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Student Unrest, and the Law

William B. Saxbe*

MANY PEOPLE have recently expressed alarm about the student unrest in our universities and on our college campuses. I am delighted to have this opportunity to submit an article to *The Cleveland State Law Review*, for it provides a forum for me to express my views on the subject.

The Problem

By *student unrest* I do not mean anarchy. As Justice Thurgood Marshall said in a commencement address at Dillard College in New Orleans, "Anarchy is anarchy and it makes no difference who practices it. It is bad, it is punishable, and it should be punished."

In trying to understand the unrest in our land today, we must not confuse activism with violence, nor dissent with conspiracy. Therefore, I refer to unrest of the spirit and soul—not violence. The Gallup Poll reported on May 24th that a majority of students agree with the basic goals of the militants, but not their tactics. Students are genuinely concerned with the way things are on campus and in the community, and they want these things changed. Students are no longer concerned with a standard of living, but with a way of life—one that is just and moral.

Anyone who is past that time of life which is said to divide the young from the old, the trustworthy from the untrustworthy—the age of 30—may find it difficult to relate to many of the grievances which appear to activate many in our student population. The temptation is strong to denounce vigorously the hair, the clothes, the morals, the living habits, and never listen to what they say. Perhaps an equal danger, but one only a few have succumbed to, is to become a camp follower of the young, eagerly chiming in assent to anything they say or do.

It seems to me, however, that it is manifestly important that we not fall into either position. We must recognize that many serious and troubled young people are dissatisfied today with our society and our culture. That dissatisfaction has its roots not only in the way these young people perceive that society and culture but in a number of wrongs objectively part of that society and culture.

We can learn from this new generation, just as they can and must learn from us. "The present generation of young people in our universities is the best informed, the most intelligent, and the most idealistic this country has ever known . . . The ability, social conscious-

* United States Senator from Ohio.

ness and conscience, political sensitivity, and honest realism of today's students are a prime cause of student disturbances."¹

Learning requires communication, but the impasse between the generations more often than not involves a failure to communicate. Although both groups may harbor the same ideas, they express them in a slightly different manner. President Nixon said in his Inaugural address, "We cannot learn from one another until we stop shouting at one another—until we speak quietly enough so that our words can be heard as well as our voices." Simon and Garfunkel, folksingers and spokesman for the young, expressed similar thoughts in the "Sounds of Silence,"² one of the most popular songs of the younger generation in 1968.

For a mutual interchange to be even moderately successful, however, requires that we drop some of the slogans and habits of thought that block the way. Let us lower our voices and look at the problem as we see it today.

A major premise in the condemnation of violence on campus is that "our colleges and universities cannot perform their vital functions in an atmosphere that exalts the struggle for power over the search for truth, the rule of passion over the rule of reason, physical confrontation over rational discourse."³ Professor Nisbet has stated that this is true because "The university is the institution that is, by its delicate balance of function, authority and liberty and its normal absence of power, the least able of all institutions to withstand the fury of revolutionary violence."⁴

College administrators must make very clear that they will not shrink from the normal disciplinary sanction of suspension and expulsion to preserve and protect the institutions of learning which they serve. Furthermore, "advance plans should be made to determine, insofar as possible, the circumstances under which the university will use (1) campus disciplinary procedures, (2) campus police, (3) court injunctions, (4) other court sanctions, and (5) the civil police."⁵ A successful university administrator is no different than a successful

¹ Report of the Fact Finding Commission appointed to Investigate the Disturbances at Columbia University (Cox Commission), p. 4 (Vintage ed., New York, 1968).

² ". . . within the sounds of silence . . . And in the naked light I saw 10,000 people maybe more—people talking without speaking; people hearing without listening; people writing songs that voices never share; No one dare disturb the sound of silence . . . Hear my words and I might teach you. Take my arms and I might reach you. But my words like silent rain drops fell, but echoed in the well of silence."

³ Interim statement on campus disorder issued by the National Commission on Causes and Prevention of Violence.

⁴ Prof. Robert A. Nisbet, "When Authority Falls, Raw Power Moves In," reprinted in Congressional Record, S. 5982-5983 (daily ed. June 5, 1969).

⁵ *Supra* note 3.

bartender who must be able and willing to throw out a ruffian in order to stay in business and keep his place of business from being destroyed.

