high school graduates entering colleges and universities (Keyfitz, 1978: 86-88). Today there are approximately eleven million students enrolled in institutions of higher learning. This dramatic massification of higher education has been predictably accompanied by the transformation of social

relations within the world of academe. Previously more personal and face to face in nature, these social ties have progressively grown more impersonal, specialized, and formalized. The involvement of escalating numbers of individuals in ever more secondary social relations has contributed to the emergence of situations characterized by conflict and dissention and the eventual involvement of law in academe. As Donald Black (1976: 41) has observed, formal law is virtually inactive among intimates but increases as the relational distance characterizing more and more social relations within contemporary academe provides a fertile climate for the intrusion of law.

Paralleling this trend to mass educaion were efforts to democratize academe. A milestone in this respect was the 1954 *Brown v. Board of Education* decision as an effort to eliminate certain fundamental inequalities and to provide greater access to educaion regardless of ethnicity, race or social class background (Kaplin, 1978: 187), followed by, *inter alia,* Title VII of the Civil Rights Act of 1964 and Title IX of the Educational Amendments of 1972.

Although white and upper and middle class students are still overrepresented as consumers of higher education, the trend toward democratization has resulted in the increased diversification of lifestyles, personalities and perspectives in academe. Again, the relativism of modern society is apparent. The lack of normative consensus and the multitude of differing and often conflicting perceptions within academe obviously contributes to the growth in the frequency and diversity of lawsuits. The recent lawsuit filed by Allan Bakke against the University of California concerning what are "just and proper" admission standards is illustrative of the increasingly diverse perceptions.

The world of education has not been immune to the forces of rationalism in modern society. The bureaucratization of higher education is ubiquitous in the American experience. The university is now comprised of special statuses with explicit and specialized duties and obligations. Activities throughout the university are highly planned and coordinated. There are clear-cut lines of authority and supervision accompanied by a merit system and the selection of office holders on basis of technical skills and qualifications (Duryea, 1973). The march of bureaucracy (rationality) has weakened the traditional, often more irrational, sources of domination within the university. Where traditional mechanisms of social control are weakened, more formal, rational means of social control are employed. Black's (1976: 31-36) observation that law varies in proportion with other social controls is applicable. If all else is constant, there tends to be more utilization of the law in societies where other social controls are comparatively weak.

The professionalization of the American system of higher education has occurred over several decades with a discernible intensification of this trend in recent years. In essence, the process of professionalization involves decision making on the basis of expertise, formal licensing and certification, and participation in professional associations with considerable sanctioning power. The normative demands of academic bureaucracies imposed upon academicians who view themselves as professionals often generates role conflict. In bureaucracies, there is a standardization of role behavior, a low degree of autonomous decision making and role behavior that is oriented toward the organization and conforms to the administrative practices of the organization (Olsen, 1978). A profession is characterized by flexibility in role behavior, a high degree of decision making, behavior that is oriented toward the client and conforms to the standard of colleagues and

professional associations. The presence of divided loyalties between strong professional associations and the need of local academe bureaucracies is a potentially conflict-laden situation which has dramatically escalated the demands for formalized reconciliation or resolution through the law.

Another fundamental transformation of higher education as a social institution is the spread of unionism and collective bargaining. By the end of 1975, about 95,000 of approximately 600,000 higher education faculty members were employed at unionized institutions (Kaplin, 1978: 95-96). This trend is most advanced in a number of large city and state universities where the influences of urbanization, particularly bureaucratization, tend to be the greatest. The unionization of college faculties and staffs is the result of a number of influences, especially economic changes and questions of job security. Generally, unionization has signaled a greater militancy among faculty and staff members and contributed to the further formalization and contractualization of social relationships within academe. This process, in turn, often helps create and define certain adversary relationships. This development has set the stage for the intrusion of law into many sectors of contemporary academe and is reflected in the growing number of lawsuits involving contractual and collective bargaining issues (*Academe,* 1978: 2). Collective bargaining, in fact, promises to be a major focus of controversy in post-secondary education for the foreseeable future.

