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The Administrative Tribunal

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CHAPTER SEVEN

The Administrative Tribunal

Theodore J. St. Antoine*

Introduction

I need go back no more than a decade to give you a historical curiosity concerning the responsibility for the maintenance of discipline on an American university campus. There was in existence during the past ten years, and for all I know there may still be in existence, a two-paragraph, two-section procedure for the resolution of campus disciplinary problems. I find it quaintly charming in its pristine simplicity. I shall paraphrase it, out of regard for those kind people everywhere who sent us information for our study of other campus disciplinary procedures:

Section I. There shall be a Dean of Men, and he shall be responsible for the governance of the male students in this university.

Section II. There shall be a Dean of Women, and she shall be responsible for the governance of the female students in this university.

Things are obviously changing. De Tocqueville is again being proven right about the American reaction to societal problems. Eventually, nearly all our problems become problems for lawyers. The strained relations between faculty and administrators and students, now one of the major concerns of American society, have brought out the lawyers in full force.

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During the past summer I have had the good fortune to join with colleagues of the university community from the administration and from the student body in two separate but related endeavors: first, to draw up a body of substantive rules for nonacademic conduct on the campus and, second, to establish a judicial body to enforce those rules. The latter problem, the composition of a university judiciary, is the subject of this discussion. The views I shall present about structuring a university judiciary are drawn in large part from the discussions of the committees to which I belong. In addition, I shall draw upon our examination of the procedures in use at some twenty different campuses across the United States, and three helpful statements of concerned organizations—statements that have dealt with the problem of disciplinary procedures on campuses over the past three or four years. One is the *Statement of the Rights and Responsibilities of College and University Students,*\(^1\) drafted in 1970 by the Section of Individual Rights and Responsibilities of the American Bar Association. Another is the *Joint Statement on Rights and Freedoms of Students,*\(^2\) formulated in 1967 by representatives of the American Association of University Professors, the United States National Student Association, the Association of American Colleges, and other interested organizations. The third document we found helpful is the *Model Code for Student Rights, Responsibilities and Conduct*\(^3\) prepared by the Law Student Division of the American Bar Association.

Because I am currently involved in deliberations with two different committees, I shall not emphasize my personal opinions about these matters, but shall attempt to set forth the different views and opposing arguments of the various groups concerned with the creation of an effective campus judiciary. I shall enumerate what I would describe as a checklist of factors for your consideration, raising certain key questions and then

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1. See Appendix I.
3. See *Student Protest and the Law* at 371.
indulging in the law professor's ploy of failing to provide the answers.

Criteria of Campus Judiciaries

There are five different criteria that must be met by an all-campus judiciary capable of handling the kinds of problems we find in universities today. First, the tribunal must be competent and qualified to do its job. Such competence presupposes knowledge of the particular mores of the university community. Second, it must be fair and impartial. It must have the capacity to weigh opposing positions in a highly emotional situation, yielding neither to prejudice nor to outside pressure. Third, the tribunal must be acceptable; that is, it must seem to be fair to the different factions whose interests it will protect—both the persons who are charged with violations and the persons who are victims of those violations. It goes without saying that the appearance of fairness must spring from the fact that it is fair and just. It must not be counterproductive; that is to say, it must not, by the simple fact of its presence on campus, add to the difficulty of maintaining order.

Most persons would readily concede the validity of the three criteria enumerated above—competence, impartiality, and acceptability. The next two criteria, though a bit more subtle, are also of critical importance. Fourth, the judiciary must be suitable for doing the particular job entrusted to it. It may have a narrow or a broad jurisdiction. It may deal only with maintaining order on the campus; it may be analogous to a police court. On the other hand, it may have a very broad jurisdiction to deal with the kinds of problems lawyers would call civil problems, including disputes between individual members of the university community or disputes between students and their organizations. The type of tribunal to be constructed will be determined to a considerable extent by the particular function it is to perform. Fifth, the tribunal must be consistent with the traditions of the particular institution where it is established. This important requirement is frequently overlooked in the search for the one ideal tribunal for all situations. I suspect
there is no such thing. A school that has maintained an authoritarian control in the past may be able to construct an administration-dominated tribunal acceptable to that school community, while the same kind of tribunal would be entirely unacceptable at The University of Michigan or any other school where a student judiciary has been a long and respected tradition.

