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PROFESSOR Beaney's careful and well-ordered analysis of the current semantic approaches to legal nomenclature of some aspects of student-institutional relationships provides a useful perspective of recognized procedures and underlying philosophies in the field. These procedures and categorizations may not have been intended for application directly within the student-institutional relationships arena and are, perhaps, not adequate to delineate solutions to many of the problems important to the students and currently facing the governing bodies of educational institutions. If we are truly examining the framework of institutional governments — or more candidly, governing powers[1]— then it may be fair to point out that the courts will be of assistance to the parties solely at the periphery of the arena by influencing the distribution or redistribution of the governing power. The courts appear to have been, at least until now, understandably reluctant to intrude upon areas of academic standards and educational tranquility.[2] Their apparent aloofness in this field cannot all be attributed to the conservatism and tendency of the law to follow social changes with appropriate legal adaptations. Many courts feel that the academic and administrative leaders in the present structure of educational administration are most concerned with this problem and also have the greatest competency to solve it.[3] There also appears to be some discernable areas of student-institutional friction which are not amenable to resolution by way of judicial proceedings.[4]

Professor Beaney and many other writers in the field have described in some detail the difficulties facing a student or an educational administrator who attempts to seek a workable solution to conflicts within this area by primary reference to and reliance on the traditional legal categorizations of the past. Just as the institution of marriage comes into being through the medium of an innocent looking contract, once the status is created, it far overshadows the contractual considerations in disposition of problems arising in the

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[1] H. DRAPER, BERKELEY: THE NEW STUDENT REVOLT 188-99 (1965).

[2] Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749 (5th Cir. 1966); Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966); Due v. Florida A. & M. Univ., 233 F. Supp. 396 (N.D. Fla. 1963).

[3] Steier v. New York State Educ. Comm'r, 271 F.2d 13 (2d Cir. 1959); Johnson, *The Constitutional Rights of College Students*, 42 TEXAS L. REV. 344 (1964).

[4] Steier v. New York State Educ. Comm'r, 271 F.2d 13 (2d Cir. 1959).

husband-wife relationship. It is quite natural, then, to find modern writers and scholars who address their attentions to the area under examination adopting a different basis for the framework of their approach and concentrating more heavily upon the element of status of the college or university and of the student, and the aspect of rights and duties which should exist within this framework.

Professor Alvin L. Goldman, in a most scholarly and admirable article,[5] has proposed a view of the problems arising in the student-institutional arena from the basis of a fiduciary status that is relatively modern, relatively flexible, and of reasonably wide currency on today's legal scene. A literal application of the theory, however, may raise some difficulties, not only in understanding and amending present practices, but also in extending any adjustments of present practices to achieve a realization of the proper goals, both of the institution and of the student.

The underpinnings of the rationale for imposing fiduciary responsibility on an educational institution are that the student places in the institution that measure of confidence one might find in a lawyer-client, confessor-penitent, or doctor-patient relationship, as well as the view that the institution is in a position of nearly total dominance over the student. Exceptions to these assumptions may occur too frequently to justify classifying them as general assumptions.

The fiduciary theory has some original roots in the law of trusts,[6] and thus, understandably, the institution — cast in the role of trustee — would be held to one of the highest standards of conduct known in law. While no one would quarrel with the desirability of educational institutions striving to meet that kind of standard (and it does not appear to be a violent presumption to suppose that the majority of our educational institutions are in fact striving to meet that standard), the theory has a necessary corollary which should be given some objective and serious thought before the theory is embraced in its entirety. Because of the exceptionally high standard of conduct placed upon the fiduciary (for excellent reasons in a pure trust situation), there is necessarily very little responsibility, if any at all, placed upon the beneficiary of the fiduciary relationship — in our frame of reference, the student. At that impressive milestone of a person's life, when he enters upon the pursuit of higher education, it would seem that the development of a sense of responsibility for his actions would be of significant importance, not only to the student and to the institution attempting to provide

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[5] Goldman, *The University and the Liberty of Its Students — A Fiduciary Theory*, 54 Ky. L.J. 643 (1966).

[6] *Id.*

avenues of intellectual pursuit, but even to that nebulous body — society — to which both parties may be in some way accountable. This premise must enjoy some credence in the minds of those in student status, for more and more of them appear not only to be seeking but actually demanding broader and more awesome responsibilities. To the extent that the fiduciary theory might be construed to diminish the accountability and responsibility of the student in the student-institutional context, the theory might be subject to legitimate criticism.

The major tenet of the fiduciary theory, either from the stance of reposing confidence in the student or the assumption of substantial dominance by the university, carries with it a cardinal adjective change. It shifts to the university the burden of justifying in detail, in a legally oriented and artificially formal structure, the actions of the university in every case in which they might be challenged, no matter how informal or capricious the challenge might be. It is this aspect of the fiduciary theory that might be highly impractical and the one which should be seriously and critically examined before that theory is treated with approbation. This does not mean that the theory is without merit in many situations. Perhaps one should look to the rather consistent teachings of the physical sciences and, in recent years, to the empirical research of the serious social scientist which would seem to indicate an action-reaction situation. By using this action-reaction framework, despite its initial appearance of being a drastic oversimplification, one may nevertheless approach solutions to student-institutional frictions from a common, justifiable, and democratically fair basis. It is certainly not unknown in societies and in their legal filaments that one who receives a benefit incurs under ordinary circumstances, either expressly or by implication, a corresponding obligation. The corollary of this premise, of course, is that one who finds himself the recipient of an obligation can and should expect a corresponding benefit. Translated into the institutional-student framework, when a student seeks an institution, he is certainly conscious of the fact that there are certain benefits flowing from his admission to the academic environment. Consequently, with these benefits in mind, he must be held to an awareness that there are also certain obligations which he undertakes as the price of admission. One seldom finds the benefit without the obligations. Let us examine, then, the scheme of life in the university which affects the student, and view it from the benefit-obligation focus.