Competition is an ubiquitous feature of contemporary post-secondary institutions. Students compete for grades, for admission into professional schools, and upon graduation, for getting a "good job." The pressure on faculty to publish is escalating, and one's publication record is decisive in retention and promotion as well as in occupational mobility. Among both faculty and administration there is increased competition for positions in a depressed job market and heightened competition for increasingly scarce resources. Accompanying declining enrollments is the escalating competition for students by institutions. The long-standing inflationary spiral coupled with institutional financial exigencies further contribute to competitive endeavors among various departments, schools, offices, and faculty and administrative bodies. Highly competitive situations are often characterized by disputes and conflict which can lead to the definition of a situation as being unjust and in need of legal redress.

After this brief discussion of the social forces contributing to the proliferation of law in modern society and of the sources of escalating conflicts in contemporary academe, we now turn to the organizational-relational changes in post-secondary institutions.

Academe in Transition

The aforementioned conditions have produced a situation in academe where more and more rules, rather than reason, guide our daily existence. The era of collegiality is being replaced by one of liability (Ryor, 1978). The heterogeneous, impersonal, almost alienated quality of the academic climate fosters the utilization of law to assert individual rights and to settle grievances in academic situations. Students more and more come to view themselves as "buyers" of education, faculty operate under rules and regulations with regular contracts, and administrators administer under a complex web of legal guidelines.

The increasingly law-ridden character of academe is reflected in several ways. One such indication is the number of cases involving participants in academe.

Although a variety of measures are available, the expansion of the aforementioned University of Minnesota Student Legal Services is insightful. Founded in 1977, last year the service handled over 1,500 cases with approximately twenty percent culminating in formal legal representation in court. This spectacular growth has caused one University Student Government offical to comment on the agency's budget request for the coming year,". . .the request is the beginning of the growth of a giant legal agency that will cost students far more than they realize" (Parker, 1979: 1). Another discernible trend is the burgeoning number of recently appearing journals in higher education law. Most of the publications in this area, such as *College Law Digest, Journal of College and University Law,* and *The Yearbook of Higher Education,* have only recently been instituted.

Two differing styles of rational-legal authority patterns emerge in the modern private organization - managerialism and private governance.[4] These approaches involve differing styles of administration and reflect diverse interpretations of the socio-legal status of the private organization. By applying these conceptions to the academic community we can further specify the new social forms, modes of participation, and ways of exercising authority in the modern university. In turn, the emerging pattern of lawsuits in academe becomes more understandable.

The conventional image of the university is an organization administered by managers. It has been in the interest of those who control universities and other contemporary bureaucratic organizations to have their employees, clients, as well as the general public, see such organizations in this light (Weinstein, 1979: ix). Most social scientists have also, often uncritically, accepted the concept of pure administration in their analyses of modern bureaucracies.

For those who subscribe to an administrators as managers philosophy, the major goal of the administration is to look after the general welfare of the university and concern itself with the effective accomplishment of university objectives. Although managers may be influenced by law, their concern with realizing the ideals of legality such as protecting faculty or student rights or dispensing justice is limited. This is not to suggest managerialism and legalism are foreign; they share a commitment to objective and impersonal decision making (Selznick, 1969: 16).

As viewed from this perspective, the university is a non-governmental form of organization and mode of action. Private law, which focuses on the legal relations between groups and individuals outside the government, is thus applicable. A number of recent lawsuits dealing with contract, property or tort issues in contemporary academe are indicative of the pervasiveness of this image of the modern university.

In recent years, however, we have seen a growing realization that modern organizations wield considerable power. The notion that universities are political entities and not just administrative structures is gaining credence. As Otten notes, ". . .we are in a new era where power is not the monopoly of government but dispersed throughout the organizational fiefdoms" (Otten, 1970: 7). Many political processes such as conflict, deception, and the misuse of power, long neglected or given peripheral attention in the bureaucracy as administrative entity model, are increasingly recognized as decisive aspects of organizational life. Conflicts and disputes concerning policies, procedures, and objectives arise continually, often outside "proper" organizational channels.

