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Introduction

In the conduct of public affairs, tribunals, boards, and administrators must exercise discretionary or quasi-judicial functions, requiring decisions which may have a profound influence on the lives and fortunes of many people. This is particularly true in education, where public boards and administrators daily make judgments which have inestimable impact on children's lives. Interestingly, the courts of both Britain and the United States have traditionally been unwilling to intervene in such an important area to determine if the public agents are making the appropriate decisions, abusing their prerogatives, or following minimal standards of fair play and procedural process.

More recently, the courts in both countries have become cognizant of the dangers of allowing unbridled discretion to reside in the hands of governmental agents, and have acted to limit this power by laying down guidelines or standards to ensure due regard for fundamental fairness. Intervention by the courts is justified on the basis of "natural justice" in Britain and "due process of law" in the United States. Rules of natural justice in English law perform a function, within a limited field, similar to the concept of procedural due process as found in the United States Constitution, "a concept in which they both lie embedded."[1] These judicial developments have already had an important impact on educational administration in the United States, and although the future in Britain is at this point not clear, one can project from many diverse but related legal precedents that within a few years "natural justice" will become as important a consideration to British educational administration as "due process" has become in the United States.

The thesis of this article is that legal precedents based on natural justice combine to place new and extra-statutory requirements on administrative disciplinary actions which educational administration must accommodate if students are to be given maximum legal fairness and equity.

A central assumption herein is that there is a logical legal nexus between natural justice in Britain and procedural due process in the United States

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[1] Bernard Schwartz, *Administrative Procedure and Natural Law,* 28 NOTRE DAME LAWYER 169, 174–179 (1953).

prescribing standards of fair play governing relationships between individuals and agencies of government. Although emanating from two diverse common law and constitutional law bases the directions taken by the two concepts are strikingly similar and probably forecast similar futures.

Throughout this paper all reference is to student disciplinary action wherein a child may be dismissed, suspended, expelled or otherwise excluded[2] from the benefits of attending a governmentally controlled or funded school. It is assumed then that the applications of natural justice to which we refer are invoked in rather drastic circumstances wherein a court may logically conclude that the school's action could materially infringe on the child's interests in either property or liberty, or in anyway permanently stigmatize the child's future well-being. An excellent situation demonstrating both administrative arbitrariness and student permanent loss to which the concept of natural justice may be applied is found in an old 1887 English case. Here facts are set out to which the reader can readily apply the emerging standards of natural justice as later presented in other sections of this paper.

The case began on Friday, March 11, 1887, when another minor theft occurred at Haileybury College in which a coin was stolen.[3] Minor thievery was not an uncommon event at educational institutions, but Haileybury had witnessed a rather high incidence of such offences in recent years. Perplexed by this problem, one Mr. Fenning, a teacher, had adroitly marked and planted a coin in study No. 17 and anxiously awaited the culprit to entrap himself. In due course, the marked coin was found to be missing and a search of the premises revealed the stolen coin in the box of young Mr. Henry Hutt, the son of a rector of a church in Norfolk. Henry presently denied the theft, but Mr. Fenning proceeded to lock him in the infirmary away from the other students to await the return of the headmaster, Mr. Robertson, who had been visiting Oxford. During this period, Fenning wrote Charles Hutt, Henry's brother, informing him that Henry had "been caught stealing." Henry offered to account for his whereabouts when the theft had occurred but this was rejected by Fenning saying: "Oh, that would be no good whatsoever." Upon return from Oxford, the headmaster informed Henry that, "This is a very serious charge, and of course you must be guilty as no one else could have put the money there ... I will give you a quarter of an hour to consider and, unless you confess, I shall seriously consider criminally prosecuting you." Henry still maintained his innocence and at 10 a.m. on Tuesday, March 15, the headmaster informed Henry, "I have just come to tell you that you are expelled, and you will be branded with disgrace all your life ... "

In the litigation which ensued, Henry was exonerated on a criminal charge of theft but in subsequent civil action, by Henry's father against the school, the school prevailed. No issue of natural justice or procedural due process was raised throughout the litigation.

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[2] "Suspension is within the jurisdiction of the head and is usually the limit of his power, but there are some schools where the head is authorized by the articles of government to expel." G. R. BARRELL, TEACHERS AND THE LAW 176 (1976). "The master of a school has the power to expel for reasonable cause." G. TAYLOR AND J. B. SAUNDERS, THE LAW OF EDUCATION 547 (1976).

[3] Hutt v. Governors of Haileybury College, 4 T.L.R. 623 (1888).

Was the boy innocent or guilty? Certainly the headmaster did not know for sure at the time of Henry's dismissal. No opportunity was afforded the student to defend himself and no "fundamental fairness" or "fair play" was offered or given.

Is the prerogative of the school administrator today coextensive with that of Henry's era? Are the quasi-judicial functions today as unfettered as yesteryear? In view of the legal development of natural justice and due process in the past eighty years could Henry Hutt expect more equitable treatment in either England or the United States?

Natural Justice and Due Process

Both natural justice and due process find roots and commonality in the words of Clause 39 of *Magna Carta* which expressed that: "No freeman shall be seized, or imprisoned or dispossessed, or outlawed, or in any way destroyed; nor will we condemn him, nor will we commit him to prison, excepting by the legal judgment of his peers, or by the law of the land." This provision according to Blackstone "protected every individual of the nation in the free enjoyment of his life, his liberty and his property, unless declared to be forfeited by the judgment of his peers or the law of the land."[4] Clause 38 added to the protection by requiring credible witnesses to be produced against the accused before he could be convicted.[5] Effectively, these provisions protected a citizen against arbitrary action by the King or his agents and guaranteed a minimal level of procedural due process.

Natural justice is a legal concept encompassing rules of judicial procedure which have been formulated by the courts over the centuries to bring about equity and fairness. It is not to be confused with the more pervasive concepts of natural law of St. Thomas Aquinas or the natural rights of John Locke. Natural Law is couched in the religious or theological foundation of "the highest reason implanted in nature" emanating from the Eternal Law of God.[6] Natural rights as expounded by Locke and adopted by Thomas Jefferson is likewise broader than mere procedural justice, but it does not include the idea of divine reason.[7] Apparently Jefferson did not intend his concept of natural rights to possess the immutable physical nature of the universe as invoked in natural law by Aquinas and earlier expressed so lucidly by Sophocles in *Antigone,*

> "The unwritten laws of God that know not change. They are not of today nor yesterday, but live forever, nor can man assign when first they sprang to being."[8]

While one could argue that the "inalienable rights endowed by the Creator" in *Declaration of Independence* was fully as reliant on the state of nature as Sophocles' "unwritten laws of God," Jefferson's philosophy is reputed to

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[4] W. BLACKSTONE, THE GREAT CHARTER AND CHARTER OF THE FOREST (1759).

[5] *See* RAY STRINGHAM, MAGNA CARTA FOUNTAIN OF FREEDOM 63-65 (1966).

[6] *See* EDWIN W. PATTERSON, A PRAGMATIST LOOKS AT NATURAL LAW AND NATURAL RIGHTS, NATURAL LAW AND NATURAL RIGHTS 54 (Arthur L. Harding, ed. 1955).

[7] *Ibid.,* p. 61.

[8] Sophocles, *Antigone,* 8 HARVARD CLASSICS 257 (1909).

emanate from the human and innate worth of man and not from the divine invocation. Therefore, natural law and natural rights are quite broad and extend beyond the social, political, and legal bases on which the concept of natural justice is founded.

English legal authorities attribute widely varying credence to the concept of natural justice. Keir and Lawson[9] allow only passing attention and are clearly unconvinced of the legal viability of its application to governmental agencies, while de Smith[10] devotes much of his book to the subject and apparently doesn't question its importance. Writers on the law of education overlook it almost entirely.[11]

At least a part of the problem lies in the apparent inability of the courts to make up their minds as to whether and how pervasive the concept is to be. This is so even though historically the courts consistently referred to natural justice as a broad, legal, and generally desirable if not a uniformly acceptable concept. Since the 17th and 18th centuries[12] the courts have adhered to the idea that fairness must be present in quasi-judicial proceedings; "no proposition can be more clearly established than that a man cannot incur the loss of liberty or property for an offense by a judicial proceeding until he has had a fair opportunity of answering the case against him . . . "[13]

Even though early 19th century court decisions established, generally, that tribunals, administrational agencies, voluntary associations, and professional bodies were held responsible to adjudicate with fairness,[14] the later courts seemed disinclined to intervene in the internal deliberations of such bodies with the result that natural justice tended to wither as legal concept for a time. Early 20th century cases appeared to be primarily concerned with the essential requirement that a proper summons or notice be given and that a person not be condemned without foreknowledge of his trial.[15] Significantly, though, in all the precedent was the notion that where statute was silent on the question of procedural process for administrative hearings, the courts would invoke common law to "supply the omission of the legislature."[16] The rule according to the court in *Cooper v. Wandsworth Board* was of universal application and founded on the plainest principles of justice.[17] The necessity that the courts require certain minimal adjudication procedures for administrative tribunals was recognized by Maitland in 1888 when he said that England was becoming a "much-governed nation, governed by all manner of councils and boards of

[9] D. L. KEIR AND F. R. LAWSON, CASES IN CONSTITUTIONAL LAW 492–510 (1967).

