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Who Are Members of the University Community?

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WHO ARE MEMBERS OF THE UNIVERSITY COMMUNITY?

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THE topic assigned to me, when I first came to consider it carefully, reminded me of Ambrose Bierce's definition of hash: "Nobody knows what hash is."[1] The simple answer to our question is similar: No one knows who are members of the university community; neither are we likely to know soon. I will try to explain briefly why this is so, and what it means to relations between universities and students.

I. THE USES OF "COMMUNITY" IN THE UNIVERSITY

The question posed by the title is obviously not irrelevant in discourse of this kind. As most of us know, "community" is a well-used word in academé. It is especially common in certain critical sections of university catalogs and student handbooks. For example:

> 33. Basis for Discipline.
> The University reserves the right to exclude at any time students whose conduct is deemed undesirable or prejudicial to the University community's best interest . . . .[2]

Or:

> The rules which are included in this booklet are not static and immutable. They are constantly being evaluated and revised to remain responsive to the needs of the University community.[3]

These examples are typical of many others. Behind such references lies a long-standing *ideal* — the university as a "community of scholars" — that is cherished by present day academics despite their institution's size and internal diversity. As one former chancellor at Berkeley put it: "Our university house has many mansions. Though the dwellers therein speak in tongues of their specializations, they belong to a single community of scholarly endeavor." He went on to add: "Whatever impedes, adulterates, or thwarts that endeavor is a menace to the mission of the community."[4]

Such notions frequently imply that "scholars" and others in the university do *in fact* share a substantial measure of agreement on

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[1] A. BIERCE, THE DEVIL'S DICTIONARY 54 (1958).

[2] University of Illinois, Champaign-Urbana Campus, Regulations Applying to All Undergraduate Students, at 21, Sept. 1967.

[3] University of Michigan, *Preface* to University Regulations, April 17, 1968.

[4] Strong, *Shared Responsibility*, 49 A.A.U.P. BULL. 113 (1963).

certain central, if rather abstract, values or ideals. One recent version, for example, lists these ideals as "belief" in

> the necessity for order — the order of time, place, and manner . . . the life of the mind . . . criticism . . . the emotions . . . the life of the spirit . . . the individual . . . an ethic of personal honesty . . . social responsibility . . . the necessity for value judgments . . . the provisional nature of all value judgments . . . humility and an openness to change.[5]

Unhappily, other observers, from Robert Hutchins to Clark Kerr, have given a different version of reality in the complex, modern university. Hutchins sadly saw the modern "community of scholars" abdicating any pretense at a "Great Conversation" about fundamental issues of civilization, until its unity lay only in a common concern for the campus heating plant.[6] Kerr amended this for California purposes to a "common grievance over parking," but he kept the descriptive message the same:

> The multiversity is an inconsistent institution. It is not one community but several . . . . Its edges are fuzzy — it reaches out to alumni, legislators, farmers, businessmen, who are related to one or more of these internal communities . . . . Devoted to equality of opportunity, it is itself a class society. A community . . . should have common interests; in the multiversity, they are quite varied, even conflicting. It is more a mechanism . . . held together by administrative rules and powered by money.[7]

Empirical research has supported such an impression of diverse and segmental commitments. Gouldner, in a famous study, found that even in a modern liberal arts college the "professional" and research-oriented faculty members were also the most "cosmopolitan," oriented in their loyalties not to any one college or university but to professional goals and to their colleagues in separate academic disciplines.[8]

It is of fundamental importance to current campus conflicts that this relationship between the *ideal* of the university as a community and its *reality* in the experience of its members has become a major, explicit issue of heated controversy. From their own experience, and from the descriptions of commentators no less distinguished than these, many students are now profoundly skeptical of "community" as a viable label for the large modern campus. At best, they see its use as an earnest, anachronistic appeal for return to a time that never was, when all interests among students, faculty, and the society could be reconciled without covert or open conflict. At worst, they

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[5] W. Martin, *The University as a Community,* in Berkeley: Center for Research and Development in Higher Education 5-6 (mimeo at Univ. of Cal. at Berkeley).

