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THE STUDENT AS PRIVATE CITIZEN

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THE Lord Chief Justice of Ireland, before whom an Irish barrister was vigorously pressing a particular claim, is reputed to have said, "Do your clients not know the meaning of the phrase *volenti non fit injuria?*"[1] The barrister's quick response was, "My Lord, in the hills from which my clients come, they speak of little else." In the hills and vales of New York from which I come we now speak of little else than matters of student discipline and student conduct, and the institutional relationship among students, faculty, and administration.

The crisis of identity has never been more intense in American universities than it is now. Quite abruptly, all the apparently well-established roles within the university — from trustee to entering student — are up for reexamination. It is as if the relationship among faculty, students, administration, and governing boards had never been considered in depth. From Berkeley to Columbia (and everywhere in between), notions accepted without substantial challenge in the entire history of higher education in the United States lie shattered in the midst of campus unrest, protest, and even open warfare. Suddenly, the old order has departed.

The ultimate issues are not yet framed with total clarity. Some students challenge the bigness and impersonality of their universities; others demand a larger share in the decisionmaking process; and still others, presumably only a few, press their demands simply for the sake of pressing demands, seeking to bring down the entire university establishment so that it can be replaced with another not yet defined.

Although ultimate objectives may not be clear, students are presumably agreed in their desire to be free from the paternalistic supervision of student life often provided by universities. However, it is less clear that they want a completely arm's-length relationship in which the university would no longer provide academic sanctuary for youthful excesses for which the outside community might otherwise exact its pound of retribution. When students demand amnesty from university sanctions and withdrawal of criminal charges as a condition of return to academic routine, they seem to ask for the

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[1] I am indebted to my colleague on this panel, William Van Alstyne, for a translation — "He who consents cannot expect relief for injury."

best of both worlds — academic shelter against the outside community plus freedom from control by the university community. Few in this life can long have it both ways. Universities and their student constituents must seek new accommodations that may be different from what either might choose in their best of all possible worlds.

The present discussion is directed to one aspect of this overreaching problem. The immediate aim is to examine the extent to which the university should treat its students as private citizens of the larger community and as adults who have come to the university as consumers of the educational product marketed there. We must, therefore, as my late colleague Edmond Cahn might have said, view it from the "consumer perspective."[2] From this inquiry certain consequences will follow that may call for rethinking of traditional university concepts about the deliberative process within the university community, the rules governing student conduct, and the procedure for disciplining infractions of that code.

At the outset, it must be conceded that there is no entirely relevant model for the modern university. The business corporation, in which the profit motive is understandably central, is not directly analogous to the educational structure, however corporate its form, where minimization of financial loss is the most that can be sought. Yet, the functions of the university — even the public university — are also not like those performed by other not-for-profit agencies, private or governmental. The dispensing of higher education is not comparable to providing police or fire protection, highway construction, provisions for sanitation, or other functions of government available to all citizens. Nor is higher education like elementary and secondary education which is thrust upon the willing and the unwilling alike. However important higher education may now be as a key to advancement in the modern world, it is still offered only upon satisfaction of specified conditions of admission and standards of performance. The student recipient must, in short, prove himself worthy of the educational benefits he seeks.

From what has been said thus far, one observation is already obvious: At least as long as university education is not available to all, reasonable conditions may be imposed upon all members of the university community. Conversely, the university may not rightfully regard itself as a surrogate parent with power to decide unilaterally all questions affecting the student as a member of the university community.

The discussion that follows, in seeking to identify the extent to which the student should be regarded as a private citizen, accepts

[2] E. CAHN, THE PREDICAMENT OF DEMOCRATIC MAN 17-42 (1961).

without argument the following propositions believed to be self-evident or now established beyond substantial doubt.

(1) No rational distinction should be drawn between "public" and "private" universities. The only area of university-student relations in which the public-private distinction could arguably make a difference is in the constitutional standard required for rules of student conduct and disciplinary proceedings where state action is present. But even then an exceedingly good argument can be made that, for these purposes at least, private universities cannot justifiably be excused from the same constitutional standards as those that must be applied by public universities.[3] In any event, it would be a cruel hoax on the integrity of the educational process for any university to take refuge in the public-private distinction in justification of otherwise unsupportable policies.