As organizations become large-scale the Weberian-like concern for limiting their dominance has deepened. As Selznick suggests, we have recently "seen a

transition from preoccupation with freedom of association to a concern for freedom in association" (Selznick, 1969: 38-39). This awareness, a response to new self conceptions and new opportunities, has contributed to advocacy as a modern legal paradigm and is, in turn, reflected in growing numbers of lawsuits.

With the recognition that private organizations can be more oppressive than the state, questions concerning what structural conditions and ideological guidelines can be devised to balance organizational dominance are increasingly raised. In an advanced technological society the deprivation of a college education can have such overwhelming consequences it can amount to the denial of citizenship (Otten, 1970: 4). Within the context of the growing assertiveness of individual rights and the elaboration of the concept of legal entitlement, the notion of private government and private governance emerges.

Sovereignty has generally been the basis for separating the public and private spheres. Traditionally a distinction was made between public law (administrative law, criminal law and constitutional law) which had to do with the organization of government and the relationship of government and the individual and private law which encompasses legal relations outside government. With the increasing secularization of the state, sovereignty has weakened. The distinction between public and private spheres had diminished. Coupled with the growth of large scale organizations public law jurisprudence has declined (Selznick, 1969: 244-246).

Both the public and the courts are increasingly answering the question - can we justifiably talk of governance apart from the state - in the affirmative. The state is today simply one association among many. With the continual convergence of governmental and non-governmental forms of organization and modes of action, the modern university, corporation and trade union come to be defined as quasi-public. The rule making activity of private organization is the basis of governance to many. As Selznick (1969: 45) argues, sociologically, if not legally, there is a transition from private to public responsibility when leadership becomes accountable to the interests of others.

The application of the law of governance in academe opens the way for due process questions to be raised. The law of due process is, thus, rapidly emerging as the basic source of establishing doctrines used to bring the rule of law into wider spheres of academe. Traditionally, the courts supported administrative discretion by asserting student status was a privlege. With due process now being applied beyond the conventional public law context, the courts have narrowed the range of adminstrative discretion.[5] In *Dixon v. Alabama State* Board of Education (249F 2d 150 (D. C. Ala. 1961), cert. den. 368 U. S. 930 (1961)) disciplining of demonstrating students was at issue. The court concluded the state could not "condition the granting of even a privilege upon the renunciation of the constitutional right to due process."

Large-scale public, and especially private, organizations still have unresolved legal problems. The legal order is now grappling with the issues of how the modern university, public or private, should conceive and protect the rights of the participants in academe. How and to what degree can the modern large-scale bureaucracy be held accountable for its actions? By briefly reviewing several other contemporary lawsuits in academe, we can suggest how the court is dealing with these. In addition we can judge to what extent the notion of private governance has evolved beyond the more traditional managerial image of university administration.

Varieties of Lawsuits in Academe

With increasing frequency conflicts, disputes, and grievances that arise on campuses across the United States end not on campus but in court. In this context we find certain dominant patterns emerging regarding the appearance of lawsuits in terms of faculty-administration, student-faculty, and student-administration relations.

Faculty-Administration Relations

The faculty-administration relationship in post-secondary institutions is defined by an increasingly complex web of legal principles and authorities. The essence of this relationship is contract law, but, "That core is encircled by expanding layers of labor relations law, employment discrimination law, and in public institutions, constitutional law and public employment statutes and regulations" (Kaplin, 1978: 87). The growth in the number and variety of laws and regulations governing faculty-administration relations coincides with a profound increase in the number of lawsuits stemming from that relationship.

