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Judicial Overkill

THE CAMPUS AND THE COURTS

By Robert M. O'Neil

The summer respite on the campuses following Cambodia and Kent State is now behind us. The academic community waits to see whether universities may again be closed down during the year, and, if so, who will close them—students, politicians, state police or National Guard. For the first time there is a serious prospect that the pressure to close may even come from the courts.

Resort to judicial authority, however, may not in the long run serve the best interests of the university. While the appropriate use of the courts and the application of the laws of the land remain at the heart of the democratic process, sufficient evidence is at hand to suggest that use of an outside arbitrator has already endangered traditional academic autonomy. More important, many administrators believe that legal action will accomplish what they themselves are unable to do, *i.e.*, keep the peace on campus, not realizing the price they have begun to pay for turning to the courts. For the growing number of lawsuits involving colleges and universities has given to the courts a new role of academic decision-making.

Consider the ironic pairing of two court cases during the week of the Cambodian invasion. On the afternoon of May 4, the Court of Common Pleas granted the Prosecuting Attorney of Portage County, Ohio, an order indefinitely closing the Kent State campus in the wake of the killing of four students by National Guardsmen. Three days later, a group of students obtained an injunction forcing the University of Miami (Florida) to reopen doors that had been closed in the aftermath of the Kent State deaths. Both orders were granted immediately, without time for careful judicial inquiry. Thus, Kent State remained closed under court mandate while Miami remained open under a similar decree.

One would have to know much more about the precise facts and the legal allegations to judge whether either the Ohio or the Florida court erred in issuing its order. But undoubtedly the Kent State authorities would have closed the campus themselves without a

judicial decree, and the Miami administration was preparing to reopen that campus the following Monday and did not need a judge to stiffen its resolve. The two injunctions were not so much erroneous as gratuitous.

These developments are not as harmless as they may at first appear, for the precedent is a dangerous one. A brief review of three pending lawsuits will suggest the deeper hazards in litigating such issues of campus governance and responsibility.

The administration of Washington University in St. Louis is being sued for over \$7 million by students claiming a denial of their educational and political rights during the disturbances this past spring.

A group of students, faculty members and student organizations at Ohio State have been sued for \$1 million on similar grounds.

A comparable suit is pending against the president and regents of the University of Minnesota, though without an accompanying money damage claim.

All three suits reflect the dissatisfaction of politically conservative students with unsettled campus conditions. In the Ohio State case, the plaintiffs are seeking recovery from other students and faculty members who, they say, created these conditions; in the other two cases, the litigants are pressing charges against administrators who, they claim, condoned such conditions. Specifically, the Washington University suit alleges that the chancellor failed to call the police to restore order at certain troubled times; the Minnesota complaint contends that the administration allowed the use of campus facilities by groups advocating such crimes as fornication and sodomy, while failing to protect campus access for agencies such as the FBI, ROTC, and Army and Navy Intelligence.

Both the Washington University and Ohio State cases focus directly on the "reconstitution" of classes this spring. The former attacks Washington's chancellor for suggesting that academic departments might wish to relax requirements for completing the year's work. The Ohio complaint originally named a senior faculty member (since dropped from the suit on technical grounds) who made a campus speech attacking the rules of student conduct on the day before the Cambodia

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invasion. Several teaching assistants among the defendants are charged with participating in the same rally and helping to create an atmosphere conducive to disorder.

Two premises underlie these suits. The first carries a rather naive assumption: that the courts can somehow maintain or restore order on a deeply troubled campus when the administration and even the police have failed. The other premise—not the least bit naive—is that the president or chancellor, having so failed, may be liable for heavy damages for his inability to keep the peace. Thus the plaintiffs seek, in effect, to have it both ways.