(2) Longstanding concepts of university-student relations are no longer sufficient (if ever they were) to justify arbitrary treatment of students under the paternalistic excuse that the university knows best and always acts in the best interests of its students. However conceptualized, whether as *in loco parentis, ex contractu,* or any other variant on the same theme, all these theories are now shown to be inadequate.[4]

(3) A rational theory of university-student relationship can only develop from a conception of the university as an instrument of our modern, complex world. In recognition of the importance of the university to the needs of society, it has thus far been given a position of esteem and responsibility. In return for this position of trust and respect, the university must strive to accomplish in the best fashion its high purposes; the pursuit of truth, the advancement and transmission of knowledge, and the provision of related community services. The most important single measure of a university's excellence is the "intellectual growth of its students: their initiation into the life of the mind, their commitment to the use of reason in the resolution of problems, their development of both technical competence and intellectual integrity."[5]

(4) In the spirit of the above statement of university purposes, it follows that university discipline should be limited to student mis-

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[3] *See* Van Alstyne, *Student Academic Freedom and the Rule-Making Powers of Public Universities,* 2 LAW IN TRANSITION Q. 1 (1965); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 HARV. L. REV. 1439 (1968); *cf.* Dorsen, *Racial Discrimination in "Private" Schools,* 9 WM. & MARY L. REV. 39 (1967); Nelkin, *Cy Pres and the Fourteenth Amendment: A Discriminating Look at Very Private Schools and Not So Charitable Trusts,* 56 GEO. L.J. 272 (1967).

[4] The point is fully developed in several of the papers in this symposium.

[5] UNIVERSITY OF CAL. AT BERKELEY, REPORT OF THE STUDY COMMISSION ON UNIVERSITY GOVERNANCE, CULTURE OF THE UNIVERSITY: GOVERNANCE AND EDUCATION (Jan. 15, 1968).

conduct which distinctly and adversely affects the university community's pursuit of its proper educational purposes.

(5) It is a fundamental postulate of American society that every quasi-public function or service must be made available under circumstances that include the maximum freedom consistent with attainment of permissible objectives. The educational function should be no less free — indeed, it should be more free. In the university context this means academic freedom for students as well as faculty. Although academic freedom has long been established for faculty members, it was somehow not thought essential for students until recent years.[6] In the present context academic freedom includes at least all the elements necessary to free intellectual inquiry — dignified treatment of students as individuals worthy of respect; fair procedures in disciplinary proceedings (academic due process); and right to privacy in matters of opinion, in places of residence, and in university records relating to students.

To say that the above propositions should now be regarded as established should not be taken to mean that the hard questions of degree are settled. Nevertheless, those difficult issues of more precise definition need not be resolved now before moving on to other propositions relevant to the present discussion.

One final observation before taking the plunge. The problems that lie ahead for universities and colleges do not so much involve questions of law; rather, the issues usually involve hard choices more than hard law. Let us, then, be about the task of measuring the difficulties.

I. Violation of Law Off Campus

In the days of academic innocence, now nearly gone, it was common for universities to regard their role as that of surrogate parent to their students for all purposes during their stay at the university. In this view, the university assumed responsibility for off-campus as well as on-campus student conduct. Some of the "town-gown" frictions developed when universities sought to reclaim their students from local police, thus providing shelter against community-imposed sanctions. For this purpose, it made no difference whether the university sanctions were more or less severe than those of the civil law. The point was that miscreant students could be withdrawn into a kind of academic sanctuary, at least for all except

[6] For the recent recognition of the importance of student academic freedom see *Joint Statement on Rights and Freedoms of Students*, 53 A.A.U.P. Bull. 365 (1967) (approved by the Association of American Colleges, the American Association of University Professors, the National Student Association, and the American Association of Higher Education, among others). *See generally Developments in the Law — Academic Freedom*, 81 Harv. L. Rev. 1045, 1128-59 (1968).

the most serious offenses. Some students who sought or accepted such shelter may have become disenchanted when they discovered the summary procedures by which academic sanctions could be applied. But the practice had great lasting power, particularly in university communities where the university tended to dominate the town in which it was located.