Repression, however, by itself is not enough. Suppression of legitimate grievances may precipitate reaction outside of the peaceful avenues of change, as it already has in some instances. Because a majority of students are in sympathy with the goals of the militants, but not their tactics, we must as responsible citizens, and I must as a responsible legislator, attempt to define these goals. We then can redirect the idealism of youth to constructive action rather than destructive despair.

The Causes

The source of student discontent has been analyzed by many and the conclusions range from immediate definitive explanations to others which are less immediate and more esoteric.

Students are unwilling to accept the gaps between professed ideals and actual performance. . . . Today's intelligent, idealistic students see a nation which has achieved the physical ability to provide food, shelter, and education for all, but has not yet devised social institutions that do so.⁶

The loneliness, emptiness, and frustration that students feel in their everyday lives have led to the rise of the antihero. For example, many of you are undoubtedly aware that Dustin Hoffman has become something of a hero of the younger generation by virtue of his confrontation with life's hypocrisy in the movie, "The Graduate."

Today's youth does not reject authority as such, but the hypocrisy which it finds inextricably intertwined with it. It finds this hypocrisy in a war which it cannot understand, a draft which it finds unfair, and a set of national priorities which are poorly structured.

We are in the midst of a worldwide revolution. In trying to better understand it, I think it is helpful to examine what has been said by men like Professor George Wald, the Nobel laureate from Harvard. Professor Wald believes that much of the restlessness manifesting itself on our campuses and in our cities can be traced to the realization by this generation that it is by no means assured of its future.

Today's young people grew up in the post World War II period, an era where we have always had a Pentagon, an increasingly large army, a draft, and now the war in Vietnam. They are further confronted with the threat of a nuclear holocaust, chemical and biological warfare, and the population explosion. The youth today see the future in terms of nuclear destruction or famine resulting from the population

⁶ *Ibid.*

explosion. Is it any wonder that Professor Wald calls today's generation "a generation in search of a future"?⁷

It seems to me that the purpose of a democratic form of government is to institutionalize change through a peaceful political process. Yet, how do we explain to youth that violence is not an effective means of change when it has been used effectively to institute change, both at home and abroad. This group has witnessed in short order the assassination of President Kennedy, Medgar Evers, Martin Luther King, Jr., and Senator Robert F. Kennedy. The United States has enunciated ideals of peace and economic development, but has reacted violently abroad by sending troops to the Dominican Republic because we did not like what was going on there, and dispatching over half a million troops to Vietnam to solve that problem.

Therefore, this present generation of students has come of age in one of the most turbulent eras of change we have known. Past generations have borne the marks of their formative years—the generation that came of age during the Depression probably made its mark in Postwar America's desire for stability and assurance against unsettling change. Characterizations could be made of many such generations. It should not be surprising that our students reflect much of their formative years, and these years, as I have shown, have increasingly been characterized by violence.

I would like to set out another factor which appears to me to have stimulated and fed campus unrest. It has almost become a cliché, but there is much truth in the observation that relations between the student body and teachers, and between each of these groups and administrators, have grown increasingly strained. Where once there was a sense of community, a coming together of scholars, this was replaced by an Olympian administration cut off from student contact, busily raising funds and promoting the development of increasingly close ties with business and the military; this was also replaced by an ever growing number of teachers so pressed for time in which to conduct research, often for government, and to prepare material for publication, on which advancement in teaching ranks is so dependent, that their personal contact with students decreased to a minimum. College administrators, by isolating themselves from the student body and fostering a system in which the teachers became more isolated, failed to provide what the students had a right to expect.⁸ Let us not forget, teaching is the primary purpose of a university.

⁷ Speech of Prof. George Wald, Kresge Auditorium, Mass. Inst. of Technology, March 4, 1969, reprinted, Cong. Rec. S. 3258-3259 (daily ed. March 26, 1969).

⁸ The Higher Education Act of 1965, Comm. Report No. 650, 89th Cong., 1st Sess., at 56, states: "The committee has noted that there has been a tendency in recent years for college teachers to devote less time to classroom instruction and to personal counseling of students than previously, factors which have become more evident as

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As Secretary of Health, Education and Welfare, Robert Finch, recently said:

I think we need to have a long hard look at what is behind this student unrest. It is not simply the Vietnam War. In my opinion, it is a failure of the governance of education, the governing bodies, the institutional apparatus, to respond. Probably they have been more rigid than almost any other institution in our whole society. . . . in the face of very fast changing conditions.⁹

There is another factor adding to the unrest, one that I believe cannot be overlooked in trying to understand our youth and its troubles. That factor is boredom. The role of boredom in today's unsettled world was discussed in a recent essay by Professor Robert A. Nisbet of the University of California. He noted that between boredom and brute violence there is as close an affinity historically as there is between boredom and insanity, boredom and cruelty, and boredom and nihilism.