Types of Tribunals

I shall now examine some of the principal kinds of tribunals in existence and proposed at various campuses across the country. In general, it may safely be concluded that the solution is not the creation of an all-administration tribunal or an all-faculty tribunal, if the accused are to be students. I think one can simply set aside the model I mentioned at the opening of my remarks. The stark statement that "[t]here shall be a Dean of Men and he shall be responsible for the governance of the conduct of the male students of this university . . ." is an anachronism in today's world.

The extent to which there shall be student participation in any such tribunal is always a critical question. The growing sentiment of various professional groups that have considered the matter favors student participation. The American Bar Association Statement drafted by the Section of Individual Rights and Responsibilities of that body states flatly that students should be entitled to participate in any all-campus judiciary. The Joint Statement on Rights and Freedoms of Students, drawn up in 1967, suggested the advisability of student participation. It is not surprising that the third study, the Model Code prepared by the Law Student Division of the American Bar Association, plumps firmly for an all-student judiciary.

Our committee studied a relatively good cross section of American colleges and universities, examining the judiciary systems, actual and proposed, of some twenty schools. By and

4. Supra n. 2.
5. Supra n. 3.
large, they break down into three types of campus judiciaries—mixed faculty-student tribunals, all-student judiciaries, and systems using individual hearing officers. Over half of the twenty systems we looked at are mixed tribunals, with both faculty members and students participating. The precise ratios vary rather widely. Some are evenly balanced, but frequently the student members exceed the faculty members by one, or conversely, the number of faculty members is greater by one. Some four or five of the systems we examined have all-student judiciaries. Significantly, we found that at least two of these systems provide for a faculty adviser. This person does not have a vote but is responsible for providing professional counsel in the handling of the procedures of the tribunal. Finally, about five of our sampling of twenty or more schools have tribunals involving hearing officers. These systems make no provision for student participation. A case is heard by a hearing officer, either a faculty member or an outsider. Three schools use outsiders— independent hearing officers not connected with the school in any capacity. The hearing officer system is used in three schools under what might be described as emergency conditions, a significant and troublesome point which I shall discuss later. The unhappy fact is that some long-standing internal judicial systems have broken down in the last two years when the crunch came and there were serious, campus-wide disturbances. Three of the Big Ten schools, including The University of Michigan, resorted to outside hearing officers in aggravated cases.⁶

Critique of Tribunal Systems

Let me now attempt to apply to the three general patterns of judiciaries—the mixed tribunal, the all-student tribunal, and the hearing officer—some criticisms based upon the criteria listed earlier. At this point in time, these five factors—competence, fairness, acceptability, suitability for the assignment, and consistency with a given school’s traditions—guide

⁶ See M. Sowell, Chapter 8.
my thinking about the desirability of any particular kind of tribunal.

I shall deal first with the all-student judiciary, a body composed entirely of students, possibly with a professional to offer guidance and counsel, especially regarding procedural matters. The counselor may be an outsider or a faculty member. What are the points in favor of this system? One can be sure that such a tribunal will be knowledgeable, that it will understand the mores of the university community, and that it will be acceptable to the students. In most cases, students will have the most confidence in a tribunal composed of members drawn from their own constituency. As the students are wont to say, they believe a person should be tried by a jury of his peers.

There are valid objections to an all-student judiciary. If it is really intended that the tribunal deal with campus-wide problems of a major nature—the kind of massive disturbances experienced within the past two years—serious questions arise. Can the members of such an all-student tribunal withstand the inevitable political pressures? Can they be counted on to find persons guilty of disruptive conduct when they may sympathize with the aims of the persons engaging in such conduct? Another question of critical importance is whether such a tribunal will be acceptable to the faculty and the administration of the university community. Faculty members or administrators, after all, are likely to be the principal victims of major disruptions. It is understandable that students who are the accused have a special concern about who will judge them; at the same time, the faculty and the administration have a legitimate concern about who will judge the persons who have allegedly victimized them. There are possible compromises to minimize these conflicts. Certainly an all-student judiciary will not present the difficulties I have indicated as long as its jurisdiction is confined to dealing with problems between students or problems between students and their organizations. Moreover, if an essentially all-student tribunal is to be entrusted with the responsibility for dealing even with major
cases of disruption, the insertion of some outside voice such as a professional counselor or law officer to provide procedural guidance for the students may help to ensure an orderly hearing and heighten faculty confidence in the soundness of the system.

The hearing officer—the single individual entrusted with responsibility for handling cases—has some distinct advantages. The hearing officer is thought by many to be the most likely to guarantee impartial treatment for all parties. An outside person will not be subject to the special pressures imposed upon a member of the university community. His impartiality should be assured if care is taken in the selection process; he should not, for example, be the unilateral appointee of the president of the university.