[6] *See, e.g.,* R. HUTCHINS, FREEDOM, EDUCATION AND THE FUND: ESSAYS AND ADDRESSES, 1946-1956, at 167-96 (1956).

[7] C. KERR, THE USES OF THE UNIVERSITY 18-20 (1963). *See also* Clark, *The New University,* AM. BEHAVIORAL SCIENTIST, Vol. XI, at 1-5, May-June, 1968.

[8] Gouldner, *Cosmopolitans and Locals: Toward an Analysis of Latent Social Roles,* 2 AD. SCI. Q. 295-97 (1957).

suspect that it is calculated ideology, designed to obscure the much more complex moral and political realities of university life.

II. Legal Standards: The University As Bureaucracy

It is by no means accidental that our question is phrased in the language of community. But it is instructive that such a term has rarely entered the usage of the courts in discussing academic life.[9] Legally, the university is a charitable corporation (if privately controlled and financed)[10] or an instrumentality of the state (if explicitly "public" in character).[11] In either case, the organization and management of its affairs rests largely in the hands of its board of control (trustees or regents), and is officially executed by administrative officials.[12] Instead of a general "membership," participation in the university is legally regulated according to a series of specific graded relations relying mostly on doctrines of contract.

Since our focus here is explicitly on student-institutional relations, I will not dwell long on other groups of members in the community. However, it is not irrelevant that there are many and diverse classes of membership. Regents or trustees are one group; typically they are appointed or elected as the legal members of the corporation.[13] Major administrative officials usually are appointed by the board and serve at its pleasure.[14] Faculty members generally are held to be employees on contract.[15] A large number of "research un-faculty" now are employed on most large university campuses, and these too have employment contracts for specific services, but few other emoluments of university membership.[16] The same may be said of the nonacademic personnel, the large white-collar and blue-collar work forces of the major university corporation. Alumni of the university — its graduates who received its degrees — are another group often informally considered members. Technically, they have

[9] *Cf.* Goldberg v. Regents of Univ. of Cal., 248 Cal. App. 2d 867, 871, 57 Cal. Rptr. 463, 467 (1967) (using the term "academic community").

[10] Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

[11] Annot., 65 A.L.R. 1394 (1930). The specific legal characterizations of public universities vary by state and institution. *See* T. Blackwell, College Law: A Guide for Administration 237-50 (1961).

[12] *See, e.g.,* Cal. Const. art. IX, § 9; Ohio Rev. Code Ann. § 3335.02 (Page 1960). Public institutions are under a variety of controls by state fiscal agents. *See generally* M. Moos & F. Rourke, The Campus and the State (1959); Comment, *State Universities — Legislative Control of a Constitutional Corporation,* 55 Mich. L. Rev. 728 (1957).

[13] Foley v. Benedict, 122 Tex. 193, 195, 55 S.W. 2d 805, 808 (1932); Chambers, *Who Is the University?,* 30 J. Higher Ed. 320, 324 (1959): "This body — the governing board, constituting a single artificial person — legally *is* the university."

[14] See Annot., 29 L.R.A. 378, 385 (1895); Annot., 140 A.L.R. 1076 (1942).

[15] Annot., 75 A.L.R. 1352, 1355 (1931).

[16] Kruytbosch & Messinger, *Unequal Peers: The Situation of Researchers at Berkeley,* Am. Behavioral Scientist, Vol. XI, at 33-43, May-June, 1968; C. Kerr, *supra* note 7, at 65-67.

no continuing rights of university membership, but in practice there frequently is an office of the alumni association on the campus, and typically an officer of the campus administration is charged with "alumni affairs."

Finally, students are widely thought to have a contractual relation with their university. In some instances, students are explicitly advised that this is so. One university information booklet puts it this way:

> The prevailing legal interpretation regarding the rights and privileges of students is that the student who is admitted to the University *contracts with* the University to abide by its rules and regulations. Failure to live up to this contract is sufficient grounds for disciplinary action of various degrees of severity, the most serious of which is dismissal of the student.[17]

And courts have so held.[18] On a closer analysis, however, several commentators have recently noted that a simple contract theory would seem to be only one kind of theory relevant to students' legal rights and obligations in the university.

