Are Universities Above the Law?

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Corporate governance is a much-discussed topic, and the operation of corporations has proven a fertile field for investigative journalism. But even though many colleges and universities are multibillion-dollar-a-year operations, the subject of university governance has been largely neglected. This is unfortunate because university governance raises fascinating questions of great public interest involving the complex intersection of law, morals, and education. *Nasar* v. *Columbia* is a case in point.

On May 6, Columbia University submitted a motion to dismiss a lawsuit filed against it in mid-March in the Supreme Court of New York by Sylvia Nasar, the John S. and James L. Knight professor of business journalism at the Columbia University Graduate School of Journalism. Nasar's complaint alleges, among other things, that "from 2001-2011, Columbia illegally misappropriated and captured for its own purposes income generated by a $1.5 million charitable endowment" established by the Knight Foundation. Columbia contends that Nasar's suit is without merit and that even if all her allegations were true, the university could not be found to be in violation of the law. But if all of Nasar's allegations are true and the courts of New York are unable to grant relief, it would mean that New York state law permits university administrations to disregard their written agreements with impunity and behave deceitfully when called to account.

A distinguished *New York Times* journalist and author of the Pulitzer Prize-nominated biography *A Beautiful Mind* (made into a major Hollywood film), Nasar was appointed in 2001 to the Knight chair as a tenured Columbia professor. She has built an esteemed program in business journalism at Columbia and in 2011 published the bestselling *Grand Pursuit: The Story of Economic Genius*.

Nasar learned of irregularities in Columbia's management of Knight chair funds in 2010. She protested to Columbia and alerted the Knight Foundation, which promptly initiated an audit performed in the autumn of 2010 by Big Four accounting firm KPMG. According to the KPMG audit, "it appears that the Graduate School of Journalism did not abide by the original terms and spirit of the grant agreement." The audit concluded that at least $923,000 of expenditures were "unallowable" and claims against Columbia could total as much as $4.5 million.

The original Knight Foundation agreement with Columbia provided that endowment income should be used specifically "for *additional* salary and benefits to the base salary" (emphasis added) of the holder of the Knight chair and "to support the chairholder's program of research and service." The agreement also stipulated that "the base salary and benefits of the Knight Chairholder shall be provided by the Donee [Columbia] (from funds other than those earned from the Knight Endowment Grant)." In fact, as the KPMG audit shows and as Columbia acknowledges, the journalism school did use endowment income, in violation of the agreement, to pay Nasar's *base* salary and not to supplement her base salary or support her research. In addition, Nasar's complaint alleges that Columbia repeatedly dissembled about misappropriated funds and that, after Nasar discovered Columbia's misuse of Knight chair monies, Nicholas Lemann, the dean of the journalism school, sought to intimidate her into keeping silent.

In response to an email I sent to Lemann (who will be stepping down on June 30 after 10 years as dean) seeking his views on the lawsuit, associate dean for communications Elizabeth Fishman replied that "we don't comment on matters in litigation." That is to be expected and is unexceptionable. The last thing lawyers want is for clients to inadvertently reveal sensitive facts, disclose legal strategies, or antagonize judges.

Nasar's allegations, however, are disturbingly familiar. They reflect a tendency at our leading universities to avoid transparency and disdain accountability. This tendency cultivates in administrators and professors an imperiousness in the wielding of power and in professors and students a submissiveness in the face of power. This tendency and the vices it nurtures are no less a threat to the goal of liberal education—forming individuals fit for freedom—than are the corruption of the curriculum and the imposition of ideological conformity that characterize today's campuses.

The avoidance of transparency and the disdain for accountability can be seen, for example, in *Robertson* v. *Princeton*. In December 2008, Princeton University settled a lawsuit brought in 2002 by Robertson Foundation trustee William Robertson. The lawsuit alleged that Princeton diverted hundreds of millions of dollars that were restricted by the terms of the Robertson Foundation's agreement with Princeton. William Robertson contended that instead of using the money to support students planning to enter government service,

particularly in the field of international relations, as called for in the agreement, Princeton put the funds to a wide variety of other uses that had nothing to do with the foundation's stated purpose.