Students constantly stress two problems about a judiciary employing a hearing officer. The first is in the nature of a philosophical objection, and I apologize if my phrasing fails to convey its full flavor: he who sits in judgment should be a member of the same community that is governed by the laws the judge is administering. In other words, with the practical implications now emphasized, one who applies a rule or regulation should act with the realization that one day that rule or regulation might be applied against him. The second objection students lodge against the individual hearing officer from outside is even more practical: they are skeptical that he has a sufficient understanding of, or sympathy with, the peculiar mores of the university community. They doubt whether he can properly assess the significance of acts of dissent, especially in a time of great social change. They question whether he can assess the impact of sanctions, if he is the person who is going to impose sanctions.

The third type of tribunal, the mixed student-faculty judiciary, is by far the most common among the cross section of campus systems we have examined. The advantage of a mixed tribunal is the capability of providing a breadth of views, a characteristic not always found in the all-student tribunal.
A possible serious defect in a mixed tribunal is that it may promote factionalism, dividing the members along political lines. Thus, a student member of a mixed tribunal may actually find it much harder to vote to convict an accused student, joining those faculty members voting for conviction, than he would if he were sitting as a member of an all-student tribunal. Traditionally, students have been hard judges of fellow students. It is only in the last few years, since political problems have become central campus issues, that skepticism has developed about the objectivity of student judgment of their peers. There is a risk that in serious cases where feelings run high a mixed tribunal may have trouble avoiding splits along party lines. That would, of course, destroy the acceptability of the final result, either to the accused or to the charging party.

Variables Affecting Tribunal Composition

I would suggest that three variables are vitally significant in determining the right kind of campus tribunal—one that is adequate for the task and acceptable to the different persons affected by the decisions of that tribunal. These variables may ultimately control the decision as to the best kind of tribunal for a particular institution. The first variable is the method of selecting the members of the tribunal. Regardless of who they are, how are they to be selected? The second consideration is the scope of the jurisdiction of the tribunal. What kinds of offenses will it deal with? What kinds of problems will confront it? Thirdly, is there any appeal from decisions of the tribunal? If so, to whom or to what body? I shall deal with each of these factors in turn, relating them to the three general types of tribunals we have examined.

Selection of Members

The objections customarily lodged against the hearing officer—that he is likely to be the unilateral appointee of the university president or another administrative official, and that
he will not really know the campus situation—can be greatly diminished if the students have a hand in his selection. Similarly, much of the sting can be removed from the arguments against an all-student tribunal if there is some arrangement for joint selection by faculty and students. Of course, the joint selection process immediately calls up the specter of other problems. Will diverse groups ever agree on appointees? How do you handle the situation where one faction refuses to act? Such pitfalls surely exist. Nevertheless, one might work out a system to establish a predetermined pool of candidates. If the hearing officer system is used, for example, the pool might be a group of professional arbitrators. From that pool, one constituency could choose a panel of a prescribed number, and the second constituency could choose half of that panel to form the actual roster of hearing officers. If you can get agreement on some predetermined group as the initial pool, I am persuaded it would be easy to work out a quick, simple method for joint selection.

A novel way of choosing students for an all-student judiciary has been suggested by the Section of Individual Rights and Responsibilities of the American Bar Association. To my knowledge, it is not in use in any of the schools surveyed by our committee, although we at Michigan are now considering it seriously. This method is a random selection of students in a process similar to that employed to draw jurors for the civil courts from the general community. Many persons object to an all-student judiciary, especially one in which persons petition for appointment and then are screened by a student government body, on the ground that such a tribunal is too likely to be ideologically oriented. The detractors claim that the judiciary becomes a self-selected group of political activists of the university community, who are not typical of the vast majority of students. The objectivity of the activists is suspect in the eyes of many faculty members. A random selection can avoid that particular problem by providing a genuine cross section of students. I suppose that most faculty members would concede that if we cannot rely upon the good judgment
of the mass of our student body, then the future is pretty bleak no matter what we do.

One difficulty with a randomly selected tribunal, especially if it is to serve on an ad hoc basis, is that it cannot acquire professional competence—experience in interpreting either the substantive or the procedural rules that it must apply. Any kind of ad hoc body would need the guidance of a law officer or some kind of professional counselor to a far greater degree than would a permanent student judiciary.