Levine and others have noted that, were courts to apply contract doctrine in a thoroughgoing way to student discipline cases, they might well apply rules of construction appropriate to a "contract of adhesion," wherein one party has far greater bargaining power than the other and can effectively set standardized contract terms favorable to itself.[19] In such cases, the weaker party has little choice in varying the terms of the agreement; he can only "adhere" to the other's terms or reject the bargain altogether. Consequently, courts frequently construe contracts of adhesion — *e.g.*, the standard insurance contract — against the party that dictated their terms, assigning him the burden of proof as to breach of the contract and as to the meaning of the terms to be construed.[20] Such a burden might prove extremely heavy in construing the meaning of some terms in university-student "contracts," such as a right to expel students "for any reason deemed sufficient."[21]

Other commentators have suggested that the legal relation of students to their university is not one of contract but one of status —

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[17] Senate Committee on Student Discipline, University of Illinois, Undergraduate Student Discipline at the University of Illinois, at 3, April 1968.

[18] Booker v. Grand Rapids Medical College, 156 Mich. 95, 120 N.W. 589 (1909); People *ex rel.* Cecil v. Bellevue Hosp. Medical College, 60 Hun. 107, 14 N.Y.S. 490 (Sup. Ct. 1891). *See* 35 COLUM. L. REV. 898, 899 (1935).

[19] Note, *Private Government on the Campus — Judicial Review of University Expulsions,* 72 YALE L.J. 1362, 1377 (1963); *Developments in the Law — Academic Freedom,* 81 HARV. L. REV. 1045 (1968).

[20] Kessler, *Contracts of Adhesion — Some Thoughts About Freedom of Contract,* 43 COLUM. L. REV. 629 (1943); *cf.* Carr v. St. John's Univ., 17 App. Div. 2d 632, 231 N.Y.S.2d 410, *aff'd mem.*, 12 N.Y.2d 802, 187 N.E.2d 18, 235 N.Y.S.2d 834 (1962).

[21] *See* Anthony v. Syracuse Univ., 224 App. Div. 487, 489, 231 N.Y.S. 435, 438 (1928).

"participation in a pre-established social pattern"[22] with broadly unspecified terms, the indicia of which the courts recognize on the basis of common knowledge and popular attitudes. Such a theory is given credence by recent judicial discussions that specify *no* relation of students to their university, except that they are subject to rules made by the university's officials. Two writers in recent years have suggested that a *specific* status-relation be specified by the courts — that students be considered beneficiaries of a *trust* imposed upon the university as fiduciary agent.[23] No court has so far adopted such a theory. Rather, mention of the university's "trust" in the literature of law and administration suggests that its beneficiaries are not properly its students but the general public and its other benefactors.[24]

Whatever the specific theory invoked, however, the general reasoning of courts has been the same in many essentials for some years. Thus, university officials have a duty to make and enforce rules designed to serve the purposes of the educational institution. These rules and their enforcement cannot be arbitrary or violate constitutional rights. But "reasonable restrictions on the freedoms of speech and assembly are recognized in relation to public agencies [including universities] that have a valid interest in maintaining good order and proper decorum."[25] What is reasonable and what is not will be determined in the circumstances of the specific case. And the courts will not presume that discipline has been irregular; rather, they will limit the scope of their review on the ground that "the subtle fixing of . . . limits [on student freedoms] should, in a large measure, be left to the educational institution itself."[26]

The result in cases of university expulsions for misconduct has been ad hoc, case-by-case reasoning within very broad and largely unhelpful doctrines. By careful analogic reasoning from the facts of particular cases, lawyers may discern limits to the university's power of exclusion. For example, exclusion or expulsion of a student on the basis of race is unreasonable, and some elements of due process are required.[27] Several commentators have recently made this kind of

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[22] Note, *supra* note 19, at 1369.

[23] Seavey, *Dismissal of Students: "Due Process,"* 70 HARV. L. REV. 1406 (1957); Goldman, *The University and the Liberty of Its Students — A Fiduciary Theory,* 54 KY. L.J. 643 (1966).

