

**THE TRIUMPH OF LAW
IN OUR ACADEMIC DISORDER**

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THE PRESIDENT

The Triumph of Law In Our Academic Disorder

By

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When the president of Harvard University catches a cold, it's his entire profession that publicly sneezes.

That's what happened, recently, when President Rudenstine was forced to take a rest. Suddenly, there wasn't a media outlet in the land that *wasn't* discussing the challenges of today's university presidency: the usurpation of academic by fund-raising functions . . . the 5- or 6-year period that often leads to presidential "burn-out" . . . and Rudenstine's alleged shortcomings as a chief executive officer who failed to delegate and was therefore -- quote -- "over-involved."

What very few of those commentators got around to suggesting was that our universities have turned out, amid the ideological firestorms of the 1990's, perhaps to make a lot less "sense" than they used to their publics . . . that they are therefore being eaten alive by what is so often referred to as "our litigious age" . . . and that those on the front-lines of this process, otherwise known as university presidents, are also the chief victims of its cannibalistic tendencies!

Take a profit-making company -- *any* profit-making company -- be it General Motors or Apple Computer, be it publicly owned or privately held, be it engaged in the manufacture of a product or the delivery of a service. Such a company, we know, has only one true purpose, which is *to make money*. Brewers make and sell beer in order to make money. That monolithic goal imposes what we might call an automatic sense of order, which extends to the company's legal staff as it extends to everyone else on its payroll. The quest for profits is as disciplinary an

influence as a bear or an elk for a party of hunters. Among other things, it defines the constituencies whom the company must please and whose dissatisfactions it needs to take seriously.

And now compare the typical operations of a university, an institution for whom the definition of goals and purposes has become an eternally unresolved task . . . a work in apparent perpetual progress whose constituencies shift and change like the proverbial sands of the desert . . . and for whom the surest way of outraging one constituent is to please another.

Indeed, the full extent to which universities have become monuments to distraction and to mixed, even contrary, purposes shows up even when we compare them to their co-tenants in the non-profit and governmental high-rise, including hospitals, museums, opera houses, symphony halls, police, fire and other agencies, and the public elementary and high schools. Precisely because these facilities and services are under such budgetary pressure right now, their prevailing purpose is clearer than ever before: they must somehow continue to perform their established functions at lesser cost.

Such logic does *not* permeate the world of higher education, so many of whose purposes are uncertain, ambivalent, or the subjects of fierce current dispute. All of us agree that a person urgently in need of medical care must have access to a nearby emergency department . . . that failure to pick up the garbage correlates, in a direct ratio, with the risk of disease and death . . . and that a 10-year-old needs to be in school. Were university presidents to benefit from a comparable level of shared agreement, their "burn-out" rate would drop considerably.

Here are just a sampling of the questions university presidents ask themselves every day of the year:

Is this institution primarily devoted to teaching or to research?

If *research* is its primary mission, then how can we reduce teaching-loads while still raising faculty salaries and keeping tuition-charges under strict control?

If *teaching* is now its major concern, then how do we measure faculty productivity in ways that will hold up when tenure- and promotion-time roll around . . . and that will hold up still better when the resulting decision reaches the law-courts, as it too often does these days?

How do we successfully integrate new information technologies into the university's functioning without turning it a "virtual" university that has no need for a campus . . . without busting its budget . . . and without alienating those who insist that we need more printed books and journals in the school library?

While the university joins the Internet and in other ways "goes global," how can it *also* meet its responsibilities to the community right around its traditional campus, where youth gangs, cocaine and heroin are likely to pose more of a problem than screens and modems? And how can it carve out a budget for these responsibilities without alienating such constituencies as faculty, staff, alumni, parents, and the kinds of donors who feel that its main purpose in life is the teaching and maintenance of Western Civilization? And the questioning process, once launched, goes on and on. Among the *other* problems that university presidents pose for themselves as they sit at their paper- heavy desks:

At a time when our nation's politics have turned decisively against "the counterculture," what can we do about the fact that universities are so often identified as the *heart and soul* of "the counterculture"?

At a time when the election of 1994 is being seen as a direct negative response to affirmative action and equal employment opportunity, how do we deal with the fact that universities are so often identified as the very *bastions* of affirmative action and equal employment opportunity?