Many legal disputes center on the meaning and interpretation of the faculty-institution contract. Depending on the institution, a contract may vary from a basic notice of appointment to a complex collective bargaining agreement negotiated under federal or state labor laws. In some instances, the formal document does not encompass all the terms of the contract and other terms are included through "incorporation by reference," that is, by referring to other documents such as the faculty handbook or even to past custom and usage at an institution. In the context of contract interpretation, disputes arise most often in terms of contract termination and due notice for such termination. For example, in *Brady v. Board of Trustees of Nebraska State Colleges,* (242 N.W. 2d 616 (Neb. 1976)), the court ruled in favor of a tenured professor, since the institution which dismissed him had violated a section of the college bylaws. Failure of an institution to give due notice of termination is usually considered as a breach of contract by the courts, and such legal action by a faculty member often results in his or her reinstatement as well as compensatory damages, as in *Greene v. Howard University* (412 F. 2d 1128 (D. C. Cir. 1969)). In *Greene* five nontenured professors were terminated close to the end of the academic year because of their involvement in disorders on campus. The plaintiffs asserted that the university breached their contractual obligation to give appropriate advanced notice of termination, and the court decided in their favor.

A number of suits instituted by faculty members to redress their grievances against university administrations have focused on faculty personnel decisions such as appointment, retention, promotion, and tenure policies, and pecuniary matters affecting women and minority groups. As a result of civil rights legislation, hiring procedures must follow clearly established affirmative action guidelines. Many traditional practices of departments and universities are being questioned, such as the use of "the old-boy network" or other selection processes not in compliance with these guidelines. Similarly, termination procedures must also follow specific guidelines and deadlines, and in recent years faculty members have increasingly resorted to lawsuits on the grounds of procedural matters. In this "age of civil rights" characterized by the broadening application of the law of due process, an increase in the number of lawsuits dealing with salary, sexual, and racial discrimination in the context of promotion and tenure matters has occurred (Kaplin, 1978: 108-128).

Student-Faculty Relations

Since students see themselves as purchasers of education, they expect "delivery" of a product (Stark 1976 and 1977). In this context, the question of academic malpractice becomes important (Vacca, 1974; Comment, 1976; Drushal, 1976; Newell, 1978). Although the concept of academic malpractice is rather amorphous, several patterns have emerged. A faculty member may be charged by a student who perceives a particular course as "worthless" (*Time,* 1975: 3), or by a student who contends that he did not obtain any "relevant" information, or that for some reason it did not fit into the student's general educational outlook or requirement or area of concentration (*The Chronicle of Higher Education,* 1975: 1 and 10). In such instances, individual professors are charged, and the object of the lawsuit is usually the recovery of tuition monies and occasionally an intent to seek punitive damages, since the legal doctrine of *respondeat superior* (i. e., the sins of the employee are imputed to be those of the employer) is usually invoked (Comment, 1976: 767-770).

In recent years several cases have been litigated in which students have claimed contract damages for an institution's failure to provide bargained-for services. For example, in *Trustees of Columbia University v. Jacobsen* (53 N. J. Super. 574, 148 A. 2d 63, *appeal dismissed,* 31N. J. 221 156 A. 2d 251 (1959) a student filed a counterclaim alleging Columbia University:

> Had represented that it would teach the defendant wisdom, truth, character, enlightenment, understanding, justice, liberty, honesty, courage, beauty and similar virtues and qualities, that it would develop the whole man, maturity, well-roundedness, objective thinking and the like; and that because it failed to do so, it was guilty of misrepresentation, to defendant's pecuniary damage.

Although the trial court granted the university's motion for summary judgment and was sustained on appeal, such complaints of misrepresentation are becoming commonplace.

Such complaints of misrepresentation often arise from the provisions in catalogues, bulletins, and other printed material which are, as it was noted, considered by courts as contractual between the student, the faculty, and the institution. Even course objectives and descriptions are viewed by courts as contractual. In *Ianniello v. University of Bridgeport,* for example, a student sued the university for monetary damages she incurred as a result of taking a course where the instructor failed to follow the course description (*The Chronicle of Higher Education,* 1975).