In its conduct surrounding *Association of Alumni of Dartmouth College* v. *Trustees of Dartmouth College,* Dartmouth similarly showed itself averse to transparency and accountability. In 2007, led by reform-minded members, the Association of Alumni of Dartmouth College filed a lawsuit to prevent President James Wright from packing the board of trustees with handpicked members friendly to the administration. After the complaint survived Dartmouth's motion to dismiss but before the case went to trial, the Dartmouth administration exploited its tightly held information about college alumni to successfully champion a new slate of candidates to the alumni association. Upon winning election, the reconstituted alumni board promptly withdrew the lawsuit.

And disregard for transparency and accountability was on prominent display in 2006 after three Duke University lacrosse players were falsely accused of raping an African-American woman. University professors were quick to publicly vilify the accused student athletes, and high administration officials, including Duke University president Richard Brodhead, seemed to presume their guilt. Eventually, Duke reached an out-of-court settlement with the indicted lacrosse players while disgraced district attorney Mike Nifong was disbarred for grossly unprofessional conduct.

In each of these cases extraordinary measures were necessary to compel universities to honor elementary considerations of good governance and fair process. There is no reason to suppose that the conduct in question is exceptional; indeed, given the opacity of university decision-making and universities' insulation from accountability, it is likely that these cases represent the tip of the iceberg.

Courts are legitimately wary about adjudicating university controversies, out of concern for academic freedom and a reluctance to substitute judges' judgment about essentially academic issues for the judgment of professors and administrators. The Princeton, Dartmouth, and Duke cases, however, do not revolve around academic freedom or essentially academic issues. Rather, they deal with the ordinary business of courts, which is determining whether parties have abided by their agreements, guidelines, and promises. The same is true of Sylvia Nasar's lawsuit against Columbia.

One of the central legal questions raised by Nasar's lawsuit concerns the effect of a curious 2011 agreement between the Knight Foundation and Columbia. For some reason, despite the findings of the KPMG audit, the Knight Foundation decided to forgive 10 years and perhaps millions of dollars of documented misappropriations by Columbia; it also chose to alter the terms of the endowment to substantially reduce support for the Knight chair. Nasar argues that while the 2011 agreement legitimately changes Columbia's obligations going forward, it cannot retroactively alter Columbia's obligations in earlier years. She contends that she is

entitled as holder of the Knight chair since 2001 to substantial damages as a specific beneficiary and as a third-party beneficiary of the original endowment grant agreement contract between Columbia and Knight that was in effect until 2011.

Regardless of whether the courts find a legally cognizable injury in the case of *Nasar* v. *Columbia*, the educational question demands the closest examination: Can a university, which operates as a public trust, be trusted to prepare its journalism students to shoulder the responsibilities of the press in a free society if it cannot be trusted to deal honorably with, and respect its formal obligations to, its faculty? So too does the question of university governance to which the *Nasar* case gives rise require careful consideration: What steps can universities, many with endowments in the billions and even tens of billions of dollars, take to ensure—and to assure members of the university community and the public—that they are using gifts consistent with donors' intent?

Perhaps the distinguished journalist Paul Steiger—managing editor of the *Wall Street Journal* from 1991 to 2007, and founder and executive chairman of *ProPublica*, a prize-winning online news organization devoted to investigative journalism in the public interest—might be induced to weigh in on these important questions about universities and their legal, moral, and educational obligations. And perhaps Columbia University's commencement ceremony later this month might provide just the occasion. That's when Steiger, who is also both a Knight Foundation trustee and good friend of Columbia Journalism School's Dean Lemann, receives a Doctor of Laws honorary degree from Columbia.

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