How can we help our students to stay out of trouble while not violating their civil rights -- particularly the right to privacy?

How can we keep abusive messages off the computer screens of our campus without imposing censorship and protect academic freedom?

And above all, how do we deal with the spongelike *porosity* of today's university, which has become an open book to the formerly *outside* world, and whose actions are subject to scrutiny -- ceaseless and continuous scrutiny -- by the media and dozens and perhaps hundreds of *lawyers*?

If these are just a few of the questions that President Rudenstine, like other academic c.e.o.'s, was having to ask himself each day, then is it any wonder that -- being flesh and blood -- he succumbed, however temporarily, to stress? Unlike the c.e.o. at General Motors or Apple, he had goals -- goals that often contradicted each other -- washing into his office through the door and the windows! And in arguing with *some* of his constituencies, while their opponents pounded on his office door, he couldn't even sit back and say, to those in front of him and those waiting their turn to speak: "As president of this university, I will fix your problem!" The president of Harvard University has less true clout, in many ways, than Cambridge's director of sanitation!

As I've suggested in my remarks thus far, the university's rise to the status of Most Stressful Institution is deeply interwoven with its actual and potential legal involvements. Go back only half a century and what will seem most striking about the university is its vaguely "genteel" tone: the sense that sharp definitions, like frantic speed, are simply irreconcilable with its basic nature. Back then, attorneys of a sufficiently respectable sort . . . mostly drawn from the ranks of the school alumni, and from firms identified with what was soon to be called The Establishment . . . were called in to finalize the arrangements that gentlemen, with a few ladies in attendance, had concluded behind closed doors.

Come back from half a century ago to 1995 and lawyers, sharp of tooth and claw, will be seen to have occupied the very center of the academic landscape. Nothing that gets taught in the classroom, nothing that gets printed in the university's catalogues or course-listings, nothing that gets said to the press by an administrator, can any longer be taken for granted. It must be scrutinized . . . in advance . . . as a source of possible litigation.

And each day's major newspapers must be studied with similar intensity -- for who knows what trends or tendencies, presently limited to a handful of schools, may in fact turn out to be the Wave of the Future where litigation is concerned? After all, even the fact that Newt Gingrich is a former professor, and Bill Kristol the possessor of a Ph.D., may signal trouble ahead. Their academic backgrounds may make those triumphant worthies *more* rather than less likely to scapegoat higher education as a source of America's ills . . . which in turn would encourage all kinds of people to sue, sue, *sue*.

So it can be said with some fairness that *litigation consciousness* rather than Western Civilization or the Cold War or a concern like better access for the disadvantaged now forms the binding connective tissue of academic life. Only a few years ago, it was fashionable to lament that universities had become more concerned with money than with ideas. Today, *litigation* . . . including lawsuits launched by disgruntled students or ex-students, faculty or former faculty, staff members still on the payroll or staff members whose jobs have been terminated . . . *litigation* is being seen as a major threat to the stability of schools of higher education. A court-case, after all, if it goes against an academic institution, so easily sets a precedent for other disgruntled parties seeking to articulate a grievance and to be paid compensatory damages.

Just how serious the impact of our litigious age has been on academic life can be seen by the extent to which it has compromised the university's traditional and conventional disciplinary activities. When I myself was a freshman at Columbia, for example, *someone* -- someone who turned out to be my own roommate (Jesse where are you today?) -- dropped a condom full of water from a 5th-floor window onto the head of the secretary employed by the Dean of Students.

For my roommate, who was a graduating senior admitted to medical school, blame for this misdeed would have meant disaster. So, as one with an unblemished record and three years to recover, I took the rap for him, received an appropriate "stern warning," and religiously mended my alleged and in truth nonexistent bad ways. I always thought the Dean knew the truth.

Can you imagine a comparable outcome in today's academic world? From beginning to end, once that condom had reached its unlikely destination, lawyers would have been involved at the university end and therefore, necessarily, from my end as well. The moment would have come when my lawyer, in conference with me, and with my parents in attendance, would have cried out: "Fool! Stop sacrificing your future to Stone Age notions of loyalty! Let your roommate fight his *own* battles!" And the entire event, instead of making a jolly cocktail-party anecdote, would have haunted me for the rest of my days. Not to mention Jesse.