Cornell University provides a convenient illustration where the practice, now discontinued, was described as follows in the *Sindler Report:*

> In the past, an informal working relationship between Ithaca and Cornell has permitted public officials to return students apprehended for less serious law violations to the University's jurisdiction, on the expectation that the University will impose, through its disciplinary procedures, a substitute punishment for court-imposed penalties.[7]

Rejecting the practice as "an undesirable application of the *in loco parentis* tradition," the report recommended its abolition:

> Adherence to the principle of responsible student freedom and maturity requires, in our judgment, that the University explicitly disentangle itself from acting as a substitute mechanism for the law when students are charged with law violation by public officials.
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> . . . .
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> Although well-intentioned and humane in purpose, this practice retards the development of responsibility and maturity among students. Once a student is apprehended by the police, the University's efforts to insulate him from the ordinary consequences of his act undercut the idea of student freedom and unwittingly promote a disrespect for law . . . .
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> A second consideration of equal importance is that Cornell's educational purposes make inappropriate any extensive and continuous University assumption of varied law enforcement roles in its relations with students. Some University involvement in law enforcement is necessary . . . . But, wherever possible, the University should eschew acting as a general law enforcer or as a de facto "arm" or "agent" of public agencies. The University cannot reject a role as a community law enforcement agency if it agrees to substitute its authority for that of civil officials once the latter have apprehended a student for law violation.[8]

The logic of the *Sindler Report* is unassailable, once it is accepted that the university's concern with its students does not extend beyond their activities on campus and those rare cases off campus where their activities bear directly on the university-student relationship. Where students cause damage to property or inflict injury on persons, whether in collegiate exuberance or as part of calculated criminality, the university has no proper concern beyond assuring fair treatment for

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[7] CORNELL UNIVERSITY, REPORT OF THE UNIVERSITY COMMISSION ON THE INTERDEPENDENCE OF UNIVERSITY REGULATIONS AND LOCAL, STATE, AND FEDERAL LAW 3, 4 (Sept. 27, 1967) (Prof. Allan P. Sindler, Chmn).

[8] *Id.* at 3-5.

the offender and providing assistance in the securing of counsel or bail where necessary. Of course, if the student misses academic obligations because he is imprisoned, he may be subject to academic penalties comparable to those visited upon any other student for similar noncompliance with educational requirements. But no academic sanction for the criminal act is appropriate unless, in the remarkable exception, the circumstances of the crime suggest the possibility of repetition involving the risk of injury to persons or property within the university community. Realistically, however, it is hard to conjure up circumstances in which a student with that risk potential would be left free by the civil authorities. The university should not attempt to second-guess the police and the judicial authorities as to whether a suspected or convicted wrongdoer can be safely returned to the general community.

Of course, universities can point out problems in these suggested procedures. Always fearful of their reputation in the community, universities tend to be concerned about the presence on their campuses of persons charged with crime or, worse yet, convicted offenders. In response to this concern, it must be said that the range of vision is too narrow which would deny return to the university community of one who has violated the law and suffered the penalty. The university must uphold the principle of the open society in which the wrongdoer has an opportunity for rehabilitation.

A few atypical cases can be imagined where student activity off campus may bear so directly upon the university-student relationship that a university-imposed sanction might be justifiable. The following two situations are illustrative:

(1) Where a student uses the university name to falsify its position, to associate it with a cause not approved by the university, or in a way to bring serious discredit upon the university, there may be reason to impose a university sanction. Even here, however, the university should take such action only in the most extreme cases. There are, after all, civil remedies available to limit at least the most aggravated instances of false representation.[9]

(2) Where a university facility abuts a public street, cases can be imagined of students interfering with ingress to, and egress from, university buildings, or otherwise interfering with classes or other university activities without ever technically entering the campus. Here, too, the university could ultimately protect its interests through police action, possibly leading to criminal charges. One can imagine approval of university action in such narrowly circumscribed circumstances, but the university will ordinarily want to avoid that course of action.