[10] S. A. DE SMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 134–245 (1973).

[11] *See* G. R. BARRELL, TEACHERS AND THE LAW 119 (1976); London: *see also* G. TAYLOR AND J. B. SAUNDERS, THE LAW OF EDUCATION (1976).

[12] R. v. Chancellor of Cambridge University, 1 Str. 557 (1723). per Judge Fortesque " . . . for even God himself did not pass sentence upon Adam, before he was called upon to make his defense." The University of Cambridge was ordered to restore academic degrees to one Dr. Bentley because they had been taken from him without notice or a hearing.

[13] de Smith, *op. cit.*

[14] Re Brook, 16 C.B. (N.S.) 403 (1964); Wood v. Wood L.R. 9 Ex. 190 (1874); Dawkins v. Antrobus, 17 Ch.D. 615 (1881); Fisher v. Keane, 11 Ch.D. 353, (1878).

[15] Parr v. Lancashire & Cheshire Miner's Federation, 1 Chancery 366 (1913); Burn v. National Amalgamated Laborourer's Union, 2 Chancery 364 (1920).

[16] Cooper v. Wandsworth Board of Works, 14 C.B. (N.S.) 180 (1863).

[17] *Ibid.*

officers, central and local, high and low, exercizing the powers which have been committed to them by modern statutes."[18] During this period, the courts rather firmly established that while it was unreasonable to expect governmental departments to strictly adhere to the procedure of courts of justice, nevertheless minimal standards of judicially acceptable behavior, couched in natural justice, were necessary.[19]

Interestingly, the best known precedent concerning natural justice was formulated by the House of Lords in an education case, *Board of Education v. Rice.*[20] This 1911 precedent has been used to both advance and impair the formulation and application of standards of natural justice. It advanced the concept by maintaining that good faith and fairness must be adhered to in administrative hearings but it inhibited progress toward more precision in administrative procedure by asserting that the educational agency did not need to treat such hearings formally or as a trial. The pertinent part of the case states:

> "Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds ... In such cases ... they must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything. But do not think they are bound to treat such a question as though it were a trial.... They can obtain information in any way they think best, always giving fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view."[21]

This broad latitude bestowed upon the agency, did little to enhance the rights of children to procedural fairness in disciplinary cases. Also the case must be viewed with caution in application to a student disciplinary situation, since it revolved around an interagency dispute between a local education authority and the managers of a school rather than between an individual and an educational agency.

Without norms or procedures to define natural justice some agencies tended to proceed as they had previously, in possibly an arbitrary and sometimes capricious manner. This situation was worsened four years after *Rice* when in Arlidge's[22] case the House of Lords held that a governmental department could not be compelled to divulge one of its inspector's reports to the appellant, even though the report could have contained relevant information prejudicial to the appellant's case. With this case at the forefront, the English courts began a partial retreat from natural justice which did not end until 1964.

In *Arlidge,* the lower court held that a local board had the duty to hear both sides of a case and that both must disclose all evidence of fact placed before them; they held that nonproduction of evidence was contrary to the principles of natural justice. The House of Lords reversed this decision holding that full disclosure by a minister was not required by natural justice. Lord Haldane explained that the responsibility of a tribunal is to mete out justice, but the

[18] F. W. MAITLAND, CONSTITUTIONAL HISTORY OF ENGLAND 501 (1955).
[19] de Smith, *op. cit.*
[20] A.C. 179 (1911).
[21] *Ibid.,* p. 505.
[22] A.C. 120 (1915).

procedure is not fixed and the detail must depend on the nature of the tribunal. Although the rationale of this case coincided, and indeed followed *Board of Education v. Rice,* the House of Lords added the important admonition that so long as the work by a Minister is done fairly and judicially no review can be had except to Parliament itself. This statement, of course, largely ruled out judicial review of administrative hearings and effectively negated further advances in judicial application of natural justice.

The nadir in the potency of natural justice was reached in 1951 when the Privy Council held that a textile trader in Ceylon could be denied his trading license without any kind of a hearing,[23] whatsoever. Lord Radcliffe reasoned that the principle of natural justice did not apply if the government official was merely withdrawing a privilege if nothing in statute or regulation required a hearing. No attention was paid to the long established common law principle, referred to above, that "the justice of the common law (in this case natural justice) will supply the omission of the legislature."[24] Wade says that in this case "the primary principles of law were abandoned in favor of a fallacious doctrine, resting on no authority, that a license was a mere privilege, and that therefore the holder could be deprived of his livelihood without ceremony."[25] Had this decision been followed, quite logically, school children could well have been dismissed, suspended or expelled from school without ceremony or due process.

As Wade maintained, it was impossible to see what "defensible reasoning prompted the judicial retreat"[26] from the right to be heard before an administrative tribunal. The retreat did finally subside in 1952 when Lord Denning ruled that a trade union membership committee could not deny a man his livelihood to work without acting in accordance with elementary rules of justice: "They must not condemn a man without giving him an opportunity to be heard in his own defense. . . . "[27]

Virtual complete reversal of the nonintervention doctrine had to wait until 1964, when in *Ridge v. Baldwin,*[28] Lord Reid in the leading speech, exposed the fallacies of *Arlidge* and attendant decisions by saying that:

> "The authorities on the applicability of the principles of natural justice are in some confusion. . . . The principle audi alteram partem goes back many centuries in our law and appears in a multitude of judgments of judges of the highest authority. In modern times opinions have sometimes been expressed to the effect that natural justice is so vague as to be practically meaningless. But I would regard these as tainted by the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured, therefore it does not exist."[29]

Lord Reid, significantly, emphasized that whether the cases concerned property or tenure of an office, or membership in an institution, they were all governed by the principles of natural justice. A child's interest in attending

[23] Nakkuda v. Jayaratne, A.C. 66 (1915).
[24] H. W. R. WADE, ADMINISTRATIVE LAW 199 (1971).
[25] *Ibid.*
[26] *Ibid.,* pp. 200–201.
[27] Abbott v. Sullivan, 1 K.B. 189 (1952).
[28] A.C. 40 (1964).
[29] *Ibid.*

and participating to the fullest in the benefits of an educational institution clearly fall under the ambit of *Ridge v. Baldwin.*

Natural justice itself prescribes certain rules of judicial procedure established through legal precedent which compel government and it's agents to treat individuals with minimal standards of fairness. Essentially natural justice encompasses two elements.

(a) The rule against bias: No man shall be a judge in his own cause, or *nemo judex in causa sua,* and
(b) The right to a hearing: No man shall be condemned unheard, or *audi alteram partem.*

The rule against bias is "the first and most fundamental principle of natural justice."[30] Accordingly, it is of fundamental importance that "justice should not only be done but should manifestly and undoubtedly be seen to be done."[31]

Lord Denning explained the two components of natural justice in *Kanda v. Government of Malaya*:[32]

> "The rule against bias is one thing. The right to be heard is another. These two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it. The Romans put them in the two maxims: Nemo judex in causa sua: and Audi alteram partem. They have recently been put in the two words, Impartiality and Fairness. But they are separate concepts, and we are governed by separate considerations."

Audi alteram partem requires that the accused know the case against him and have an opportunity to state his own case.[33] Each party must have the chance to present his version of the facts and to make submissions relevant to his case. Fairness is the hallmark of this process and though the extent of process required is sometime in question the basic principle that "no one should be condemned unheard" prevails.

Judicial fairness in the United States, although finding its basis in a written constitution, and ascribing to a different set of precedents, results in similar requirements of fairness, an unbiased tribunal and *audi alteram partem.*

The fifth and fourteenth amendments of the *U. S. Constitution* provide that neither the federal government nor a state shall "deprive any person of life, liberty or property, without due process of law." Originally, these provisions were interpreted to apply to judicial proceedings only and not to quasi-judicial proceedings conducted by governmental ministers or by educational agencies. In the United States, as in England, school administrators, by virtue of standing *in loco parentis,* were not required to adhere to any particular standards of fair play when sitting in judgment over actions of students. Only since the landmark case of *Dixon v. Alabama*[34] in 1961 has this been changed.