What we've lost, in other words, is the kind of sublegal *flexibility* that was once regarded as indispensable in an institution engaged in preparing people for their respective futures. What we've gained, meanwhile . . . and what has animated the entire painful process . . . is a weakening of the kinds of abuses that were formerly taken for granted, in both the non-profit and the profit-making sectors of the economy.

What we've lost, at every point in the administration of a university, is a note that once seemed intrinsic to an institution that claimed to be teaching people how to conduct their professional lives. The results of this loss of authority can be seen, for example, in letters of appointment. Gone is the day when the chair of a department would write a straightforward letter to Dr. So-and-So informing him or her of an assistant professorship to which he or she had been appointed. Today, the letter is much more likely to read:

It is my great pleasure to tell you that I plan to recommend, to the Dean of our Division, that you receive this appointment. Following the Dean's recommendation to the Vice President for Academic Affairs, and the latter's approval, we will be most

happy to move forward in the direction of making this an official offer, to which your prompt response would be appreciated, given the fact that the semester begins in two weeks, and that you will have to arrange your and your family's move from Honolulu to Chicago.

Both inside and outside the academic world, in other words, fear of litigation has introduced a tone into our lives . . . our individual and collective lives . . . that goes well beyond caution. It amounts to a fear and a distrust of the entire human race. What this has meant in corporate circles is neatly summed up by the film made from Michael Crichton's novel, Disclosure. Among its more rigorous portraits is that of the corporate c.e.o. played by Donald Sutherland, whose spontaneous overflows of obvious good will run in tandem with his evil intent. *Nothing and no one can be trusted*, the film seems to shriek in the direction of its audiences. And the happy ending, for the protagonist portrayed by Michael Douglas, seems considerably more "fairy-tallish" than the cutting-edge electronic technology through adroit use of which he proves his innocence.

If our litigation-prone society now contemplates, in its movie-houses and on its home-screens, such parables of total distrust, then what can we say when similar fears find their way into higher education? In academic life today, the fear of being misunderstood or misinterpreted or in some way unjustly held liable is having a considerably more insidious result than in the corporate sector of the economy, where the intensification of distrust represents a quantitative rather than a qualitative shift.

As testimony over the ages has made clear, the goal of making money is compatible with violations of the Golden Rule. But the processes of thinking and reasoning that have traditionally been central to academic life depend, by their very nature, on *trust* -- especially when those processes are taking place at their most creative levels. To offer a genuinely new idea for scrutiny and criticism can feel very much like offering oneself up in the manner of the biblical Isaac . . . on an altar, for sacrifice. But if our economy and our society are both to flourish . . .

which is a hope that we all devoutly share . . . then faculty members in our universities must continue to perform this dangerous act, unhindered by continuous second-guessing.

The dreadful possibility we must now consider, in other words, is that at a point in time when law and litigation have become central to academic life, they have also begun to contradict what was once considered its essence, which is the difficult quest for Truth. And this contradiction can be divided into two major destructive forces. First comes the fear of individual faculty members that *something* they say or write will get them into trouble, even if they regard it as necessary to their research or teaching.

And right behind *that* fear comes the fear . . . which is especially keenly shared by university presidents . . . of a new culture of disloyalty, among faculty members or staff. If they do get the university into legal trouble, runs the usually unspoken reasoning that some of them fall into, "then the university -- not *me* -- will take the fall. Hundreds of thousands of dollars in legal expenses won't come out of *my* pocket." And for *some* faculty members, alas, this line of reasoning extends all the way to an unseemly eagerness to blow the whistle *against* the school in which they hold a position. Our campus mores see to it that the corporate axiom . . . "my paycheck may be threatened if my company gets badly hurt" . . . has no reliable academic equivalent.

So in our universities today, the interpenetration of the academic world with the world of legal practice has had distinctly mixed results. The gains where individual rights and civil liberties are concerned have been offset and, in some situations, perhaps *overbalanced*, by the changes that have taken place in the prevailing tone of scholarship and teaching. And it is only a small additional paradox that in its very ambivalence in these respects, the academic world is once again playing its traditional role as a bellwether for the rest of American society.

