Are Universities Above the Law?

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Peter Berkowitz October 27, 2008

Three lawsuits--against Dartmouth College and Duke and Princeton universities--may be the best things to happen to higher education in decades. The Dartmouth suit, though recently withdrawn, focused attention on the role of alumni in college affairs. The Duke case raises the question of the extent to which courts will require universities to observe their own rules and regulations. The Princeton case puts at issue the enforceability of restricted gifts. All three expose the often opaque governing structures under which colleges and universities operate and bring into focus the need for transparency and accountability in higher education.

More than the scope of universities' legal responsibilities is at stake here. That's because upholding the rule of law on campus can contribute to the reform of university governance--and the reform of university governance is an indispensable precondition for the restoration of a liberal education -worthy of the name.

Association of Alumni of Dartmouth College v. *Trustees of Dartmouth College*, filed in the autumn of 2007 by the association's executive committee, sought to prevent college president James Wright, his administration, and the eight "charter trustees"--a self-perpetuating, life-tenure, insider group--from packing the college's board of trustees with friendly members. The board-packing scheme, plaintiffs contended, violated an 1891 written agreement on the basis of which, for over a century, the board had selected half the trustees (the "charter" trustees) and Dartmouth alumni had elected half. By diluting elected-alumni representation on the board, the administration aimed to discourage others from following in the footsteps of Silicon Valley entrepreneur T. J. Rogers, Hoover Institution fellow Peter Robinson, George Mason law professor Todd Zywicki, and University of Virginia law professor Steven Smith. Over the last few years, all ran successful write-in candidacies for election to the board of trustees on platforms--apparently regarded by the Dartmouth administration as subversive--calling on the college to protect campus freedom of speech, preserve high intellectual standards, and keep the emphasis at Dartmouth on undergraduate education.

Unfortunately, soon after the association survived Dartmouth's motion to dismiss the lawsuit (in which the court found that plaintiffs stated a legitimate contractual cause of action) in February 2008, the college administration mounted an unscrupulous campaign on behalf of new candidates to the association's executive committee. For example, the administration refused to allow the alumni-elected trustees to use the same email and mailing lists that the administration used to attack them, thereby inhibiting the free flow of information and contaminating the election. In June, the administration-backed slate won. Within weeks of

gaining control of the Association of Alumni's executive committee, the newcomers withdrew the lawsuit. Since the administration had blocked the elected-alumni trustees from disseminating their views, it would be unfair to conclude that a majority of Dartmouth alumni prefer a board of trustees that is neither accountable to them nor inclined to demand that the college administration safeguard the principles of liberal education. But such a board of trustees is what Dartmouth has now got.

The Duke case--*Edward Carring-ton, et al.* v. *Duke University, et al.*--grows out of the notorious lacrosse scandal of 2006. It implicates matters that go directly to crucial questions of university governance.

In February, 38 Duke lacrosse players not indicted in 2006 and several family members sued the university, along with Duke's president, provost, dean of students, and deputy general counsel, in federal court. The plaintiffs, represented by, among others, Washington lawyer Charles Cooper, seek damages for the infliction of emotional distress, fraud, invasion of privacy, breach of contract, tortious breach of contract, and other injuries connected, they contend, to Duke's mishandling of the false accusations of rape against three team members and the city of Durham's corrupt indictment of those three. (Having been proclaimed innocent by North Carolina's attorney general in April 2007 and having seen Durham district attorney Mike Nifong disgraced and disbarred, the indicted players have settled separately with Duke but are pursuing a civil lawsuit against Durham.)

The gravamen of the unindicted lacrosse players' complaint is that "Throughout the crisis, Richard Brodhead (the President of the University) and other Duke officials consistently sacrificed the rights and interests of the accused Duke students in an effort to avoid embarrassment to Duke and to minimize criticism of its administration." The lacrosse players allege that, in violation of the university's own published antiharassment policies, Brodhead suppressed, discredited, and ignored exculpatory evidence; looked on passively as faculty and students conducted a campaign of harassment against the lacrosse players; and issued public statements and imposed disciplinary measures that were calculated "to impute guilt to the players and further inflame public opinion against them."

In late May, Duke University, represented by, among others, Washington lawyer Jamie Gorelick, filed a brief in support of its motion to dismiss, in which it contended that under North Carolina law student bulletins and faculty handbooks do not form enforceable contracts, and even if they do it is up to Duke to judge when the requirements of academic freedom override the promises made in them. To which the unindicted lacrosse players reply that Duke did indeed have a contractual obligation to "implement and enforce" the policies and protections outlined in its undergraduate student bulletin and faculty handbook; that such an obligation is confirmed by the very cases that Duke cites against the proposition; and that the lacrosse players' complaint raises no significant issues of academic judgment.