As a matter of law, the prospect of actual recovery in these cases seems quite remote. The courts have never really recognized anything like a “property” right to an uninterrupted higher education. Whatever contractual claim there might be is usually qualified either by cautionary language in the college catalogue or by conditions beyond the control of the administration that would temporarily excuse full performance. Moreover, so long as the student receives academic credit and (in due course) his degree, the bare contract has presumably been fulfilled anyway. Even if a substantial breach could be proven, the measure of damages would probably not exceed a share of the tuition and fees paid by the student or his parents, a share reflecting the period of the interruption.

The only remaining theory of recovery is that of tort—the branch of the law which redresses a wide range of negligent or willful wrongs. Before one can recover for the consequences of another’s default, he must first show some legal duty that has been breached. The nature of the obligation involved here is at best uncertain. If a student suffers *physical* injury through the negligence of university officials—in a chemistry laboratory, on the athletic field, or even on a university-sponsored excursion—he may recover damages against the persons he proves to have been at fault, or against the institution itself. Perhaps some analogy could be drawn between physical injury suffered in this way and the consequences of an interrupted spring quarter. But the degree of culpability is manifestly different: is the chancellor legally liable for failure to call the police in the same way he is accountable for not repairing broken stadium seats or for hiring a careless bus driver?

Some observers have suggested that a constitutional claim might be advanced. But while the courts have begun to develop legal safeguards for the constitutional rights of college students, the pertinent decisions protect only against denial of educational opportunities on arbitrary or discriminatory grounds—e.g., because a student happens to be black, or Catholic, or a member of SDS (or YAF, for that matter). They do not ensure against interruption of a student’s education because of the political activities of his fellow students.

Apart from disorder and reconstitution cases, other kinds of university conflicts are finding their way to court. In New York a group of Long Island University students, unhappy about not being sufficiently consulted in the process of selecting their new chancellor, sought a court injunction to block his taking office. The suit was dropped by mutual consent when the trustees agreed to increase student participation in university governance.

At Madison, Wisconsin, this spring, shortly before a teaching assistants’ strike, a group of TA’s filed suit to gain access to English department meetings from which they had previously been barred. The judge suggested that the department reconsider, at an open meeting, the decision that precipitated the suit. The department then decided to make future meetings open, thus mooting the lawsuit.

Last fall and winter, the Tufts University community in Medford, Massachusetts, sought a court decision on the bitterly divisive issue of minority employment in the construction of new campus buildings. Although both sides agreed to abide by the judicial decision, the Superior Court ultimately declined jurisdiction and left the matter to the litigants.

One may easily forget that litigation is a weapon which cuts both ways. In recent months faculty and student groups at the universities of Kentucky, Kansas and Denver have filed suits to enjoin the further use of National Guardsmen on their campuses under nonemergency conditions. The parents of at least two of the students killed at Kent State have brought death actions against the university officials. Similar suits will very likely be filed on behalf of the two students killed at Jackson State College. The extensive searching of dormitory rooms at Kent State after the May 4 tragedy is also being challenged in court. And faculty members at Kent State may seek an injunction against further surveillance of their courses and interrogation of their students by the FBI and other law enforcement agents.

Countersuits of this kind do not serve to correct the balance. They are at best crude weapons to be used after-the-fact—after someone has been killed on campus, after residence halls have been ransacked, after Guardsmen have held the campus in a state of siege. Such legal recourse is essential, for without it vital interests would go unprotected. But these suits do not solve the basic problems, and they may encourage encroachment on campus autonomy.

Resort to litigation serves to legitimize a potentially dangerous practice. One can only caution against its excessive use. Undoubtedly, there will be much more of this sort of litigation in the months ahead. But it may very well limit some crucial options, rather than widen them. The danger to institutional autonomy is clearest in the suits involving money damages brought against university officials. However unlikely the prospect of recovery may be, the threat clearly constricts, and may

distort, the exercise of administrative judgment at the very time when campus officials need greater flexibility and broader scope in dealing with campus unrest. The university president who fears a lawsuit if he fails to call the police may make the wrong choice simply because he is reasonably sure he will *not* be sued if he *does* call the police.