**Scope of Jurisdiction**

As I have said earlier, the scope of the jurisdiction of a campus judiciary will have a significant bearing upon the kind of tribunal that is needed. “Civil” disputes among members of the university community, or even individual cases of disorder, disruption, or violence, may well be handled competently by a student tribunal. But what about the major disruptions?

The critical questions involved in attempting to establish a campus judiciary must ultimately be faced. To what extent should cases of group violence on the campus be left to the civil authorities? To what extent should a campus judiciary limit its jurisdiction to cases involving peculiarly institutional problems—relations between students or their organizations, for example—leaving the massive disruption case entirely in the hands of the public prosecutor and the civil courts? There are benefits to be derived from this kind of approach. It places much less strain on the internal system. Students would not have to worry about the prejudices of faculty members on the tribunal influencing judgments, destroying or gravely impairing a student’s academic career by applying the heavy sanctions of suspension or expulsion. Faculty members would not have to worry about excessive leniency on the part of student judges. It would be strictly a matter for the civil authorities.

The notion that the university is like a private club, in which honorable gentlemen alone are to be admitted, may very well be an anachronism. In today’s world, the great state university may be more akin to a public utility. If the civil authorities
conclude that a man is sufficiently safe to be allowed to walk free in society, why should the university complain about his attending a lecture? On the other hand, I do not believe that simply turning the whole business over to the civil authorities is the proper course to take. I have a deep concern that students do not fully appreciate the damage that may be done to their future careers and even, perhaps, to their psyches in the present, by a tangle with the criminal process. A felony or a substantial misdemeanor on their records and a month or two in jail are deadly serious matters. Moreover, the heavy costs of bail and attorneys' fees cannot be treated casually. From the faculty's and administration's perspective, I think experience indicates that there is always a risk to academic freedom and autonomy in inviting courts and legislators to become involved in university governance. So I am not happy about a wholesale transfer of campus discipline to external bodies.

There may be an acceptable middle position with regard to the second variable—the scope of jurisdiction of the campus tribunal. Perhaps we could adopt the approach that the university system should grapple with cases having a peculiar institutional flavor, or cases in which the magnitude of the offense is not really assessable by general community standards, leaving all others to the civil authorities. Let me give you an example of each kind of case. One can validly argue that a private quarrel between two students or between a faculty member and a student, with resulting violence, does not involve the university as an institution and should be left to the civil authorities—to the parties to resolve between themselves outside the university system. On the other hand, there are certain kinds of offenses that the civil authorities will recognize, but will fail to comprehend fully the seriousness within the university context. For instance, I presume most courts would regard the deliberate misappropriation of a five or ten-dollar book for two or three days as a very minor offense, punishable, perhaps, by a fine of ten dollars. If, however, that book were one of only two library copies urgently needed by a
large class two days before an examination, the university community might feel that a ten-dollar fine did not adequately reflect the gravity of the offense.

The distinction I have just outlined would leave most major campus disruptions—those directed against the university itself—within the jurisdiction of some campus judiciary. At this point in the development of a campus jurisprudence, I think that necessitates some substantial involvement by the faculty and administration in the selection and manning of the tribunal dealing with such cases. Faculty involvement need not be total. For example, the faculty might have a hand in the selection process, or at the appellate level, and leave fact finding to the students.

Appeal Procedures

The third important variable affecting the adequacy and acceptability of any trial judiciary is the process of appeal from its decisions. All of the tribunals I am familiar with that have all-student trial bodies provide for some kind of an appeal. Generally, provision is made for an appeal to an all-faculty or mixed faculty-student tribunal. More informally, the accused has the right to request clemency from the president of the university. Student judiciaries have traditionally made harsh judgments and some form of appellate review has always been included as a protection against such harshness. The most pressing issue today is whether complainants should have the right of appeal. What happens, for example, if there is an acquittal by a student tribunal in a significant disruption case, where political issues are at stake? Should the prosecution be allowed to appeal? A prosecution appeal grounded upon alleged erroneous rulings of law or allegations that findings of fact are clearly at variance with the evidence is certainly no denial of due process, in the strict sense. But it is contrary to the American tradition in the criminal process, and I can assure you from my experience that the students will vigorously oppose prosecution appeals. At the same time, however,
an individual complainant may justifiably feel incensed if he is unfairly denied redress, and then has no opportunity for appeal. Again, it may be possible to find an acceptable middle position. In cases which involve a "civil" rather than "criminal" controversy, that is, where it is not the institution against an accused student, but rather a faculty member against a student, or a student against another student, and the plaintiff feels that he is entitled to some personal relief or restitution, it may be that the complainant should be allowed to appeal in what is essentially a private action. On the other hand, the prosecutor acting on behalf of the university in quasi-criminal proceedings could be denied an appeal.