Courts are generally and properly reluctant to consider claims that involve a university's exercise of academic judgment--should a student have received an A or B? Did Professor Jones deserve promotion? But courts in general and North Carolina courts in particular have shown themselves prepared to examine whether universities have complied with specific promises, particularly where those promises do not implicate strictly academic judgments. This is the situation in the Duke case. Whether Duke published explicit promises in its student bulletin and faculty handbook to protect students from harassment and, in the event of serious accusations against them, to provide them a presumption of innocence and procedural rights guaranteeing a fair disciplinary process is a factual question, not one depending for its answer on academic training or expertise. So is the question whether Duke could have reasonably expected the students and their parents (who are paying upwards of $50,000 a year in tuition, room, and board) to rely on those promises.

Certainly courts will best serve universities' larger mission--the creation of a community devoted to the transmission of knowledge and the pursuit of truth--by compelling them to honor their formal promises of impartial treatment and their specific guarantees of fair process for students and professors alike. To hold otherwise would be to set universities above the law, transform administrators into dictators whose will on campus is the final word, and thereby undermine the rights on which the free and open exchange of opinion depends.

The lawsuit brought in New Jersey state court by lead plaintiff William Robertson, a Robertson Foundation trustee, against Princeton University in July 2002, is, after almost seven years, slated to go to trial on January 20, 2009. *William Robertson, et al.* v. *Princeton University, et al.* is a "donor intent" case of unprecedented magnitude. It threatens to cost the university an enormous sum: As of August 2008 the Robertson Foundation's endowment was worth approximately $900 million, which, at the time, represented about 6.5 percent of the university's $13.5 billion endowment.

William's father and mother, Charles and Marie Robertson, established the foundation in 1961 with a $35 million grant, then the largest gift by a private individual to a university. Charles, Princeton class of '26, served as the foundation's first chairman until his death in 1981. The 1961 certificate of incorporation provides for the foundation's board to be made up of three trustees designated by the Robertson family and four trustees designated by Princeton University, including Princeton's president. The foundation's purpose, according to the certificate of incorporation, is to support programs at Princeton's Woodrow Wilson School of Public and International Affairs for students pursuing government careers, particularly in international relations.

The lawsuit alleges, among other things, that Princeton violated the gift's terms by surreptitiously using hundreds of millions of dollars of Robertson Foundation funds for a variety of matters, including building construction and faculty and graduate student support in diverse academic disciplines that have little or nothing to do with the gift's original purpose. The plaintiffs, Robertson family members who select family trustees and serve as family

trustees, are asking the court to sever the foundation's relationship to Princeton and allow them to redirect foundation funds to programs at other universities, to be used, as originally intended, to train students for careers in government with a focus on foreign affairs. In its filings, Princeton acknowledges that it has a legal obligation to honor the 1961 agreement but contends that its expenditures have been consistent with the Robertson Foundation's purposes broadly construed.

Complicating matters is that, in contrast to the Duke case, resolving these issues involves a significant element of academic judgment: Whether or not particular expenditures by Princeton--on student fellowships, courses, research projects, faculty salaries, physical infrastructure, and so on--reflect the donor's intent depends on what sorts of academic priorities advance the donor's goals. But as the New Jersey court has recognized in rejecting Princeton's seven year effort to have the lawsuit thrown out, while courts are rightly reluctant to substitute their judgment on *purely* academic matters for the judgment of university administrators and professors, courts, in the course of upholding the law, can no more *entirely* avoid judgments that touch on academic issues than can courts enforcing employment contracts in the telecommunications business entirely avoid judgments about science and technology.

At the heart of the Robertson Foundation case is the integrity of restricted gifts. These enable private individuals to promote diversity and innovation in higher education by encouraging worthy but neglected paths of study and sponsoring fruitful avenues of inquiry that reigning orthodoxies undervalue or suppress. Provided that universities properly review the terms and goals, restricted gifts--which universities are always at liberty to decline--not only pose no intrinsic threat to academic freedom but can enhance it by supporting important but unpopular or dis-favored courses of study.

The predictable criticism that lawsuits like these menace university autonomy is wrongheaded. Universities should not be law-free zones. By demanding that universities conform to the regulations they set for themselves and abide by generally applicable laws, the 2007 executive committee of Dartmouth's alumni association, the Duke lacrosse players, and William Robertson and his family members are defending the conditions that are indispensable to conserving intellectual freedom and fostering liberal education on our campuses.

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