The risks are less obvious in other kinds of cases. Yet, even in the routine petition for an injunction against actual or threatened disorder, the campus that turns routinely to the courts has really chosen preservation of integrity over autonomy. The mere delegation of a range of internal questions to an external authority—one which is not accountable to any internal pressures and which is not fully cognizant of the institution's needs—creates dangerous precedents. For not only the issues initially assigned to the court but many others as well may eventually pass beyond the control of the campus. And the intervention of civil authorities is more likely when the courts are asked to issue a restraining order that only the police can enforce and only the court can interpret.

At the same time, there is another growing danger: that increasing resort to the courts will cause the internal decision-making and conflict-resolving channels of a university to atrophy. If alternative external forums are readily available, the pressure to compel a university to put its own house in order may be removed at the very time such pressure is most vital.

Superficially, many comparable questions might be raised by lawsuits seeking reinstatement of persons dismissed from the university. But the university is not threatened as seriously by legal challenges to student discipline and faculty dismissals. Such lawsuits rely on familiar constitutional doctrines to support the plaintiff's claims to procedural due process or substantive civil liberties. When a court holds that a university rule violates the First Amendment, it performs a task similar to that of reviewing allegedly repressive policies of any other agency or body. There is no chance to probe the inner workings of the university or to call university officials to testify. Nor is there any need to substitute the judgment of a court for the wisdom and the expertise of men who govern the university.

Thus the disruption-reconstitution cases really begin where the reinstatement cases leave off. The essence of the charge in such cases as those against Ohio State, the University of Minnesota and Washington University is that the president or chancellor made an unwise choice among a range of legally permissible options. The court can decide such a question only by reviewing the judgment and the discretion of the administration on matters that require a high level of expertise—and on which, given the nature of the times, a wide margin (even for error) must be allowed. Yet the theory on

which the recent suits rest is that a court of law can define the duties and responsibilities of a university president in time of turmoil with the same precision that it can determine when proper care has not been exercised in maintaining the buildings and grounds.

There is at least one hopeful sign that courts recognize the need for restraint in this complex, sensitive area. Late in June the Federal Court of Appeals in Washington, D.C., declined to apply antitrust or constitutional law principles to an accreditation dispute between Marjorie Webster Junior College (a small proprietary institution in Washington) and the Middle States Association. Middle States holds that proprietary colleges are *prima facie* ineligible for membership.

The Marjorie Webster case suggests that courts are becoming aware of the risks of entering the "academic thicket." In the Court of Appeals, for example, eleven professional and accrediting organizations filed friend-of-the-court briefs backing Middle States. Some defended the particular standard of exclusion involved. Others, including the American Bar Association, the Association of American Law Schools and the American Association of University Professors, dealt only with the appropriate standard of judicial review. The latter groups argued that courts should tread warily in a field where judicial expertise and precedent are lacking, and where the consequences of broad intrusion are difficult to estimate.

The court, of course, might well have reached the same conclusion without any advice from these interested non-parties. But the participation of so many professional academic groups is significant. It suggests both the depth of concern for the judicial role in complex academic controversies and a way of urging caution upon courts faced with such issues.

Whether or not the courts deal with such cases, the issues that generate them will surely persist. For it is clear that judicial intervention will not remove the problems that divide and disrupt campuses. It is equally clear that judicial abstinence will not bring peace to the campus. If the courts decline to intercede, responsibility for solving internal conflicts will revert to the campus, where it belongs. One last effort must be made to develop on-campus tribunals that can resolve issues which are now increasingly relegated to external forums. Rather than going to the courts, cannot campus problems be solved on campus with comparable integrity and vastly greater expertise? Of course, campus decisions may not always be obeyed. But neither may court orders, as the number of recent contempt proceedings suggests.

The inherent advantages of trying to utilize every available campus mechanism are substantial. The hazards of surrendering academic control to external constituencies are great enough without the university's adding its own self-inflicted wounds. As the situation is now progressing, we may well be headed rapidly in the wrong direction.