[9] *But cf.* New York Times Co. v. Sullivan, 376 U.S. 255 (1964).

II. VIOLATION OF LAW ON CAMPUS

To say that the university in its role as student disciplinarian ordinarily should not venture outside its own confines is to discuss only half the problem. The other half, violation of law on campus, is not so neatly resolved. Where student action on campus violates both a university rule and a law of the general community, the university often faces hard choices. It may choose to turn the student over to the civil authorities for sole punishment. It may hold him for university discipline alone, including the possibility of counseling without formal charges. Or it may permit the imposition of sanctions by both civil and university authorities.

The choices involve use of discretion but ordinarily not questions of law. For example, there is no question of double jeopardy in the constitutional sense. If the offense contravenes a genuine university interest, there is no reason to prevent punishment by both civil authorities and the university. In the case of theft by one student from another in a residence hall for example, it offends no sense of fairness to dismiss the wrongdoer from the hall, perhaps even from the university, *and* to allow civil prosecution of the crime.

Ordinarily, however, the choices are more difficult. The following questions present the principal difficulties of decision:

(1) *To what exent, if any, should the university seek to uncover student violations of law for prosecution by the civil authorities?* It is tempting to conclude that the university should no more play the role of substitute policeman than it should the role of substitute parent. Clearly, a campus pervaded by the Big Brother concept would be one on which free and open intellectual exchange would languish. Nevertheless, the university cannot altogether escape its responsibilities to the community by taking the position that the university is a safe haven from the world outside.

The community ordinarily provides the university a geographical enclave in which the civil authorities do not intrude to the same extent as in other parts of the community. Indeed, there is often an informal understanding that the police will not enter the campus except upon invitation or in the case of unusual disturbance. In exchange for this quasi-immunity from police surveillance, the university must have some obligation to report violations of law that would ordinarily be prosecuted by the civil authorities. Should the university report only serious crimes that it cannot avoid knowing, or should it more actively seek out the unlawful activities of its students? The issue is most acute in the areas of social morality, where many students rebel against society's restrictions on sexual freedom and the use of narcotics. Here the university faces a dilemma. Violations of law are most likely to take place in private places, often in resi-

dence hall rooms. Unless the university establishes its own underground surveillance system, including a network of spies, or unless it violates ordinary concepts of residential privacy protected elsewhere by the fourth amendment against the police or by statute against private landlords, it is likely to know little about the private lives of its students. On the other hand, if police officials act against student violations of law on campus not reported by the university, the community is likely to find in the university's failure to act a confirmation of its judgment that the university seeks to put itself and its students above the law.[10]

However great the risk of public censure, it is probably preferable for the university to avoid the police role of undercover agent. This does not mean that the university should not have its own security force to preserve order on campus and to protect safety and property. Nor does it mean that student violations of law should not be reported for civil prosecution. But even here, as discussed below, there may be cases in which the university can properly choose not to report minor infractions of law by students.

(2) *When, if ever, is it proper for university officials to fail to report a known violation of law to the civil authorities?* The ordinary citizen in his role as a responsible member of the community should assume the obligation to report actual or suspected violation of law known to him where it seriously endangers life, safety, or property interests. The university community must respond in a manner at least equally responsible where serious violations of law by students are known to the university.

Even the most responsible private citizens do not, however, consider themselves bound to report the minor infractions of law that are all too visible in daily life — parking offenses, pedestrians crossing against traffic lights, and an infinite variety of other petty offenses. In this respect, the role of the university is in part similar and in part dissimilar. There is undoubtedly a *de minimis* principle that excuses a university from having to report every minor infraction of law by its students. Moreover, where the same act is also an offense against the university code, the university has an alternative method of proceeding which is not available to the individual citizen. It will often be preferable to utilize university procedures as the sole disciplinary action. No embarrassment need be felt for not reporting the fact to outside authority.