[24] Marquette University, Student Handbook, 1967-1968, at 24. It should be noted that the status of beneficiary is a protected but subordinate one, presuming the trustee's superior knowledge about the best interests of the beneficiary who is presumed to be incompetent in this regard. A status such as "citizen" or "member" connotes something far different, including both status-obligations and status-rights, including a share in the conduct of an association's (inescapably political) affairs.

[25] Goldberg v. Regents of Univ. of Cal., 248 Cal. App. 2d 867, 874, 57 Cal. Rptr. 463, 471 (1967).

[26] *Id.* at 875, 57 Cal. Rptr. at 472.

[27] Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied,* 368 U.S. 930 (1961).

reasoning.[28] But it is important to note the difficulty in performing these lawyer-like tasks. Laymen before the law — including most university administrators, faculty members, and students — have little chance of gauging the constitutionality of a disciplinary action before the fact. Not even a "clear and present danger" test guides their judgment in this area; the manifold circumstances must be judged against even less specific standards. In the diverse world of the modern university, this is no easy task for *anyone* on the campus.

In sum, the law leaves student rights and obligations largely to the internal processes of the institution, which is *legally* a bureaucratic corporation. The *social* or *institutional* character of the university therefore is critical in determining what those rights and obligations are and how they are perceived. In that context, the apparent reasonableness and the enforceability of the university's informal norms are vitally affected by the fact that the university is widely experienced as something *other* than a "community," while university officials continue to insist that it *is* one.

III. Access to University Facilities

As I have mentioned, university membership is relevant to such questions as, Who may be *expelled* from membership, and on what theories? A second set of issues concerns who may be *excluded* from using university facilities.

The modern urban university with its multiple functions, its large and attractive campus, its rooms designed for meetings and discussions, its pleasant open spaces, and its "audiences" of intelligent members is a natural focus of attention for outsiders. Its activities and many of its policies contemplate a regular flow of visitors — faculty members and students of sister institutions, parents of enrolled students, taxpayers or contributors touring "their" campus, customers at on-campus films, concerts, lectures, and museums.

Most of this flow is invited, encouraged, and welcomed by the official university structure. I suppose that the intercollegiate football game is the most obvious example of an activity only distantly related to intellectual purposes for which universities and whole university towns are willing to suspend much normal operation, to set up special traffic flows, and to arrange special relationships between city police and campus officials for the handling of law-breaking "pranksters."

Other regular campus visitors, such as the nonstudents who participate in the overt political life of the large campus, are more

[28] Note, *supra* note 19; Van Alstyne, *Student Academic Freedom and the Rule-Making Powers of Public Universities: Some Constitutional Considerations*, 2 LAW IN TRANSITION Q. 1 (1965).

controversial. Present concern with the question of who are members of the university community arises most of all, I suspect, from the problem that university authorities have in dealing with such campus disorders as political rallies, protest demonstrations, and symbolic challenges to campus rules or practices. In reacting to these disturbances, some public officials have chosen to emphasize the presence of nonstudents among the protesters, implying that they are the principal instigators, or the essential "cadres" of troublemakers, who basically cause the protests on campus.

Such thinking evidently weighed heavily with the California legislature when, in 1965 (after the Free Speech Movement at Berkeley), it enacted a new criminal trespass statute (known locally as the Mulford Act) applying specifically to state colleges and to the University. That Act made it a misdemeanor for any person who is "not a student or officer or employee of a state college or university, and who is not required by his employment to be on the campus," to refuse a campus official's request to leave, if it "reasonably appears" to the official that the person is committing or has entered the campus for the purpose of committing "any act likely to interfere with the peaceful conduct" of the university.[29]

This approach was also followed by University officials during the Berkeley sit-in of November 1966, which arose over a special location in the lower lobby of the Student Union assigned to Navy recruiting officers by the administration. Some five hours after that incident began, the city police were called in. They consulted with campus administrators and then arrested only seven persons, all nonstudents, said by police officers to be leaders of the demonstration. Faculty members and students present told a different story — that some of those arrested had in fact been far less involved than many students who were not disciplined at all. A three-day campus "strike" followed.