The failure of a student to pass an internal examination may also result in attempts to involve the court. In such situations, the student may question the expertise and competency of professors to evaluate examinations or a department may be accused of following improper procedures during examinations. Questions of expertise and competency usually arise in the area of alleged academic overspecialization (i. e., is someone qualified to evaluate an examination in social psychology when his professed speciality is social change?) Issues of improper procedures often arise in the context of due process involving the department's or the university's failure to spell out specific guidelines for examination procedures, for not living up to those guidelines or not informing the student fully and in writing about these guidelines and appeal procedures (Mancuso, 1976: 85-86).

The student's failure to pass a professional examination is another ground for lawsuits. Here the charge is usually that a given department "failed" to properly prepare the student to successfully take an external examination, such as a bar

examination, and thus provided a "defective product." In *Huckabay v. Netterville* (263 So. 2d 113 (La. 1972)), although the court ruled against a graduate of the Southern University Law School who claimed the Univesity was responsible for his failure to pass - on three different occasions - the state bar examination, it also noted that a properly drafted contract suit may have stated a "remediable" course of action.

Finally, in the context of student-faculty relations, the appropriateness of a given curriculum may be the object of a lawsuit. In such instances the dispute could conceivably center on the marketability of a given training, specialization, and curriculum with the resulting failure to prepare an individual to carry out his work in a non-academic situation. It should be noted, however, that the question of job preparation, or lack of it, has so far received little legal attention and has been the object of few lawsuits (*Time,* 1975).

Student-Administration Relations

Increasingly, admission policies, disciplinary rules, suspension and dismissal procedures, the rights of students to organize, alleged censorship activities over student publications, and sex discrimination practices are being challenged by students in court.

Certain courts are beginning to consider college registration as an implied contractual agreement between buyer and seller, and starting to interpret the college catalog as a form of institutional advertising. This legal nexus has been summarized in a recent California decision as follows: "The basic legal relation between a student and a private university or college is contractual in nature. The catalogues, bulletins, circulars, and regulations of the institution become a part of the contract" (*Zumbrun v. University of Southern California*, 25 Cal. App. 3d 1, 10, 101 Cal. Rptr. 499, 504 (1972)). Although constitutional law principles have recently been invoked to define and limit the scope of student rights in public institutions, the courts "still view the student-university relationship as one of contract with certain constitutional protections required if the institution is public" (Mancuso, 1977: 97). Some statutes, such as paragraph 29035 of the *California Education Code,* go even further and outlaw false and deceptive advertising by schools and provide for recovery of damages by students, including court costs and reasonable attorney fees (Drushal, 1976: 6622).

Since the celebrated Supreme Court's Bakke decision (U. S. Supreme Court No. 76-811, *The Regents of the University of California v. Allan Bakke*), admission policies and procedures are expected to come under increasing scrutiny. Future challenges by minority groups will raise new definitions of discrimination in higher education, particularly in states where blacks and Spanish-speaking persons continue to be substantially underrepresented in more prestigious positions within universities. Rigid adherence to quotas and affirmative action guidelines could, in turn, raise legal questions of reverse discrimination in admission policies.

Institutions of higher learning customarily have written rules of conduct or behavior which students are expected to observe. At the same time, these written rules and regulations have become the target of increasing numbers of lawsuits. In many recent cases students subjected to disciplinary action questioned the validity of these rules (Kaplin, 1978: 229-233). In the same vein, the role of the university as *in loco parentis* is increasingly being questioned in court by students, and on occasions, by their parents.

Although institutions of higher learning have the right to dismiss, suspend, or otherwise sanction students for misconduct or academic deficiency, this right is determined by a body of procedural requirements which must be observed in such actions. Consistent with *Dixon v. Alabama* case, recent rulings indicate a judical trend toward increased protection of student rights in both public and private institutions in suspension and dismissal cases (Kaplin, 1978: 250).