Youth is beyond question idealistic. But in our present society, youth is also bored. And it is from boredom that so much of the intellectual character of radical political action today is derived. . .

. . . It is boredom born of natural authority dissolved, of too long exposure to the void; boredom inherited from parents uneasy in their middle-class affluence and who mistake failure of parental nerve for liberality of rearing; boredom acquired from university instructors grown intellectually impotent and contemptuous of a calling that explains the mindless, purposeless depredations today by the young on that most precious and distinctive Western institution: the University.¹⁰

The Law

The law of the land is reasonably clear. It protects speech. Not only verbal speech but a wide range of "symbolic" speech is to remain free from government restraint. And we have long since resolved the argument in *Gitlow v. United States*,¹¹ between Justice Sanford, who thought apparently that only discussion which was a "mere academic and harmless discussion" was entitled to claim the protection of the First Amendment,¹² and Justice Holmes, who readily conceded that "[e]very idea

(Continued from preceding page)

institutions of higher education have become larger and more impersonal. While recognizing the importance of research—which this committee has encouraged in other legislation—we nevertheless are hopeful that this act will serve to encourage the expert and the teacher to devote more time to the classroom and the student. We look to an equitable balance between research and teaching and between the outside lecture platform or publishing house and the classroom."

⁹ Interview of Secretary of Health, Education and Welfare, Robert Finch, Wash. Post, May 11, 1969, at A4.

¹⁰ *Supra* note 4.

¹¹ 268 U.S. 652 (1925).

¹² *Id.* at 665.

is an incitement.”¹³ As Justice Brennan put it in *New York Times v. Sullivan*,¹⁴ we have “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open.”¹⁵

Strangely enough, however, it was not until the present Term of the United States Supreme Court that it was unequivocally established that we were as committed to the principle when it was exercised by our student population as when we expressed our own ideas and our grievances.

In *Tinker v. Des Moines Independent Community School District*,¹⁶ the Court protected the wearing by high school students of black arm bands to signify distress at our Vietnam policy. “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”¹⁷ Because the operation of the educational institution demands a great deal of order, conduct of students, in or out of class and stemming from the time, place, or type of behavior, which “materially disrupts classwork or involves substantial disorder or invasion of the rights of others,” is subject to restriction by the authorities.¹⁸ Violence on campus is not immunized.¹⁹

The line thus drawn seems to me reasonable enough. It will afford the student, in college and high school, room in which to develop and make known his views, on both those academic matters which directly affect him and those wider public issues which may directly affect him or which may interest him as any other good citizen would be interested. We tend to restrict our thinking on this subject by our references to “children” or “kids” and this restriction operates to comfort us by its image of immaturity. But when the age at which most male students graduate from high school is the age at which they have to register for the draft, and when male college students are confronted with the question of the draft during their entire college careers, it cannot be said that their interest, not only in the mechanics of the Selective Service System, but in the broader policy issues of war and peace, is a “mere” academic one.

But even were the overriding issue of Vietnam and its satellite issues to fade tomorrow, we must recognize, I think, that the youthful

¹³ *Id.* at 673.

¹⁴ 376 U.S. 254 (1964).

¹⁵ *Id.* at 270.

¹⁶ 393 U.S. 503 (1969).

¹⁷ *Id.* at 506.

¹⁸ *Id.* at 513.

¹⁹ See, *Barker v. Hardway*, 283 F. Supp. 228 (S.D. W.Va. 1968), *aff'd per curiam*, 399 F. 2d 638 (4th Cir. 1968), *cert. denied*, 37 U.S.L.W. 3335 (1969).

student of today is bound to have a greater interest in, knowledge of, and desire to change the world about himself. Our children do mature earlier. The pervasive effect of television makes clear to them what a great, big complicated world there is out there. And their sense of morality and idealism, not yet blunted by too much contact with the "realities" we take for granted, is rightfully appalled at the gap between the ideals we profess and the lives we lead.