At the very outset, one is faced with the question of whether there exists any "right" to an education at all. The proposition is certainly not well-settled in court decisions at this time, but the

"right" may at least be an incipient or emerging one. The right appears to be firmly established at the primary-secondary level, but it is not so clearly established at the college level. If it is not yet established, should it be?

While some courts may feel disinclined to strike out confidently in this area, at least one court has addressed a peripheral question and has outlined the obligation of a parent with sufficient means to provide an education beyond high school to a child who may no longer be a minor.[7] If this parental duty is nurtured in the future and grows into a societal one, then it must necessarily follow that every student will acquire a "right" to an education beyond the high school level. If this does occur, what will be the reasonable limitations of this "right" with respect to a specific institution? The attitude of the courts, at least in 1968, would appear to stop short of preempting the lonely and sometimes tedious value judgments which a particular college or university admissions committee has traditionally made. Despite the fact that sophisticated and statistically appealing nationally standardized test scores are available, it seems unlikely that the courts will intercede in the intellectual and aptitude areas in determining the "right" of admission to a given university.[8]

A somewhat different aspect of the "right" to admission has not been so forbidding to judicial intervention. Where rejections by the university have been based upon refusal to comply with minor physical standards such as vaccinations, the courts have intervened.[9] If a trend is discernable in this area of the imperfect "right" to admission, it would appear to be toward a liberalization and a more critical view with respect to exclusionary admission standards. Elements of capriciousness on the part of the university will probably be questioned more frequently and legitimately by the students — and perhaps the courts — at the very outset of the benefit-obligation relationship.

While we are considering the view of this problem from the perspective of admissions, we should also consider the initial obligation which may arise from a holding out by the university of particular esoteric capabilities in the sense that it may offer opportunities to students that cannot be offered by other institutions. If this benefit is offered to a prospective student, is there then a concomitant obligation to meet the expectation? That is, does the institutional obligation extend to the standards of quality in the providing of experiences which are promised at least by implication? If this kind

[7] Crane v. Crane, 45 Ill. App. 2d 316, 196 N.E.2d 27 (1964); Maitzen v. Maitzen, 24 Ill. App. 2d 32, 163 N.E.2d 840 (1959).

[8] Lesser v. Board of Educ., 18 App. Div. 2d 388, 239 N.Y.S.2d 776 (1963).

[9] Kolbeck v. Kramer, 84 N.J. Super. 569, 202 A.2d 889 (1964), *modified and aff'd*, 46 N.J. 46, 214 A.2d 408 (1965).

of obligation does arise, can it be changed after the student has provided the university whatever benefits may flow from his matriculation?

By the same token, if the university, in advance of matriculation, imposes obligations on the student, ostensibly in exchange for promised benefits, must the sanctions used to impose the obligations be fair? This question raises the specter of "due process," that popular and stylish phrase not necessarily susceptible to a definition of uniform applicability even in the federal courts.[10] Although *Dixon* set out a rather neat summary of procedural due process in the student-institutional arena, other cases cast doubt as to the universality of application of particular criteria. A five- or six-point list may not be nearly so important as whether the procedure adopted is essentially fair in a given instance. This fairness should be evaluated by the type and magnitude of the benefit and the corresponding type and magnitude of the obligation in the individual confrontation.

Once the admission stage is passed, what of the benefit-obligation flow in the actual operation of university life — its classes, courses, curriculum, and offerings? If the university holds itself out through its catalog as providing certain subjects, experiences, or interchanges with outstanding professors, has the student a right to demand the performance advertised by the university? May the student question the quality of the method or the person to whom he is exposed? One of the classic situations encountered in this particular benefit-obligation situation is that of a university "billing" a professor of national reputation as the teacher of a given course. If this is done, has the student a right to see this professor more than once a week in a lecture hall filled with many other students? Does he have the right to engage in dialogue with him in order to benefit from intellectual experiences with a man of this caliber? Furthermore, does he have the right to have a grade determined by the professor, or does the professor have a right to delegate grading to someone who has not taught or even been present in the class? While this may be a sensitive example in some circles, I think it graphically illustrates the presence of a benefit-obligation equation. This equation may not be capable of easy categorization under the more familiar labels of "due process," "equal protection," or "contract," but there seem to be aspects — with a legal flavor — present in the minds of the students and similar aspects which should be present in the minds of the administrators of the institution.

A final area of inquiry with respect to the benefit-obligation aspects of the student in his relationship to the institution should be

[10] Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961); Due v. Florida A. & M. Univ., 233 F. Supp. 396 (N.D. Fla. 1963).

the dismissal procedures and the awarding of the degree. These two considerations clearly involve the question of benefits or rights, and in this area the courts have not been universally reluctant to intervene. When they have intervened, they have traditionally limited their inquiry to the question of capriciousness and arbitrariness, or whether or not the dismissal or withholding of the degree has been for academic reasons, and if so, whether or not conclusions with respect to academic failure were arrived at under a fair process.[11] In this area the benefit-obligation approach may again provide a more coherent basis for analysis of student-institutional problems more easily appreciated by both the institutions and the students.

The labels of due process, fiduciary relationship, contract, right of privacy, and equal protection will long be with us. The problems, however, do not seem to lie tranquilly within these distinct categories. From its inception, the student-institutional status raises certain obligations and promises certain benefits on the part of both parties. How these come about comprises the real gist of the legal aspects of student-institutional relationships. Why not resolve them on that basis?

[11] Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961); Connelly v. University of Vt., 244 F. Supp. 156 (D. Vt. 1965).