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[30] Report of the Committee on Minister's Powers, Command No. 4060, 1932, pp. 75–80.

[31] The King v. Sussex Justices, *ex parte* McCarthy, 1 K.B. 256 (1924).

[32] A.C. at p. 337 (1962).

[33] E. C. S. WADE AND A. W. BRADLEY, CONSTITUTIONAL LAW 654 (1966).

[34] 294 F.2d 150 (5th Cir. 1961). (In Dixon, three students were summarily expelled from Alabama State College. No notice or hearing was afforded the students. The U. S. Fifth Circuit Court of Appeals, in reinstating the students, held that the due process clause of the fourteenth amendment required that notice and some opportunity for a hearing should have been given.)

Dixon manifestly established that procedural due process applies to schools and other governmental agencies and deviations from the minimal fairness required therein may void any disciplinary action taken.

Impartiality: Nemo Judex In Causa Sua

Impartiality is the essence of fair judicial treatment. Justinian stated the rule in his *Institutes*[35] and numerous old English cases establish the precedent. Of particular note is the *Earl of Derby's Case* in 1613 in which Chamberlain of Chester, being the sole judge of equity, could not hand down a decree in a matter in which he himself was a party.[36] In 1614, in *Day v. Savadge*,[37] it was held that protection against bias was so fundamental that even Parliament could not enact a law contrary to the principle. The court said that "even an Act of Parliament made against natural equity, as to make a man judge in his own cause, is void in itself."[38] Justice Holt summarized the doctrine in 1701 saying:

> "It is against all laws that the same person should be party and judge in the same cause, for it is manifest contradiction; for the party is he that is to complain to the judge and the judge is to hear the party; the party endeavours to have his will, the judge determines against the will of the party and has authority to enforce him to obey his sentence; and can any man act against his will or enforce himself to obey."

A judge must come to the case with an open mind without previous knowledge of the facts or preconceived notions of the outcome. No connection can exist between the judge and one of the parties involved so as to create a conflict of judicial interest.

Bias has been categorized into two basic types, that arising from financial interests and that which emanates from some relationship with a party or witness involved in a case. Any direct pecuniary interest no matter how small will disqualify a judge.[39]

The validity of a judge's decision may be successfully challenged where personal ties exist with one of the parties, as where one party was a friend of the judge's wife's mother.[40] Similarly a magistrate in charge of issuing licenses for sale of alcohol was biased where he also participated in a campaign against the sale of alcohol.[41]

Bias in the school setting, though, may not always be so readily recognizable. Seldom do students or teachers sit in judgment over their own cases. If they did obvious bias would be present. Bias though may be charged where an administrator or officer sits in review of challenged policies which he formulated or in review of executive action which he carried out. Further, it may well be that school officers or governors may be forced to set as tribunals at different levels, possibly, reviewing their own decisions on appeal.

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[35] INSTITUTES OF JUSTINIAN Book 4, Title 5, Law 1 (R. W. Lee translation 1956).
[36] 12 Co. Rep. 114 (1613).
[37] Hobart 85, 87 (1614).
[38] *Ibid.*
[39] R. v. Rand, 1 Q.B. 230 (1866); Dimes v. Grand Junction Canal, 3 H.L. Cas. 759 (1852).
[40] Cottle v. Cottle 2 All. E.R. 535 (1939).
[41] Law v. Chartered Institute of Patent Agents, 2 Ch. 276 (1919).

In *Hannam,* the court looked with disdain upon intercommittee membership where certain school governors sat in review of their own decision.[42] In this case a teacher challenged his dismissal on the grounds that the presence of three governors on the subcommittee conducting his hearing conflicted with natural justice since the same governors were also members of the full board of governors which sat in review of his appeal. The lower court judge found for the teacher and in so doing applied the test of whether "a reasonable man would say that a real danger of bias existed." On appeal the local education authority claimed that this test was inappropriate and the correct one was whether there was a "real likelihood of bias." The Court of Appeal found that both tests were substantially the same and followed Lord Hewart's definition of bias in his celebrated dictum in *Rex v. Sussex Justices, Ex parte McCarthy*[43] in which he said:

> "The Court looks at the impression which would be given to other people. Even if he'—the chairman of the tribunal in that case—'was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand . . . "

In the *Sussex Justices* case Judge Danckwerts applied the reasonable standard, that if a person subsequently hearing the facts might have reasonable doubts about the judge's impartiality then bias must be held to exist.[44] What a reasonable man would believe in the particular circumstance is therefore a valid standard to determine bias. In furtherance of its definition, the court in *Hannam* quoted *Sussex Justices* saying:

> "The Court will not inquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'The judge was biased.'"[45]

Beyond the applicability of these two tests, Justice Sachs in *Hannam* observed that an even more appropriate basis in holding for the teacher was the obvious conflict of interests, *nemo judex in causa sua.* Here on its face, the facts showed that the governors were judges in their own cause since the appeal was taken from their lower decision in which they not only sat in judgment but as members of the subcommittee were also the accusers. In this regard, the appeals court maintained that:

> "The governors did not, upon donning their subcommittee hats, cease to be an integral part of the body whose action was being impugned . . . "

Hannam, therefore, suggests strict standards of bias which must be applied to discretionary or quasi-judicial decisions in educational administration, that a decision cannot stand if there is a reasonable doubt regarding the impartiality of the proceeding or if the school administrator renders judgment in his own cause.

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[42] Hannam v. Bradford Corporation, 1 W.L.R. 937 (1970).

[43] 1 K.B. 256 (1924).

[44] *Ibid.,* p. 602.

[45] *Ibid.*

This rather difficult standard, though, may be deemed too harsh a restraint on administrative prerogative. For example, in *King v. University of Saskatchewan*,[46] the Supreme Court of Canada refused to quash a university decision, dismissing a law student for low marks, merely on the grounds of overlapping membership on various university committees. Effectively, this court found that there must be a presumption of impartiality rather than a presumption of bias if the university is to function properly and the general rule that "no man may be a judge in his own cause" must be modified in the university setting. According to this court, it "was perfectly proper for the president of the university to be a member of the special appeal committee set up to consider a student's appeal of dismissal. The court was careful to point out that no member of the law school faculty sat in judgment on the appeal committee. The mere fact, then, that university officials sit in a quasi-judicial capacity rendering judgments in which the university is itself a party did not render the decision invalid.

The restrictive standards of *Hannam* are more directly brought into question when viewed in light of Lord Devlin's earlier comment that, "We have to satisfy ourselves that there was a real likelihood of bias—not merely satisfy ourselves that that was the sort of impression that might reasonably get abroad."[47] Not only is the "reasonable man" versus the "real likelihood" test of bias unsettled but as *King* documents the overlapping membership issue is equally hazy.

In the United States a fair trial in a fair tribunal is a basic tenet of due process,[48] just as it is with natural justice and this applies to administrative agencies as well as to the courts.[49] But in the United States the presumption against impartiality of the agency may well be more difficult to overcome than it is in England. The view of the Supreme Court of the United States is apparently more in keeping with *King,* the Canadian decision, than with *Hannam.* This was apparent in a recent Supreme Court rejection of a teacher union claim that bias of the school board invalidated board action to dismiss teachers. As a party to the dispute, the school board was alleged to have a prejudicial interest in the proceedings.[50]

Here the school teachers as a result of impasse over contract negotiations with the school board decided illegally to go out on strike. The school board instituted dismissal actions against the teachers and conducted a hearing prior to their dismissal. On appeal before the Supreme Court, the Attorney for the teachers claimed *inter alia* that the Board was not sufficiently impartial and free from bias to exercise judgment over the striking teachers. Plaintiff teachers argued that individual board members had a personal or official stake in the decision and that because of the strike, and the difficult negotiations, the board members harbored personal bitterness toward the teachers. No actual proof of

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[46] 6 D.L.R. 31 (1969).

[47] R. v. Barnsley Licensing JJ., 2 Q.B. 167 (1960).

[48] In re Murchison, 75 S.Ct. 623 (1955).

[49] Gibson v. Berryhill, 93 S.Ct. 1689 (1973).

[50] Hortonville Joint School District No. IV. v. Hortonville Education Association, 96 S.Ct. 2308 (1976).

this was, however, presented other than the fact that the board had dismissed the teachers in the first place.