In such a context, asking who are members of the university community becomes tantamount to asking who may be treated summarily. In other words, Who can be ejected from the campus or arrested for criminal trespass, without having to consider any *rights* he may have as a university member? One difficulty with this approach — not a theoretical but an eminently practical difficulty — is that typically the nonstudents in question are not simply "outside agitators" who have come to practice their demagoguery on innocent and otherwise satisfied community members. Usually, they are former students. Often, they are also future students, provided their "misconduct," deriving from political and moral convictions, does not

[29] CAL. PENAL CODE § 602.7 (West Supp. 1967).

make them ineligible for admission.[30] They are, not infrequently, more authentic members of the community with which the *students* identify than most of us who are employed by the university in official capacities.

The Mulford Act, which has not yet been tested in court, raises a number of constitutional questions.[31] Some of these concern the meaning and breadth of the standard of "reasonable appearance" as an official *apprehension* of "likely" or intended "interference." Others concern the types of activity most likely to be seen as "interference" (including possible injury to persons or property, but also speech and assembly) and the high standards that legally must be applied to prior restraints on such activity. The issue that bears most directly on our central focus here is that of equal protection of the laws. The question may fairly be put: Why single out those not enrolled in the university or employed by it for special restrictions going far beyond the "time, place, and manner" requirements placed on student expression by the administration? Addressing this issue, the California Legislative Counsel felt it sufficient to assert:

> It is reasonable to establish as a class, persons other than students, officers, or employees of a state college or a state university, in light of the object of such a classification, namely the preservation of the peaceful conduct of campus activities of which students, officers and employees of a campus form an integral part, which cannot be said to be the case with persons generally.[32]

It may well be that the Counsel is correct in supposing that the courts would accept such a bald and general assumption as self-evidently "reasonable." Time will tell — time, and the facts of the cases on which the issue is raised. If so, however, much of the reality of modern university life will have been ignored. Nonstudents from the areas surrounding such university campuses are a rich source of talent for campus activities, participation in student musical, artistic, and literary exploration, and work and enthusiasm for student organizations. Recognizing this, some universities' regulations provide routinely for a proportion of nonstudent memberships in "recognized student organizations."[33] It is no longer uncommon for students at major academic centers to drop their university registration for several months or a year at a time to earn money, to work in civil rights causes, or merely to consider their own futures more carefully

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[30] *See* Heist, *Intellect and Commitment: The Faces of Discontent,* in ORDER AND FREEDOM ON THE CAMPUS 61-70 (O. Knorr & W. Minter eds. 1965) on the abilities and intellectual commitments of students in the Free Speech Movement at Berkeley.

[31] *See generally* Comment, *The University and the Public: The Right of Access by Nonstudents to University Property,* in *Symposium: Student Rights and Campus Rules,* 54 CALIF. L. REV. 132 (1966).

[32] Opinion of Legislative Counsel, No. 17766 (Apr. 30, 1965), ASSEMBLY DAILY JOURNAL 3443-48 (May 17, 1965).

[33] University of Michigan, University Regulations 5 (1968).

before continuing formal study. Some educators seem to favor increasing and explicitly valuing such "moratoria" in today's long train of formalized learning. Many nonstudents are more studious by far than the average enrolled sophomore and remain deeply involved in the intellectual and cultural lives of their university. They are members of its "community" in the best sense of the university tradition.

There are more technical difficulties as well. Is the large university free to treat certain members of the public as trespassers whenever an administrative official judges that they are "likely to interfere" with unspecified campus activities? The danger in such an approach is illustrated by a recent New York case.[34] While attempting to register their children at a city school, a group of Negro parents (and one nonparent) were arrested for loitering near the school grounds, under a statute that forbids anyone to remain "in or about any school, college or university buildings or grounds without written permission from the principal, custodian or other person in charge thereof, or in violation of posted rules or regulations governing the use thereof . . . ."[35] The court noted that the statute had been enacted to control sex molesters of small children, purveyors of narcotics, and "idlers and troublemakers in general." The judge found the attempted registration a "legitimate purpose," even though it led to a heated dispute with school authorities, and emphasized that the mothers in question could not be compared to "those unsavory young men" whom the statute was intended to include.[36] But the school authorities and the arresting officers evidently had not seen it that way until the court's decision.