[10] The police raids for narcotics offenders at the Stonybrook campus of the State University of New York provide a recent example. The predawn invasion of campus residence halls and the arrest of a number of students was acutely embarrassing to the administration which was charged with negligent failure to know what it should have known, and there were dark hints of complicity and coverup. The university's denials never quite caught up with the original headlines.

Difficult choices will of course be necessary, but the principle is rational. The university should report serious violations of law for external prosecution, but may proceed against other forms of student conduct under its own rules without reporting such incidents to local authorities. Or, as previously noted, in a few cases it may be proper to proceed against a student in both forums.

(3) *In what circumstances should the university leave prosecution for violation of law on campus to the exclusive jurisdiction of civil authorities?* It can be argued that every violation of law that occurs on campus is also a violation of university regulations, express or implied. In a sense this is true, but it is difficult to believe that university interests are deeply involved in every infraction of law that occurs within the geographical limits of the university campus. Accordingly, the university should impose its discipline only in the case of violations of law that directly and distinctly threaten identifiable university interests.

III. PROTESTS AND DEMONSTRATIONS: PRINCIPLE PUT TO THE TEST

To determine whether the above suggested principles make sense in practice, it may be helpful to test them against the hard reality of escalating protests and demonstrations from which few campuses have escaped. The several interrelated issues can be approached in a series of propositions.

(1) Student participation in demonstrations off campus should not be subject to university discipline except in the two rare cases, discussed above, where (a) the student deliberately falsifies the position of the university or outrageously abuses its name, or (b) a demonstration immediately adjacent to the campus disrupts university functions.

(2) Orderly and peaceful demonstrations on campus should not be forbidden unless they interfere with legitimate university functions. As "blackletter" text, this statement of principle may be thought to give little guidance, and it is true that such difficult questions as the following lie immediately beneath the surface of this somewhat bland pronouncement.

When does a demonstration lose its protected status because it is no longer peaceful and orderly? A model commonly suggested depends on the labor cases where a complex body of law has been developed in definition of permissible and forbidden picketing. However, the university may not want to insist on the full measure of rights it might enforce in a court of law. Times of turbulence and student unrest require special forbearance on the part of university officials in tolerance of demonstrations and protests in oppo-

sition to university policy. Even when the subject of a protest or demonstration is not clearly relevant to the educational process or the university functions, the university should be hospitable to this kind of expression, even though inconvenience and even some interruption of normal activity may be the price.

What are the "legitimate university functions" entitled to protection from interference? The answer of course is determined by the understanding of general university purposes. The university has at least an obligation to assure the safety of individuals, the protection of property, and continuity of the educational process. The required level of university tolerance may depend not only on whether the protest is orderly or disorderly, but also on the place chosen for the demonstration. Where picketing or other forms of peaceful protest take place outside university buildings, the university should not interfere except to maintain free passage through areas where members of the university community have a right to be.

Many universities that might tolerate quiet, out-of-doors demonstrations draw the line in protection of their interior spaces by refusing to permit picketing, distribution of leaflets, or placing of notices on bulletin boards inside university buildings;[11] but this limitation may be unduly restrictive. Picketing, placarding, and leafleteering in places not inconvenient to the university are also not likely to be an effective means of communicating a protest. Perhaps it would not be a strain on campus order to permit peaceful picketing and other orderly demonstrations in public areas of university buildings, including corridors outside auditoriums and other places set aside for public meetings. The requirement of orderliness should remain as before, including now a special injunction against interference with free passage, excessive noise, or the right of the primary audience to hear and be heard. In short, freedom is a two-way street in which freedom of protest is protected only so long as it does not unreasonably interfere with other protected freedoms. In the university context, the protected activities include not only classes, libraries, and public meetings, but also normal administrative functions and such service-related activities as health services, recreational activities, and on-campus recruitment.

In determining the permissible limits of protest, the person in charge, whether professor, administrator, or other university representative, should be given authority to make the initial judgment. That is, any direction to desist from specified activities or to leave the premises must be obeyed unless manifestly unlawful or outside the scope or the authority of the person issuing the order. In the event

[11] Columbia University, for example, enforced a rule against demonstrations of any kind in university buildings — at least until late April of 1968.

of subsequent disciplinary proceedings for failure to comply with such an order, it is not unreasonable to place the burden of establishing the lack of authority to issue the order in question on the person charged with noncompliance. Examples of these principles in practice may be helpful.