The Supreme Court in holding against the teachers said that mere familiarity with the facts of the case by an agency in performance of its statutory responsibility does not disqualify the decision maker. "Nor is the decision maker disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not 'capable of judging a particular controversy fairly on the basis of its own circumstances.'"[51] Only to show that a public board is "involved" in events preceding a decision is "not enough to overcome the presumption of honesty and integrity in policymakers with decisionmaking power."

Although this decision was rendered under the Due Process Clause of the Fourteenth Amendment rather than natural justice, the logic nevertheless is less restrictive than the English precedent established in *Hannam.* In *Hortonville,* the board members were clearly parties to the dispute and were quite obviously sitting in judgment in a dispute over which they had an official interest. Even in light of this, the Supreme Court found that bias must be shown to exist, in fact, and not merely by virtue of the board members being judges in their own cause. A school board having executive, quasi-legislative and quasi-judicial functions must, according to the United States Supreme Court, frequently sit in judgment over certain of its own decisions, but this, in and of itself, did not create a presumption of bias. Simply to show that an administrative agency has a dual role, without more, does not constitute a due process violation.

> "The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weaknesses, conferring investigative and adjudicative powers on the same individual poses such a risk forbidden if the guarantee of due process is to be adequately implemented."[52]

While one can probably distinguish *King,* the Canadian Supreme Court decision, from either *Hannam* or *Hortonville* since it involved the special setting in which a university faculty and administrators are called upon to adjudicate, no similar factual distinction can be found between *Hannam* and *Hortonville.* In both these cases only public officials sat in review. In each, public officials, board members, sat in judgment over their own cause. A minor distinction was present in that one case emanated from an action and appeal of a subcommittee of the board while the other did not, but essentially the issues were the same. Without factual distinction one must assume that the law pertaining to bias is more constraining on officials under English natural justice than under American due process. This, however, may be mitigated to some extent if one considers that substantial disagreements remain among English jurists regarding the appropriate standard or test to be applied. If the English courts choose to follow the "real likelihood" test then the precedent

[51] *Ibid.*

[52] Withrow v. Larkin, 95 S.Ct. 1456 (1975).

would be quite similar to that expounded in *Hortonville.* It may be that with the uncertainty which exists, school officials in England would prefer to apply an amalgam of the two tests as enunciated by Cross.[53] His formula, combining the reasonable suspicion and the real likelihood tests, is this:

> "If a reasonable person who has no knowledge of the matter beyond knowledge of the relationship which subsists between some members of the tribunal and one of the parties would think that there might well be bias, then there is in his opinion, a real likelihood of bias . . . the question is not whether the tribunal will in fact be biased, but whether a reasonable man with no inside knowledge might well think that it might be biased."[54]

Finally, though, the issue probably turns on the view a particular court will take of a given factual situation. As Jackson has observed, "The judge who says there is no real likelihood of bias would just as likely say there was no reasonable suspicion of bias; a judge who is prepared to find a reasonable suspicion of bias is hardly likely to deny a real likelihood of bias."[55]

Under either standard those in charge of administering the educational system must be aware that natural justice does apply to the actions and procedures of their tribunals and that the rule against bias will likely invalidate the exercise of prerogative if the official knowing the facts and the background of the issue involved could reasonably expect or foresee the likelihood of bias influencing objective judgment. If such exists then the school official or administrator should be removed from the tribunal, hearing or inquiry board, before judgment is rendered and before opportunity is presented to inhibit impartial discretion.

Fairness: Audi Alteram Partem

The right to be heard as a basic principle of fairness has long been accepted as a tenet of English law, however, more specific due process requirements within this broad context have not been universal even in criminal proceedings. Over the years, certain procedures indispensable to a fair trial have gradually and almost imperceptibly crept into common law practice as a result of judicial sanction rather than from statutory enactment.[56] For example, in 1591, the accused was not allowed to produce witnesses in his own behalf, but by 1630's such witnesses were permitted.[57] No right against self-incrimination existed as late as the early 18th Century and the accused was compelled to testify even though the testimony would tend to incriminate him.[58] Torture to exact a confession lasted until 1640 and the threat of torture was a valid means to obtain a confession until at least 1662.[59] Apparently, it was only with Lord

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[53] Metropolitan Properties v. Lannon, 1 Q.B. 577 (1969).

[54] *Ibid.*

[55] PAUL JACKSON, NATURAL JUSTICE 32 (1973).

[56] L. W. LEVY, ORIGINS OF THE FIFTH AMENDMENT 321 (1968).

[57] Still, though, they were permitted unsworn, which gave their testimony less weight than those taken under oath.

[58] Levy, *op. cit.,* p. 321.

[59] *Ibid.,* p. 327.

Gilberts *Law of Evidence* in about 1726 that compulsion to extort a confession was clearly identified as a violation of the "Law of Nature."[60] It was not until 1696, prompted by judicial evolution, that Parliament finally guaranteed the accused in a criminal action a copy of the indictment and extended to him the right to be represented by counsel.[61]

It is clear then that rights of fairness and due process which we take for granted today were not always available to the accused and their incorporation into English legal system resulted only after long and arduous evolution. Full due process as we know it today was not generally accepted as required judicial procedure, even in criminal cases until the 18th century.[62] Without prior precedent requiring specific procedures in the courts themselves it is little wonder that procedural fairness was so late in developing as a part of the quasi-judicial process of public administrative agencies.

Although the right to be heard is a spontaneously acceptable idea it is not settled as to what it entails or where it applies.[63] Does it require a notice for a hearing, if so what should the notice include? Is there a right to an oral hearing? Can the accused confront witnesses and cross-examine? Can the accused demand legal counsel? Can the hearing be conducted by one body and the decision be rendered by another? Is there a right to remain silent? All of these questions define the parameters of *audi alteram partem* and complete answers can only be found in exploring both English and American legal precedents.

A hearing is useless if the defendant does not know the charges against him and does not have time to prepare a defense. Where a party is completely unaware of the institution of proceedings, fairness can, of course, not be obtained,[64] consequently, it is rudimentary that notice is required.

Fundamental fairness requires that notice give the specific ground or grounds on which the accused is being charged and the nature of the evidence against him.[65] A good example of failure to observe this element of natural justice occurred in a case where three persons were bound over to keep the peace without ever being notified of the charge. Lord Parker observed in this instance:

> "It seems to me to be elementary justice that, in particular, a mere witness before justices should, at any rate, be told what is passing through the justices' minds, and should have an opportunity of dealing with it."[66]

According to *Dixon,* the landmark case in the United States, no rigid procedural guidelines are required but notice should contain a statement of specific charges and grounds which if proven could lead to the appropriate

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[60] *Ibid.,* p. 328. Lord Geoffrey Gilbert relied for his justification on the "Law of Nature" or "God's Law" rather than "Natural Justice."

[61] *Ibid.*

[62] *See* Entick v. Carrington, 19 St. Tr. 1030 (1765); in this case a general and vague search warrant was held insufficient to obtain valid incriminating evidence.

[63] Demara Turf Club v. Phang, 26 M.L.R. 412, Sup. Ct. of British Guiana (1963).

[64] Fleet Mortgage v. Lower Maisonette, 2 All. E.R. 737 (1972).

[65] Due v. Florida A & M University, 233 F.Supp. 396 (1963).

[66] Sheldon v. Bromfield JJ. 2 Q.B. 573 (1964).

disciplinary action.[67] In addition, this court required that the student be given the names of the witnesses against him and an oral or written report of the facts.[68]

Notice must state the charges citing all the pertinent statutes which will affect the decision. The Privy Council held that natural justice had been violated where the Education Minister of Ceylon exercised his authority to "take over" a school from a director giving as the lone grounds, failure of the director to heed a statutory provision requiring payment of teacher's salaries. Unfortunately for the Minister, it was necessary to cite an additional portion of the statute, prescribing the appropriate procedure for take over. The minister had erroneously failed to consider (a) whether the school "is being administered in contravention of any of the provisions of this Act," and (b) whether if such contravention was established the order to take over could be made. Since notice did not include charges under both sections of the statute, the minister's decision was overturned. Failure to follow a statutory requirement to issue a public notice will likewise invalidate an action of a local authority. Procedurally, as a ministerial obligation, the mandates of statute must be met precisely.[69]

Interestingly, the House of Lords has held that fairness under natural justice does not extend to require an income tax tribunal to issue and make available to defendant taxpayers counter-statements issued by income tax commissioners made in response to the taxpayers statutory declarations.[70] Notifications having already been originally issued to the taxpayers as required by law, the House of Lords concluded that neither natural justice nor statute required that commissioners made counter-statements available to taxpayers. Here the Lords reasoned that the tribunal could only establish a *prima facie* case against the taxpayers which could lead to prosecution, but that since no final judgment was to be rendered taxpayers were not entitled to receive and reply to the counter-statement. Should this case have involved a tribunal with final authority regarding conviction or innocence, then presumably, the taxpayers would have had a natural justice right to obtain and respond to the counter-statements.