At the root of much campus mistrust today is the expectation (widely shared) that university administrators, when in doubt, will "play it safe" with public opinion and use vague laws or regulations to err on the side of the established organization against the interests of individuals or minority groups pressing for change. This tendency may result from a good-faith belief that the official's first responsibility (legally and morally) is to the organization as it stands, and that he must safeguard *its* established interests above all. This is the viewpoint that the jurisprude Edmond Cahn called "the official perspective."[37] He saw it as an occupational disease of those whose jobs require them to be "processors" of people in systems, a perspective that always takes as first and foremost the needs of the system itself. Sociologists would say that, where this occurs, the

[34] People *ex rel.* Bailey v. Dennis, 208 N.Y.S.2d 522 (New Rochelle City Ct. 1960).

[35] N.Y. PENAL LAW § 722-b (McKinney 1955).

[36] People *ex rel.* Bailey v. Dennis, 208 N.Y.S.2d 522 (New Rochelle City Ct. 1960).

[37] Cahn, *Law in the Consumer Perspective,* 112 U. PA. L. REV. 1 (1963).

organization as such is becoming an end in itself, "displacing its goals" and the ideals for which it was created.[38] In the loosely coordinated institution of higher learning, difficult judgments must frequently be made about this interplay of the organization's interests and institutional ideals of free thought and criticism. The manifest political implications of those decisions have engendered much of the recent excitement on our nation's campuses.

Beyond the temptation for abuses in enforcement, however, are other issues. Does the university invite the general public to its campus by holding public events there? How public and notorious are the many uses of the large university campus by members and outsiders alike? The burgeoning "city of intellect" today is a de facto place of residence and work for many thousands of persons.[39] Can its officials summarily exclude those who wish to communicate their ideas to its inhabitants, or forbid those inhabitants the right to hear all manner of controversial ideas freely expressed?[40] Is the property of the university campus "dedicated" to such narrow purposes that administrators may exclude some speech and expression even though it is of intense interest to many of those required by their employment or studies to be on the campus?

In this area again, the law is not clear.[41] Few cases have been adjudicated concerning the uses that may be made of university property specifically, and the applicability of doctrines drawn for other types of property is very uncertain.[42] Again, the courts' choices of gross analogies, and the effect of test-case facts upon these choices, will likely determine many an issue as this sphere of law develops.

IV. STABILITY AND CHANGE IN THE CAMPUS LEGAL ORDER

Thus, there exists no magic formula, no simple rule of inclusion and exclusion that will determine reliably who is legitimately on the campus rather than trespassing or loitering there. As with the issue of university expulsions, administrators, students, and others who participate in university life are left largely to the dynamics of their own daily social relations. At certain critical points, when students bent on civil disobedience are expelled too summarily, or when nonstudents intimately involved in campus life are arrested for

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[38] *See, e.g.,* R. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE 199 (rev. ed. 1967).

[39] This trend is expected to continue. Graubard, *University Cities in the Year 2000,* 96 DAEDALUS 817-22 (1967).

[40] *See* Marsh v. Alabama, 326 U.S. 501 (1946); Tucker v. Texas, 326 U.S. 517 (1946); Schwartz-Torrance Inv. Corp. v. Bakery Wkrs. Local 31, 61 Cal. 2d 766, 394 P.2d 921, 40 Cal. Rptr. 233 (1964), *cert. denied,* 380 U.S. 906 (1965).

[41] Comment, *supra* note 31.

[42] *See, e.g.,* Danskin v. San Diego Unified School Dist., 28 Cal. 2d 536, 171 P.2d 885 (1946); Blease, *The Civic Center Act and the Freedom of Speech,* 2 LAW COMMENTARY 43 (1964).

campus protest activity, substantial numbers of students and faculty members in the major universities may be expected to respond with genuine outrage. Such official actions are widely seen as mere pretexts, manipulations of the letter of the law for the achievement of immediate and highly political purposes — the enforcement of short-run campus order as administrative officials conceive it to be. Not all of the protesters' actions are condoned, nor is a majority of the campus always willing to go on strike. But expedient, legalistic maneuvers themselves tend to arouse sympathies for the demonstrastors. And recent events, such as those at Columbia University, suggest that there will frequently be strong disagreement on whether the *level* and *type* of disorder in question is so disruptive that it justifies strong disciplinary action, especially if the issue underlying the protest is widely seen as legitimate.