One can go just so far, after all, in seeing the profit motive as compatible with corporate double-dealing . . . and with a pervasive reliance on courts of law as the arena in which intra-corporate,

inter-corporate, customer-involved, and stockholder-involved disputes are transacted. Creative and free exploration, even if it is more obviously at the heart of the university, has hardly been absent from the international profit-making economy of recent decades. Indeed, one of the fears of those who run our universities is that they may be losing ground, in certain respects, to the *corporate* research community, with its obvious advantages of speed in general and speedily-arranged finance in particular.

And as even a film like Disclosure suggests, those on the exploratory borders of corporate research are those, including the classic "computer nerds," who are drunk on research rather than law. They prize their corporate situations in much the same way that academic researchers prize their universities: as settings that release and encourage their quests for answers. One of the unexplored questions of the present moment is whether these corporate researchers, like their academic equivalents, are being affected -- *destructively* affected -- by the sense that lawyers are always looking over their individual and collective shoulder. On the answer to that question may hinge the future of the American economy and of each one of our wallets and pocketbooks.

A final and integrative frontier for all of these considerations is one that the legal community, the social science community, and the academic community may be well-advised to join in exploring . . . and that is the relationship between a litigious society and one marked by an ideal of individuality. It's a cliché to observe that in our own time the quest for individuality has been democratized . . . that a lust for significance and recognition is no longer regarded as the property of a tiny social, intellectual and artistic elite. *Everybody* now wants his or her "moment in the sun," even if sunlight has been redefined as the glow of the world's computer-screens.

And this broadened quest for individuality has of course begun to stimulate a broad reaction. In various ways, the communitarians as well as The Bell Curve and ex-Professor Gingrich can be seen as attempts to repudiate this quest -- this yearning, on the part of millions of individual people, to *excel*. And suddenly, this new turn of the *Zeitgeist* is also calling attention to the promises made in recent years by our schools of higher education, which have gained in obvious

ways from serving, or seeming to serve, as the pathways to personal merit. At a time like the present, when individual human life is being seen -- more and more often -- as confined by genetics and constrained by the needs of the larger community, is it any wonder that students and their parents . . . as well as disgruntled faculty members, staff members, donors, and administrators . . . should think less than twice about hauling a university into court? "Your promises were empty!" they seem to cry in unison. "You *haven't* improved my life! And you *haven't* made good use of the money I so trustingly gave you!"

In a world now reassessing its former quest for individuality, and which is making cynicism and disenchantment into our prevailing national tone, universities are threatened by the very idealisms they formerly sponsored: the notion of *improvement* as something guaranteed to those who make good use of their services. Underlying much of the litigation with which they are currently struggling to cope is the dreadful suspicion, expressed in so many books and articles of the past six years, that higher education has become some sort of collective scam . . . and that universities are run for the benefit of their tenured faculty-members rather than their students.

Consider just a few of the bitter words published by Lilian and Oscar Handlin in the most recent issue of The American Scholar, in an article entitled "America and Its Discontents." "To make black students feel good," the Handlins declare,

". . . universities and other educational institutions sanctioned their withdrawal from contacts with outsiders, stigmatizing those who socialized with whites as "Oreos" or "vanilla" . . . A variety of "diversity task forces" mushroomed at institutions eager to broaden their offerings in the supermarket the new consumer-oriented universities had become. The curriculum adapted to presumed needs by eliminating Shakespeare, Aristotle, and other dead white male pillars of Western Civilization or by now teaching them as representatives of a thoroughly corrupt Western tradition. Multicultural Afrocentric course studies, justified by pseudo- scholarly pretensions,

instead traced the birth of philosophy to Africa, and the slave trade to European Jews." [Unquote.]

The question today is not whether the Handlins are being 100% fair or accurate in this characterization. Rather, the question is whether the Carl M. Loeb University Professor at Harvard University, when he publishes such an article in the quarterly journal of Phi Beta Kappa, can be far in advance of litigious Americans seeking a scapegoat for their sorrows. If universities have indeed become a consumer-oriented supermarket, then charges of false advertising cannot be far behind, and even Harvard may prove as vulnerable to litigation as Shoprite or Safeway or Stop & Shop.

In other words, the grand meeting of the law with the academy has only, I believe, gotten started. The law already had a profound effect on the daily norms of academic life. The next few years will make clear how far those effects can go, and what will remain after they have run their course.

I thank you for your attention.

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