Vague or ambiguous notice is unsatisfactory.[71] Where a hearing was conducted to strike a doctor from the medical register because of infamous conduct, the doctor claimed that as the charge was worded he could have been struck for either performing the operation badly or not performing at all. Either way he lost. The Court, while holding against the doctor on other grounds, nevertheless, acknowledged that a notice of charges must be free of vagueness.

A notice of charges so vague "that men of common intelligence must necessarily guess at its meaning and differ as to its application" violates the first principle of due process.[72] Vagueness is primarily objectionable because it

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[67] Dixon v. Alabama State Board of Education, *op. cit.*

[68] *Ibid.*

[69] Bradbury v. Enfield London Borough Council, 1 W.L.R. 1311 (1967).

[70] Wiseman v. Borneman, 3 All. E.R. 275 (1969).

[71] Sloan v. General Medical Council, 1 W.L.R. 1130 (1970).

[72] Dickson v. Sitterson, 280 F.Supp. 486, *affirmed,* 415 F.2d. 228 (5th Cir. 1969).

tends toward arbitrary and discriminatory enforcement and fails to provide explicit standards for those who apply them.[73] Justice Black observed in *Epperson v. Arkansas* that:

> "It is an established rule that a statute which leaves an ordinary man so doubtful about its meaning that he cannot know when he has violated it denies him the first essential of due process . . . "[74]

Quite obviously then, if a vague charge is brought against a student or the charge is based on a vague rule or statute, elementary fairness cannot be served.

Whether natural justice is satisfied by written submissions rather than an oral hearing is subject to some controversy. This issue was initially settled in the aforementioned important case of *Local Government Board v. Arlidge* in 1915 when the House of Lords concluded that natural justice did not require an oral hearing.[75] In this case the respondent's dwelling had been condemned and closed as unfit for human habitation. In keeping with statute a public hearing was held but the respondent was not present and was not given the opportunity to be heard orally. The Board closed the house upon consideration of written information submitted to the hearing examiner. Although this court generally impugned natural justice it did agree that a fair opportunity to be heard was necessary. To this broad requirement, though, the court refused to add specification and concluded that oral testimony before the determining tribunal was not essential to procedural fairness in a hearing. The logic of this decision suffers in that at no point was the respondent heard, either at the public inquiry or before the deciding tribunal.

Arlidge is probably of limited value in evaluating fairness to students since the facts in dispute involved the rather simple issue of whether a house was habitable. It did not deal with the more complex issue of establishing facts and a clear understanding of the circumstances which were alleged to have transpired. The primary purpose of a fair hearing is to ascertain such facts and in *Arlidge* the actual condition of the house was not in dispute.

Controversy over the facts of a case will usually compel a hearing examiner to not merely permit but to require both oral and written testimony. In this regard *Arlidge,* especially where school inquiries are concerned, is not definitive.

Arlidge has caused consternation among legal scholars who attempt to rationalize its denial of oral testimony. Jackson, for example, says that in keeping with *Arlidge* that:

> " . . . perhaps, a university committee deciding whether to exclude an unsuccessful student from a course might well satisfy natural justice by allowing only written submissions relating to the causes of his examination failure in the form of such evidence as medical certificates. But such a committee deciding whether to expel a student for alleged dishonesty might surely be required to allow the student to appear personally."[76]

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[73] Grayned v. City of Rockford, 92 S.Ct. 2294 (1972).

[74] Epperson v. Arkansas, 89 S.Ct. 266 (1968).

[75] Local Government Board v. Arlidge, A.C. 120 (1915).

[76] PAUL JACKSON, NATURAL JUSTICE 13 (1973).

What Jackson, of course, implies is that in the former situation there is no dispute over the facts while in the latter a charge of alleged dishonesty would almost certainly involve a controversy over one or more factual situations which could be interpreted in different ways.

A decision which sheds more light on the issue of oral testimony and is directly applicable to the typical educational controversy involved a dispute over a taxpayer's integrity, and whether his version of the facts explaining the omission of certain betting income was acceptable as opposed to Inland Revenue's interpretation.[77] Because of severe illness the plaintiff had been denied an opportunity of an oral hearing. Justice Buckley of the Chancery Division held that natural justice required the plaintiff be given the opportunity to appear in person and present his side of the story. According to Buckley, refusal of an oral hearing caused substantial injustice when:

> "on one footing, the whole outcome of the case depended on whether he was to be believed in regard to his claim to have made winnings from betting accounting for the whole of the unexplained increase in his wealth . . . "[78]

This decision would appear to comport with due process decisions in the United States in which the courts have generally held that the accused student must have the opportunity at a hearing to present evidence in his own behalf.[79] In fact, the courts in the United States have more or less implicitly assumed that hearings will be oral in nature. The Superior Court of New Jersey has held that witnesses adverse to the accused student must be present and be compelled to testify.[80] If witnesses may be compelled to appear then almost certainly one could conclude that the accused himself has a right to appear and testify. Early the U.S. Supreme Court said that:

> "[T]he fundamental requisite of due process of law is the opportunity to be heard."[81]

Here the court was referring to actual physical appearance and oral testimony. In its most recent due process case involving students, the Supreme Court found that an oral hearing was possibly the only way which school officials in some situations could dismiss a student while allowing for fundamental fairness.[82] To say that the student could only convey his side of the story in writing would quite obviously fly in the face of procedural due process as prescribed in the United States.

In this light one can reasonably conclude that even though natural justice and due process are both flexible doctrines, neither can be construed to be so lax as to deny a student an oral hearing, particularly where the facts are in dispute or where they may be subject to more than one interpretation.

Natural justice requires that every individual have an opportunity to know

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[77] Rose v. Humbles, 1 W.L.R. 1061 (1970).
[78] *Ibid.*
[79] S. v. Board of Education, 97 Cal. Rptr. 422 (1971).
[80] Tibbs v. Board of Education, 276 A.2d 165 (1971).
[81] Grannes v. Ordean, 34 S.Ct. 779 (1914).
[82] Goss v. Lopez, 95 S.Ct. 729 (1975).

the evidence against him. Lord Green in 1944 maintained that the accused must have:

> " ... a real and effective opportunity of meeting any relevant allegations made against him."[83]

When letters, for example, concerning a student's qualifications become evidence in a controversy, they must be made available to the student in order that he can have the opportunity to specifically rebut them.

A tribunal, sitting as an admissions committee for registration of architects, must disclose to the applicant letters both favorable and unfavorable to his admission.[84] The Privy Council has held that failure to supply the accused with a copy of a report to a Board of Inquiry made by the adjudicating officer containing highly prejudicial matter amounted to failure to afford the appellant "a reasonable opportunity of being heard" under the Malayan Constitution and also constituted a denial of natural justice.[85] In a similar case in which applicants sought gaming licenses before a tribunal and were denied details of specific objections raised against them, the Queen's Bench Division held applicants were entitled to know the evidence against them but, interestingly, had no right to know the source of the evidence.[86] Natural justice was also held to be violated by a hearing board which refused to provide medical documents to a chief inspector of the Kent police force which revealed that he was mentally unstable and unfit to carry out his duties.[87]

Each of these decisions agree that the defendant must have access to all evidence submitted against him. This rule, though, is not without exception. In a case somewhat at odds with the logic of the above cases, the House of Lords held that confidential information submitted by an official solicitor concerning children who were wards of the court could remain privileged and the mother of the infants had no natural justice rights to the documents. The lower hearing Court had offered to release the materials to the mother's legal counsel, but not to her personally, which she rejected. The House of Lords were in agreement with the proposition that proceedings of quasi-judicial inquiries must adhere to justice and fairness, but it distinguished this case because of the involvement of infants. Lord Evershed said:

> "I venture to repeat and to emphasize that the aim and purpose of this judicial inquiry is the benefit of the infant and for such purpose to make a decision about its immediate future upbringing and control."[88] " ... that ... the welfare of the infant is paramount ... "[89]

The Court determined that the release of the material could be detrimental to the children.[90]

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[83] R. v. The Archbishop of Canterbury, 1 All. E.R. at p. 181 (1944).
[84] R. v. Architects' Registration Tribunal, 2 All. E.R. 131 (1945).
[85] Kanda v. Government of the Federation of Malaya, A.C. 322 (1962).
[86] R. v. Gaming Board for Great Britain, 2 Q.B. 417 (1970).
[87] Re Godden, 3 All. E.R. 20 (1971).
[88] *Ibid.*, p. 218.
[89] *Ibid.*, p. 217.
[90] In re K Infants, A.C. 201 (1963).