First Amendment rights have been increasingly cited in student-administration lawsuits. Under the First Amendment, students have a legal right to organize and use appropriate campus facilities. In some instances, however, post-secondary institutions retain authority to revoke or withhold recognition and to regulate the organizational use of campus facilities. When a mutually acceptable and satisfactory balance between the organization's right and the institution's authority cannot be attained, the organizing students may turn to the courts to settle their dispute with the administration (Healy v. James, 408 U. S. 169 (1972)).

The First Amendment principles also apply to student publications. The chief concern here is censorship and administrative control over publications. In *Joyner v. Whiting* (477 F. 2d 456 (4th Cir. 1973)), for example, financial support for the campus newspaper was terminated on the grounds that the paper printed pro-segration articles, and that it urged the maintenance of an all-black university. The court of appeals held that the administration's action violated the student staff's First Amendment rights.

Conclusion

The growing frequency and diversity of lawsuits as a method of conflict resolution has important implications for contemporary institutions of higher educaion. There is an increased possiblility of legal accountability for the activities of all participants in academe - particularly those of faculty and administration. The immediate effect of this growing legalization is formalization. With the escalation of the assertiveness of individual rights by the legally underprivleged, rules are enacted to specify and protect rights and to limit administrative arbitrariness.

There is a growing realization among the participants in higher education of the increasingly legalistic climate of academe. This has contributed to our heightened awareness of the legal implications of our activities. The utilization of "objective" appearing measures of student performance including standardized examinations (which may be implicated in the decline in writing skills), grade inflation, the desire to "objectively" evaluate faculty performance, and the use of multiple reviews of administrative decisions are indicative of a growing awareness of potential legal consequences.

Unfortunately, the darker side of legalization is its implication in the depersonalization of academe. A curious irony emerges - the very groups that called for expanded legalism to establish and protect their individual rights now suffer its consequences. Students become increasingly resentful of the fact that universities are being turned into people processing plants that merely certify large numbers of technicians and are unable to personalize instruction and to meet their personal needs. Faculty bemoan the loss of collegiality and the impersonal rule and law-ridden character of the modern university. The impersonal, "objective" application of rules and regulations in a universalistic manner has emerged as a growing threat to academic freedom.

In response to these developments, the desire to create, or more correctly in certain instances, receate more informal and personalized grievance and mediation machinery to provide for the non-adversary resolution of disputes and conflicts grows. Unfortunately, as this alternative grows more attractive our creative abilities in an increasingly formalized and legalistic setting often grow weaker.

La loi, methode de solution aux conflits du monde académique.

La croissance de "l'industrie de la loi" et l'accroissement des cas litigieux sont les caractéristiques de la vie américaine contemporaine. L'hyperactivité du comportement legal et l'émergence d'une société complètement "légalisée" doivent être comprises dans le large contexte des changements sociaux. Après avoir considéré l'évolution et les tendances à une légalisation croissante des conflits de gestion, cet article décrit et analyse l'empiètement progressif du domaine judiciaire dans le domaine académique comme un moyen légitime de résoudre ces conflits. L'étude de la force de ces conflits et des conséquences légales qui en résultent dans le monde académique contemporain nous permet de considérer les implications de ces développements dans l'avenir de l'enseignement post-secondaire en Amérique.

Notes

[1]In conventional usage, conflict resolution refers to broad disagreements between groups or classes such as those involving students, faculty, or administrators. Dispute settlement focuses on the public assertion of inconsistent claims by individuals over something of value.

[2]The authors wish to thank Dr. Shirley Clark, Assistant Vice President for Academic Affairs at the University of Minnesota, for providing detailed information on pre-paid legal services for college students.

[3]The authors wish to thank Mr. Joseph Arrieta of the National Association of College and University Attorneys for providing this information.

[4]For a thorough discussion of private government and the law of governance see Selznick (1969).

[5]If the law of due process were to become a common law field, it could be applied wherever the functions of governance were performed.

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