(a) Distribution of leaflets, including those without identification as to source, should be permitted in public corridors of university buildings, and the posting of notices on designated bulletin boards should not be forbidden. But distribution of leaflets or posting of notices in the classroom — inherently disruptive or at least time-consuming activities — should be within the prohibitive power of the professor in charge. As long as adequate opportunity is given for distribution of leaflets outside the class and posting of notices on bulletin boards, this prohibition is not a serious limitation on a student's freedom, and it does preserve the order in the classroom.

(b) On-campus recruitment of students for lawful employment is an appropriate adjunct of the educational process. University participation in the placement process is a service function which most universities willingly assume in satisfaction of the wishes of the great majority of their students. If on-campus recruitment is permitted at all, it should be open on the same terms to all employers who offer lawful employment and who submit themselves to reasonable regulations imposed by the university.

Where on-campus recruitment is permitted, every student has the right to be interviewed by any legal organization which desires to recruit at that campus. On the other hand, any student or group of students should be allowed to protest against the appearance on campus of any organization, provided that the protest does not interfere with any other student's opportunity to have such an interview.

Finally, *When should the community police force be called on to the campus to bring order to a chaotic student demonstration?* The argument can rationally be made that as long as the university has clearly defined what is permitted and what is forbidden and has done so in consultation with students, a serious transgression of those defined, rational, and reasonable rules should be met with strong, affirmative action taken immediately before positions become entrenched and hardened. However, there are also those who say that the police should never be called, since we know perfectly well that such action, even by the best trained police forces, will result in confrontation and some violence, even though nothing of the kind was intended.

The use of police on the campus is a policy question of the highest order, one that ultimately cannot be predetermined but must be decided as the unfortunate occasion arises. Yet, this very difficult question deserves the earnest consideration of every university or college administrator in order that some guidelines may be formulated. We administrators never know at exactly what juncture we will have to face this question.

(3) Conduct which exceeds the permissible limits may be met with academic sanctions ranging in severity from admonition to expulsion or, in cases of aggravated or persistent violation of defined rights, with civil arrest and prosecution for trespass, disorderly conduct, or any other appropriate charge. It is generally the practice within the university community to allow some overstepping of the line before penalties are imposed. Where abuse of that privilege is anticipated, persuasion should always be the first step, academic sanctions the second, and police action a most reluctant last recourse.

The unhappy fact is, however, that academic tragedy may result from a mistake in either direction, with no way of knowing where the line should be drawn except when it is too late. Thus, it has sometimes seemed that excessive permissiveness too long tolerated has led to violence. Alas, it has also sometimes seemed that repression too long imposed, or too abruptly instituted, has also led to violence.

Conclusion

The student-institutional problems confronting universities and colleges today are serious ones, worthy of our best attention. I for one believe that universities have not given them their best attention until very recently. Whether because of confrontation politics, sit-ins, or other more forceful actions, we are now listening more carefully to the things that we should have listened to long ago. The radical student groups, SDS for example, are probably not going to be satisfied when universities have done all the things that should be done. Yet, the only reason it seems to me that these student groups have any success at all with the larger body of students — as clearly they do — is that the universities have been laggard in attention to these matters of first importance. If universities respond in a meaningful way to this present challenge, the SDS's of this world will find that their otherwise explosive issues have been defused. Those groups cannot bring down universities by themselves. They — the completely disaffected groups — who don't really care about the educational system or the society in which we live, and who want to destroy "The Establishment," are not going to be won over. We shouldn't even try to win them over. That is not the issue. What is important is that

administrators see that there are *real* issues and respond to them. To be sure, there are no certain answers. But universities can and must be more heedful of the legitimate interests of their students in the search for new accommodations and new modes of fair dealing in what should be a forward-looking partnership between students and universities in the educational process.