Support for this suspension of full disclosure was found by Lord Evershed in the precedent of Lord Tucker in the case of *Russell v. Duke of Norfolk*[91] where he said:

> "There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter under consideration and so forth."

The nature of the inquiry involving infants as wards of the court was sufficient for the House of Lords to modify the standard in this special instance.

The general natural justice rule requiring evidence be released to the accused is directly in keeping with the due process standard in the United States. In *Dixon*[92] the Court put it succinctly:

> "The student should be given the name of the witnesses against him and an oral or written report on the facts to which each witness testifies."

In *Mills*[93] a federal court in Washington, D.C. even went so far as to require the school board to inform parents of their right to examine the child's school records before a hearing, including tests, reports, medical, psychological and educational information.

The United States Supreme Court probably agrees with the House of Lords' decision, *In re K Infants,* that certain natural or due process rights can be suspended under special circumstances but it does not agree that juvenile hearing rights should be in anyway diminished in these instances. Before 1966 in the United States, juvenile offenders were given hearings but not in the adversarial fashion applied to adults. Juvenile judges conducted inquisitorial hearings, a process presumed to render fair treatment, but the judge conducting the hearing was not bound by any specific due process procedures. Justification for this was couched in the same rationale as that used by the House of Lords in *In re K Infants,* that infants were a special case and should not be subjected to ordeals and conflict which could possibly be destructive to them psychologically. The United States Supreme Court reversed this precedent in a case entitled *In re Gault.*[94] The Court repudiated the right of the state, as *parens patriae,* to deny children procedural rights otherwise made available to adults. In so holding the Court prescribed a full panoply of procedural due process rights which must be applied in juvenile courts. These include adequate written notice with specification of charges and issues the defendant must meet, a hearing with evidence made available, legal counsel and a privilege against self-incrimination. Herein, the Court suggested essentially the same procedure for formal juvenile criminal proceedings as did *Goss* for hearings in the school

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[91] 1 All. E.R. 109 (1949).

[92] Dixon v. Alabama Board of Education, *op. cit.*; *See also* Goss v. Lopez, *op. cit.,* Esteban v. Central Missouri State College, 415 F.2d 1077 (8th Cir. 1969), *cert. denied* 90 S.Ct. 2169 (1970); Soglin v. Kauffman, 418 F.2d 163 (7th Cir. 1969) and Sullivan v. Houston Independent School District, 475 F.2d 1071 (5th Cir. 1973), *cert. denied* 94 S.Ct. 461 (1973).

[93] Mills v. Board of Education of District of Columbia, 348 F.Supp. 866 (1972).

[94] In re Gault, 87 S.Ct. 1428 (1966).

setting. In *Gault* and *Goss* the United States Supreme Court extends due process procedures beyond the more generalized standard of the House of Lords, *In re K Infants.* The two high courts do agree that a court or tribunal can if it deems appropriate maintain the confidentiality of records of police contacts and court action relating to juveniles. Confidentiality, however, cannot be used to withhold facts pertinent to the child's defense or to bury "the facts involved in the case."[95] Inappropriate procedural process in the name of *parens patriae* is not permissible.

Cross-examination of witnesses is fundamental to the criminal trial, but, in administrative hearings, particularly in the educational setting, its status is not so certain. Jackson has asserted the general rule in England as:

> " . . . where there is a right to an oral hearing there is probably a right to cross-examine witnesses."[96]

The issue has not yet been completely resolved in the United States. If a student were being permanently expelled from school the chances are that cross-examination would be required, but if a lesser penalty were at stake, then it probably would not be mandated.

> "It has always been recognized that the more important the rights at stake the more important must be the procedural safeguards surrounding those rights."[97]

In *Esteban v. Central Missouri State College* the United States Eighth Circuit Court of Appeals set out procedural safeguards for student disciplinary actions but it excluded cross-examination as a general requirement.[98] *Mills,* contrarily, specifically requires that schools provide the parent or guardian the opportunity to confront and cross-examine witnesses.[99] The United States Supreme Court has not ruled on this issue, intentionally excluding consideration of it in *Goss* when it said:

> "We stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity . . . to confront and cross-examine witnesses . . . "[100]

One should be aware, though, that the issue in *Goss* involved a short suspension from school and was not too serious in nature. Had the hearing been to consider permanent expulsion or other drastic actions against a student the Supreme Court may well have required opportunity for cross-examination. The Court carefully circumscribed the limited extent of its comments on the issue, saying:

> "We should also make it clear that we have addressed ourselves solely to the short suspension, not exceeding 10 days. Longer suspension or expulsions for the remainder of the school term, or permanently, may require more formal procedures."[101]

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[95] *Ibid.*
[96] Jackson, *op. cit.,* p. 15.
[97] S. v. Board of Education, 97 Cal. Rptr. 422 (1971).
[98] Esteban v. Central Missouri State College, 415 F.2d 1077 (1969).
[99] Mills v. Board of Education, 348 F.Supp. 866 (1972).
[100] Goss v. Lopez, 95 S.Ct. 729 (1975).
[101] *Ibid.*

As Jackson observed,[102] the opportunity for cross-examination is probably required under English natural justice, but the courts are not really definitive, particularly relative to the education setting. As early as 1872 Baron Martin identified elements of natural justice which should be observed, which included cross-examination.[103] As late though as 1960 natural justice was held by the Privy Council to have been satisfied even though the student had not cross-examined witnesses.[104] In this case, a student at the University of Ceylon had sat for the final examination for the degree of Bachelor of Science and was subsequently charged with cheating for having prior knowledge of a German language translation contained in one of the test papers. In reviewing the hearing procedure the Privy Council held that while elementary and essential principles of fairness must be maintained, and the defendant must be given a fair opportunity to contradict relevant statements to his prejudice, there was no duty on the part of the university voluntarily to inform the student that he could cross-examine. Accordingly, the omission to so inform was not sufficient to invalidate the proceedings.

This decision has been criticized by de Smith because the student was not legally represented and probably did not know that he should seek the opportunity to confront and cross-examine the witness against him.[105] If cross-examination is a requirement of natural justice, then the tribunal must inform the accused of his rights. This conclusion is supported in *Hoggard*[106] in which the Queen's Bench Division held that a District Council was obligated to inform persons involved in the hearing of the rudiments of natural justice and give them the opportunity to so exercise. The Queen's Bench held:

> "Where two parties are in dispute, and it is the obligation of some person or body to decide equitably between the competing claims, each claim must receive consideration and each claimant must be invited—not merely left to take the initiative if he chooses—to put forward the material in the form of documents or accounts which he desires to have considered; and he must be afforded an opportunity of making comment on the material put forward by rival claimants and which the Council are proposing to consider."[107]

From these precedents it seems reasonable to conclude that if the punishment or loss to the student is of significant magnitude, then opportunity to cross-examine is required, under due process. Natural justice appears to require cross-examination in similar important circumstances, particularly where one could show on appeal that cross-examination could conceivably have revealed additional information with important bearing on the case. If the nature of the case is such as to invoke the right of cross-examination then omission by the tribunal in informing the student may well be regarded as a violation of natural justice by the courts.

Presence of legal counsel is not a fundamental element of fairness but it may

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[102] Jackson, *op. cit.*

[103] Osgood v. Nelson, 5 H.L. 636 (1872).

[104] University of Ceylon v. Fernando, 1 W.L.R. 223 (1960).

[105] de Smith, *op. cit.*, p. 181.

[106] Hoggard v. Worsbrough Urban District Council, 2 Q.B. 93 (1962).

[107] *Ibid.*

well be invoked by the courts if the issues are legally complex or the interests of the accused are of great magnitude. Legal counsel was not required by the United States Supreme Court in *Goss* for suspensions of less than ten days, but as with cross-examination, the Court implied that where more severe penalties could be invoked against a student, counsel may be required.[108]

Similarly, now counsel may be required in England depending on the gravity of the charge and its consequences.[109] As a general principle, every person has a right to appoint an agent for any purpose whatsoever and this appears to include the administrative tribunal, whether the agent is legal counsel or merely a friend.[110] This principle was upheld where a ratepayer was found to possess a right to have a surveyor appear for him before a tribunal.[111] Accordingly, in *Pett,* Lord Denning said:

> "I should have thought, therefore, that when a man's reputation or livelihood is at stake, he not only has a right to speak by his own mouth, he also has the right to speak by counsel or solicitor."[112]

But on rehearing of *Pett* in spite of Lord Denning's position, the Queen's Bench Division held that natural justice was not violated by refusal to allow the accused to be legally represented. The Court reasoned that it was only in a "society which had reached some degree of sophistication in its affairs" that legal representation was an elementary feature of fair dispensation of justice.[113] Unfortunately, the court did not elaborate on what level of sophistication was necessary nor how to measure it.