**Tribunal Procedures**

I have been asked to go a bit beyond my discussion of the structure of a campus judiciary and say a few words about the procedures of such a body. My experience suggests that procedures do not present problems as difficult as those involved in the composition of the tribunal and the method of selecting its members. Of course, the courts require that before a student can be deprived of his status within an educational institution, he must be accorded due process. By and large, the due process required in university administrative proceedings is a relaxed kind of due process. There must be a fair hearing before an impartial judge. There may be need to have witnesses present and to afford the right of cross-examination. The accused is entitled to some kind of counsel, but not necessarily a lawyer. This kind of elementary due process, I assume, will be considered sufficient by the courts. Helpful analogies can probably be found in the very large body of law concerning the due process requirements in disciplinary proceedings of labor organizations against their members.

There are a few difficult problems. First, if the university has a paid attorney serving, in effect, as public prosecutor, will the student be left to his own devices, having to hire a lawyer or find a law student to defend him? Or should we provide for
some kind of public defender for students? I do not suggest that this issue rises to the level of due process, but I do think it presents a substantial policy question for any institution with a fairly formal procedure, including a public prosecutor—a university lawyer who will be presenting the case on behalf of the institution.

The courts have clearly indicated that double jeopardy is not technically applicable to university procedures; thus, it is not a defense against university discipline that a person has already been tried for the same act by the civil courts. Yet surely there is some kind of problem, at least in terms of the spirit of fairness, about prosecuting a man twice for a single offense. Again, I think some distinctions may be in order. There are certain kinds of offenses that are so obviously off-campus offenses that it really makes no difference whether they are committed by a student or a nonstudent. I would regard a traffic offense as the classic example of this type. If a man has served his time for illegal driving (under some kind of influence—alcohol does not seem to be the problem so much these days), why should a university try him all over again? Probably such offenses are inappropriate bases for campus discipline anyway, but at least let me suggest that we consider a rule whereby the university as an institution is given a choice: either it will proceed against a person within the university system or, if a case is so serious that internal discipline is inadequate, it must go outside. Having chosen the latter course, the institution may not turn back to the campus tribunal and invoke its processes. I recognize that some offenses may have both university and nonuniversity implications, and thus justify in theory two separate trials and penalties. It is so difficult to draw a line here, however, that I don’t think the exercise is worth the effort.

Many of the judicial systems in schools around the country now provide for the suspension of any university proceedings as long as a criminal charge is pending at the trial level against a student. This approach avoids problems of self-incrimination. It also allows the campus judiciary to take into account
the court decision on the charge against the student, in its deliberations and especially in its sanction.

Conclusion

I shall conclude with one or two personal comments. I have worked extensively with the students on two committees—one committee attempting to establish an all-campus judiciary, the other seeking to write a substantive code of conduct. I learned many lessons, but one I would put near the top was confirmation of my feeling that many students view us—faculty and administrative personnel—with a great deal of distrust and suspicion. We, of course, feel that is unjustified. We can remind them of all the good things their elders have given them—opportunity for an education and an easy affluence, among other advantages unknown to earlier generations. And yet, from their perspective, why should they trust us? They hear our generation talk everlastingly of peace, while sending them off to be killed in a war they regard as morally reprehensible. Right here on the university campuses, they hear professors speak glowingly of the life of the mind, while struggling mightily for academic status and the material rewards it brings. They hear administrators praise the concept of student participation in decisionmaking, while all too often proffering the form and denying the substance. Indeed, I am satisfied that the creation of an effective university judiciary through joint faculty-student efforts may mean much more than the maintenance of campus discipline. It might be the first long step toward bridging differences between faculty members and students, and restoring a sense of trust and common endeavor.

Another important lesson I learned from my committee work was more comforting. There is a feeling in some academic circles these days that the current crop of students has abandoned the pursuit of truth through reasoning, and relies instead on blind leaps of intuition. I am convinced this is not true. The students' premises are not always our premises, of course, nor their values our values, but in a time of accelera-
ting horizons such as ours, the advantage in those variations may lie with the young. At any rate, during our deliberations I saw the students again and again confront the faculty and administration representatives with closely reasoned, well-articulated, and often compelling arguments for their positions. And on occasion they even recognized the merits of their elders' analyses. I should like to think that augurs well for the ultimate success of our enterprise.