Such incidents, more than most others, tend to amplify the sense of frustration with campus bureaucracy, dissension, and arbitrariness. For it must not be forgotten that students and nonstudents together have *changed* the student's relation to his university dramatically in the past few years by the very tactics of disturbance, interference, and challenge to formal authority.

Thus, despite the youthful energies that they engage, most of the disorders current on our campuses are not merely pranks, not panty raids, not mere malicious mischief. They involve *issues* of the most fundamental importance and difficulty for all of us. Symbolic disorder and rulebreaking are being used openly and explicitly to "get a hearing" from university and government officials on specific issues. Morever, it is rare that such disorders have not been effective to some degree in achieving changes of the kind being sought, after many futile requests through normal channels have been politely considered and refused, or merely ignored. The situation cannot be overemphasized; *it is the reason why this conference was held.* These situations also reveal much about the current relationship of law to the social context of campus life.

A legal order is not just a body of rules, but a social order involving many informal customs, understandings, and other unspecified but implicitly assumed patterns of cooperation and competition. In the regular acceptance of these common understandings lies the "trust" that is the glue of a social system, allowing its members many mistakes and adjustments without threatening the order as a whole. This is emphatically the case for any order that aspires to be thought of as a community. It is these implicit understandings that have been eroded in the modern university, leaving the official "organization" chart to stand forth repeatedly as a naked skein of vague, semi-arbitrary rules and formalized, impersonal relationships. Where a

social order lacks such understandings and rules that have a generally understood meaning, there may still be administration — the hierarchical management of arrangements necessary for the most efficient production of goods or services. But there is little assurance of a general *sense* of community. Instead, the model of private government becomes much more persuasive to participants in the order; they tend to develop concern for a separation of powers, to become cautious about trusting the benevolence of official power, and to seek legal restraints on the exercise of untrammelled administrative discretion. This, I suggest, is what has occurred to many student and faculty members of the modern university.[43]

CONCLUSION

At Berkeley in 1964, when student activists first transferred the tactic of principled civil disobedience from the Southern lunch-counters to the university campus, they discovered the first of many "nonrules" by which our large campuses have been run for many years. The state laws and state constitutional provisions that were said to forbid certain kinds of student political expression on campus proved not to do so when students pressed the issue beyond polite discussion. Instead, students saw revealed the tenuous character of many administrative judgments about the order necessary for a university campus. That lesson was not lost when campus conflict progressed to issues concerning the rights of students and non-students before campus disciplinary authorities and the criminal courts. Coupled with the newly visible (but longstanding) inequalities among status groups in the broader society, these lessons from campus protest have produced in many young people a whole new awareness of the relationships between social and legal change.

Courts have reasoned about student obligations by inference from the needs of individual universities for reasonable order. But they have begun by logically placing each university as a member of a *class* of "educational institutions" having supposedly characteristic and well-understood purposes in light of which reasonable and necessary rules are typically made and accepted. Against this general social conception, each student has stood as a weak and rather lonely figure, trying to enforce a "contract," the terms of which he never made. Mass action by students (enrolled and unenrolled) has changed this balance of bargaining power. Consequently, we have entered a turbulent period of *explicit* "status politics" in the university, as students press for delineation of status-rights to go with

[43] *See* UNIVERSITY OF CALIFORNIA AT BERKELEY, REPORT OF THE STUDY COMMISSION ON UNIVERSITY GOVERNANCE, THE CULTURE OF THE UNIVERSITY: GOVERNANCE AND EDUCATION (Jan. 15, 1968).

their obligations for social conformity. The changes wrought already have been great, but the costs have also been great — including major disruptions for great universities and jail terms, fines, and stunted careers for many talented and highly moral young people.

The process shows few signs of stopping now; the contending parties are too far apart on the terms in which a discourse might be held. Many painful accommodations and compromises remain to be made, and it can only be hoped that the costs on both sides will soon lessen. If universities genuinely honor their own autonomy and value justice as well as order on their campuses, there is good hope that this will be so.