Later in another case, Lord Denning seemed to retract the absolute rule he propounded in the first *Pett* case. In *Enderby Town F.C. v. The Football Association*[114] he concluded that it may be a good thing that hearings before domestic tribunals can be conducted without legal counsel, "Justice," he said, "can often be done in them better by a good layman than by a bad lawyer."

Counsel then may probably be denied by tribunals adjudicating relatively minor student disciplinary cases in either Britain or the United States, but, where major detriment may result for the accused, counsel may be elevated to a more important aspect of fairness. On balance, however, representation by legal counsel cannot be said to be, at this time, a fundamental or basic element of natural justice or due process, particularly in the school setting.

Whether the tribunal or hearing committee is an appropriate one depends on at least three issues, (a) the make-up of membership, (b) the *ultra vires* doctrine, and (c) natural justice. Courts are not concerned with whether a tribunal has representation of administrators, teachers, or students, the only legal concern is that no conflict of interest or bias exists.[115]

An administrative agency cannot delegate away its quasi-judicial or discre-

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[108] Goss v. Lopez, 95 S.Ct. 729 (1975).

[109] Pett v. Greyhound Racing Association No. 1, 1 Q.B. 125 (1969).

[110] Jackson & Co. v. Napper, 35 Ch.D. 162 (1886).

[111] R. v. Assessment Committee of St. Mary Abbotts, Kensington, 1 Q.B. 378 (1891).

[112] Pett v. Greyhound Racing Association, No. 1, 1 Q.B. 125 (1969).

[113] Pett v. Greyhound Racing Association Ltd., 1 Q.B. 46 (1970).

[114] Chapter 591 (1971).

[115] See Chapter III above.

tionary functions provided it statutorily by either Parliament[116] or a state legislature.[117] Likewise a local education authority cannot delegate discretion granted it to a subordinate or another person.[118] Thus in *Allingham v. Minister of Agriculture and Fisheries* the court held that the County Executive Committee could not delegate to its executive officer the task of deciding what crops should be grown on particular plots of ground.[119]

This rule, however, is not completely inflexible, for if it were public ministers would not be able to perform effectively and the wheels of government would grind to a halt. Ministers and authorities must be responsible for decisions made by their agencies but this does not imply that they themselves must exercise the discretion first hand. Lord Green has commented:

> "In the administration of government in this country the functions which are given to ministers are functions so multifarious that no minister could ever personally attend them. It cannot be supposed that ... the minister in person should direct his mind to the matter.... Public business could not be carried on if that were not the case."[120]

But, de Smith observes that Ministers and government departments stand in special position, the rules for which do not apply to other administrative agencies leaving as a part of their function quasi-judicial prerogative.[121] This does not mean that an administrative committee cannot delegate to a subcommittee the responsibility to collect information, facts, and evidence to be presented to the full official committee for consideration and judgment.[122] If this is done, however, care should be taken that full and complete evidence is conveyed to the committee *en banc* and that the decision is not rendered based on inadequate information or evidence obtained other than from the hearing, itself.

It seems then that it is not *ultra vires* to delegate partially certain authority so long as the responsible official retains power to review the decision and make final judgment on evidence presented.[123] It would be *ultra vires* though for the statutorily constituted authority to delegate to a subordinate committee or individual the power to actually hand down a decision in the matter. Similarly, it would contravene natural justice for a subcommittee to render a decision from a hearing it conducted and then have the superior or full committee *en banc* to reverse the lower decision in the absence of full and complete hearing documentation. For natural justice requires, unequivocally, that the decision cannot be made by anyone other than the sitting judge.

Professor W. A. Robson has summed the issue as everyone is entitled to his

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[116] Ellis v. Bubowski, 3 K.B. 621 (1921).

[117] James v. County Board of School Trustees, 147 N.E. 2d 306 (1958); *See also* State *ex. rel.* School Dist. No. 29 v. Cooney, 59 P.2d 48 (1936).

[118] Keir and Lawson, *op. cit.*, p. 490.

[119] 1 All. E.R. 780 (1948).

[120] Carltona, Ltd. v. Commissioners of Works, 2 All. E.R. 560 (1943).

[121] de Smith, *op. cit.*, p. 193.

[122] *Ibid.*, p. 194.

[123] Keir and Lawson, *op. cit.*

"day in Court." Every litigant has the right to be heard in the presence of the judge.

> "The judge must hear each party in turn, and must decide the case in person, without delegating any part of this duty to any other person. The right of every litigant to see his judge and put his case before him is expressed in the maxim *audi alteram partem* . . . "[124]

In general then it may be said that he who hears the case must also decide it. It is a breach of natural justice for a member of a judicial tribunal to participate in a decision if he has not heard the evidence presented in the case.[125] Rulings by administrative bodies have been frequently quashed because decisions were given affecting individual rights where oral presentations were made before hearing officers other than those who actually rendered the decision. Bias and ignorance alike preclude fair judgment upon the merits of a case.[126]

In the United States the fifth amendment protects the individual against self-incrimination in a criminal proceeding.[127] According to Young the right extends to college students in disciplinary proceedings, but if the student chooses to remain silent the disciplinary action against him may proceed unimpaired.[128] Young's comments though are not necessarily born out by the courts. Certainly where elementary and secondary pupils are concerned, the courts give very little guidance. The dilemma is, of course, that at the lower levels the school stands *in loco parentis* and as such can presumably punish a child for not confessing to breaking a school rule or he can be found insubordinate by the headmaster for his refusal to speak out regarding rule violations. It may well be that the courts will view self-incrimination in the same light as search and seizure, another constitutionally required safeguard albeit one extending outside the criminal setting.[129] Here the courts require only that school officials have "reasonable suspicion" before searching and are not required to adhere to the more strenuous standard of "probable cause" placed on police searches by the courts.[130] Likewise, a lesser standard may probably prevail regarding an elementary or secondary student's right to remain silent.

The inconclusiveness of the self-incrimination question is demonstrated by several cases, in one of which, the court held that student witnesses could not be compelled to testify against the accused since it "might be regarded as detrimental to the best interests of the school."[131] Also, where a girl allegedly

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[124] Keir and Lawson, *op. cit.*, p. 492.

[125] R. v. Huntingdon Confirming Authority, 1 K.B. 698 (1929); Munday v. Munday, 1 W.L.R. 1078 (1954); R. v. Manchester, ex p. Burke, 125 J.P. 387 (1961).

[126] R. v. Halifax City Council Committee of Works, ex p. Johnston, 34 D.L.R.2d 45 (1962); Re Rosenfeld and College of Physicians and Surgeons, 11 D.L.R. 148 (1970).

[127] The fifth amendment states in part: " . . . nor shall [*any person*] be compelled in any criminal Case to be a witness against himself. . . . "

[128] D. Parker Young, The Law and The Student in Higher Education 15 (NOLPE Monograph Series, 1976).

[129] Fourth amendment, Constitution of the United States.

[130] Moore v. Student Affairs Committee of Troy State University, 284 F.Supp. 725 (1968); Piazzola v. Watkins, 442 F.2d 284 (1971).

[131] State v. Hyman, 171 S.W. 2d 822 (Tenn. 1943).

cheated on a history examination and later, under substantial pressure from the school principal, confessed, the court found that the confession was invalid and denied due process since it was not gained through the process of a full-blown hearing.[132] On the other hand, a California court found no merit to plaintiff's contention that procedural due process was denied because a hearing committee did not recognize the privilege against self-incrimination.[133]

At present the school administrator can apparently compel the accused to testify even though his utterances may subject him to expulsion or other punishment. On the other hand, the school, according to *State v. Hyman,*[134] may not compel other students to testify against the accused. *Hyman,* however, may not be definitive since, in that case, the school did not in fact want the witness to face and testify orally against the accused.

A complicating feature is added where the charge against the student may also be of such nature as to violate criminal statute. A substantial question arises as to whether the student's testimony before a school tribunal can be used against him in a criminal prosecution. Wright has maintained that in this circumstance the student cannot be compelled to testify and should be able, without fear of reprisal, to validly "take the Fifth."[135] This opinion is at odds with the Supreme Court of Vermont which refused to enjoin a school disciplinary hearing until after a criminal trial against the student who argued that evidence given in the school hearing would incriminate him.[136] This court held that discipline imposed by the academic community need not await the outcome of other proceedings, saying:

> "Educational institutions have both a need and a right to formulate their own standards and to enforce them; such enforcement is only coincidentally related to criminal charges and the defense against them."[137]

In this Vermont case, plaintiffs relied on *Garrity v. New Jersey,*[138] in which the United States Supreme Court earlier had held that self-incriminating evidence given in a hearing for dismissal of police officers was inadmissible in a criminal court. The Vermont court nevertheless found this unconvincing and maintained that if a student were compelled to testify against himself, that the evidence would, as a matter of routine, be held inadmissible in any subsequent criminal action.

At this time, the general rule in the United States precludes student access to the fifth amendment privilege against self-incrimination in a school hearing. Due process does not require it and the school administrator is unaffected by its strictures.

Natural justice in England does not give students the privilege either. Levy reports a rather infamous history of self-incrimination in England emanating

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[132] Goldwyn v. Allen, 54 Misc. 2d 94, 281 N.Y.S. 2d 899 (1967).

[133] Goldberg v. Regents of University of California, 57 Cal. Rptr. 463 (1967).

[134] State v. Hyman, *op. cit.*

[135] Charles Alan Wright, *The Constitution on The Campus,* 5 VANDERBILT LAW REVIEW 1027 (1969).

[136] Nsuve v. Castleton State College, 335 A.2d 321 (Vt., 1975). *See also* Furutani v. Ewigleben, 297 F.Supp. 1163 (1969).

[137] *Ibid.*

[138] 87 S.Ct. 616 (1967).

from the religious purges of the sixteenth century. The legally remarkable oath *ex officio* which condemned a man either to renounce his religion or admit guilt was a cornerstone of this era. *Nemo tenetus prodere seipsum,* that "no man is bound to betray (accuse) himself," was the futile outcry of many religious zealots destined for martyrdom. Gradually, the unjust and unnatural, and as Levy says immoral, demand that man furnish evidence against himself fell by the wayside in England.[139] Both statutorily and as an element of common law criminal due process in the English system the maxim became fundamental. Its emergency in English law was according to Griswold "one of the great landmarks of man's struggle to make himself civilized."[140]

In spite of this great advance in criminal law, however, natural justice apparently does not extend the privilege to the administrative hearing. Authorities conspicuously exclude the privilege against self-incrimination as an element of natural justice.[141] This may well be because due process and natural justice by definition, to a large extent, presuppose that the accused is willing to appear and give information. Such an assumption may, however, not be well taken.

In light of the precedents and the circumstances in which a school hearing occurs, it is doubtful that the maxim of *nemo tenetus prodere seipsum,* that no man is bound to accuse himself, will have a very large role to play in the near future.

Impact of Natural Justice on Administrative Prerogative

With the evolution of natural justice and procedural due process as more potent forces in the quasi-judicial administrative processes, practicing school administrators of necessity must formulate guidelines for their own action which will protect both them and the students within the confines of law. Basically both concepts require fairness and justice to be given each child depending on the circumstances and the child's interest as balanced against corresponding and sometimes contrary school interests. At very least, natural justice requires the school administrator first to provide the child with a hearing which is impartial and free of bias, and secondly to guarantee the student that fairness will prevail. Minimal natural justice requires that the administrator give the student adequate notice of what is proposed, allow the student to make representations on his own behalf, and/or appear at a hearing or inquiry, and to effectively prepare his case and answer allegations presented.[142]

Courts in the United States have maintained that "The touchstones in this area are fairness and reasonableness."[143] The precise boundaries of fairness under both English or American law must be kept reasonably flexible to ensure

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[139] Levy, *op. cit.,* p. 330.

[140] Erwin N. Griswold, The 5th Amendment Today 7, 73, 81 (1955).

[141] de Smith, *op. cit.*; Keir and Lawson, *op. cit.*; and Jackson, *op. cit.*

[142] de Smith, *op. cit.,* pp. 171–172.

[143] Due v. Florida A & M University, 233 F.Supp. 396 (1963); *See also* Jones v. State Board of Education, 279 F.Supp. 190 (1968), *affirmed* 407 F.2d 834 (6th Cir. 1969).

freedom for administrative agencies to operate. The United States Supreme Court has reminded us that:

> "Due process is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts.... Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account."[144]

But, as observed above, flexibility cannot be the watchword for laxness or denial of proper procedure. Minimal fairness according to American procedural due process standards are not dissimilar from those of natural justice enunciated above. They include in the words of *Dixon*[145] that (a) notice should be given containing a statement of the specific charges and grounds, (b) a hearing should be conducted, affording the administrator or board with opportunity to hear both sides in considerable detail, (c) the student should be given the names of the witnesses against him and an oral or written report on the facts, (d) the student should be given the opportunity to present his own defense against the charges and to produce either oral testimony or written affidavits in his own behalf, (e) if the hearing is not before the Board empowered to make the decision, the results and findings of the hearing should be presented in a report open to the student's inspection.

Beyond these rudiments of "fair play" various judicial precedents of both natural justice and due process add specificity and restrain administrative prerogative by reducing the administrator's boundaries of discretion. The following guidelines are suggestive of such boundaries.

I. *Bias*
   1. The judge must come to the hearing with an open mind without preconceived notions of the ultimate outcome.
   2. No connection can exist between the parties involved and the administrator except through his *ex officio* position as an officer of the school. No decision-maker should be disqualified simply because of a position he has taken on a matter of public policy.
   3. Intercommittee membership, although not illegal, should be avoided where possible in order to prevent any impression of bias. Committee membership should not be permitted to even approach offending the "real likelihood" of bias standard.

II. *Fairness*
   1. Every student has a right to be heard when punishment for an offense is severe enough to deprive him of schooling, even for a few days.
   2. Notice should be given conveying the specific ground or grounds with which the student is being charged citing rules or regulations which have been broken. Notice must not be vague or ambiguous.

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[144] Hannah v. Lanche, 363 U.S. 420 (1960).

[145] Dixon v. Alabama State Board of Education, 294 F.2d 150 (1961).

3. Notice should be delivered to the student, in writing, in sufficient time to ensure ample opportunity to prepare a defense to the allegations.
4. It goes without saying that the burden of proof should bear on the school and not the student.
5. The student should be given the opportunity to testify and present evidence and witnesses in his own behalf.
6. Even though natural justice may appear to be satisfied without an oral hearing, the weight of authority and logic seems to require that the student be given the opportunity for an oral hearing if he so desires. This is certainly true where a factual interpretation is in doubt. If no factual issue is in question, then the purpose of a hearing is largely obviated, anyway.
7. Information not officially presented at the hearing should not be used as a basis for rendering a decision.[146]
8. With the possible exception of evidence which could be harmful to the child or the parent,[147] all evidence should be made available to the accused child, parent and legal counsel.
9. To confront and cross-examine witnesses is apparently not basic to natural justice[148] nor due process,[149] however sufficient precedent is mounting that there is a right to cross-examine if the punishment or loss to the student is of such magnitude as to permanently stigmatize a child's future. If the right is present the tribunal should so inform the student.
10. To have legal counsel present is not looked upon by the courts as being fundamental to fairness. English courts appear to equivocate more on this issue than do American courts and in so doing appear to enunciate a rather important doctrine that the "right to have legal counsel present is a function of the complexity of the case." This may well be the direction the American courts will ultimately take.
11. Natural justice requires that the administrator with the quasi-judicial responsibility for rendering a judgment must both hear the case and make the decision. Delegation of decision-making authority is *ultra vires.* An administrator or a board, nevertheless, may delegate the collection and derivation of evidence, to a subordinate so long as the final decision is made by the appropriate authority based on the evidence presented.
12. Students appear to have no right to remain silent to avoid self-incrimination in an administrative hearing under either natural justice or due process. This is true even where the student claims that evidence given may tend to incriminate him in a later criminal proceeding on the same charge.

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[146] Young, *op. cit.,* p. 14.
[147] In re K. Infants, *op. cit.*; In re Gault, *op. cit.*
[148] University of Ceylon v. Fernando, *op. cit.*
[149] Dixon v. Alabama Board of Education, *op. cit.*

Had Henry Hutt[150] lived and attended school today he would have found his situation much different. An adroit attorney may well have drawn on each of the precedents considered and discussed here and won for Henry a formal hearing at which all the rudiments of natural justice and procedural due process could have come into play. While the *in loco parentis* authority of the school still exists, procedural rules certainly would mitigate the artibrary and summary treatment to which Henry was subjected.

If present standards of natural justice had been maintained, it is quite likely that Henry would have been completely exonerated as he was in his original criminal trial.

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[150] Hutt v. Governors of Haileybury College, *op. cit.*