If it was once the province of the newspapers, in Mencken's phrase, "to comfort the afflicted and to afflict the comfortable," a province largely abandoned, we may, if we are willing to listen, find our youth assuming that role. That prospect, it seems to me, is more than sufficient to justify and rationalize the granting of greater freedom of expression to young people than most adults have been willing to consider. In the exercise of that freedom much will be said that is nonsense, or unfair, or trite, or simply wrong, but in those respects comparison with adult discourse would certainly reveal no great difference. But I remain confident that the remainder of the discourse would reveal fresh thought, insight, and perspective, for which we should be most grateful.

Unfortunately, there has appeared in the ranks of our student protesters some whose primary commitment seems to be to violence and senseless disruption. Whereas the great majority of student dissidents have been and are concerned with the quality of education offered at their institutions, and with changing through the available political processes the local, state, and national policies with which they disagree, there is a significant minority about which it can only be said that the suspicion exists that they prefer chaos for the sake of chaos. These people advocate freedom of speech for everyone expressing their particular views; those in disagreement will be hounded off the platform or out of the classroom. These people not only condone, but advocate, the use of violence. They constitute a danger to the academic community and a danger to the public at large.

There is very little that the Federal Government can or ought to do about this danger. The answer lies in adequate law enforcement at the local level; but perhaps more important than that, it lies in the ability of the dissidents among the students and the faculty at each of these institutions making clear that tolerance of violence has ended, that the "crazies," as they have been colloquially dubbed, are endangering not only the reforms that are sought, but that they are perceived to be a menace by the peaceful dissidents. Until the campus revulsion drives the violent minority out, heavy-handed federal reaction will only add fuel to the flame.

Some fuel is already there, but it may be the minimum which the Federal Government should undertake to apply. I refer to Section 504 of the Higher Education Amendments Act of 1968, P.L. 90-575, which is a

fund cutoff provision authorizing school authorities to terminate financial assistance to any student engaging in conduct which works a "substantial disruption" of the orderly administration of the institution. It seems to me that the Government interest in not funding students addicted to violent conduct is adequately protected by vesting in the authorities administering the institutional affairs of colleges and universities the power to terminate funds.²⁰

An inclination to be more harsh is revealed by Section 411 of P.L. 90-557, the HEW appropriations act for fiscal 1969, and thus a temporary provision, which directs the termination of all federal funds to anyone convicted of any crime which "involves the use of or the assistance to others in the use of force, trespass or the seizure of property" of an educational institution. This provision removed any discretion from local administrators, but on the other hand it did base termination on a criminal conviction.

In this Congress, however, the inclination to be tougher is stronger and, I am afraid, irresistible to the majority. A very prominent bill which has already been the subject of hearings is H.R. 10074. This bill would require the suspension of federal aid to colleges and universities which experience disorders and which fail to take unlisted appropriate corrective measures within a reasonable time to put down disturbances. A whole series of bills modeled on this one would apparently take away the discretion of college administrators with regard to the type of response appropriate to quell unlawful disturbances.

I can appreciate, of course, the frustration which many feel at the continued illegal disorders on many campuses. I too feel that some administrators have displayed less than valor in dealing with some disorders. But it seems that this early hesitation, understandable in view of the prevailing feeling on most campuses that the police should not be called in, is giving way to more firm and thoughtful handling, which should increase in effectiveness as experience accumulates. But it is simply not true that each crisis can or should be handled by summoning the police and the national guard at the first moment. As the experience in California indicates, this may only prolong and exacerbate the situation.

²⁰ "Existing laws already withdraw financial aid from students who engage in disruptive acts. Additional laws along the same lines would not accomplish any useful purpose. Such efforts are likely to spread, not reduce the difficulty. More than seven million young Americans are enrolled in the nation's colleges and universities; the vast majority neither participate in nor sympathize with campus violence. If aid is withdrawn from even a few students in a manner that the campus views as unjust, the result may be to radicalize a much larger number by convincing them that existing governmental institutions are as inhumane as the revolutionaries claim. If the law unjustly forces the university to cut off financial aid or expel a student, the university as well may come under widespread campus condemnation." Interim statement on campus disorder, *op. cit. supra* note 3.

Thus, it seems clear that a federal measure which would compel college administrators to pull out all the stops in every crisis or pre-crisis period, or face the prospect of losing all federal financial assistance, is an overly harsh and ultimately ineffective response, akin to using a cannon where a rapier is more appropriate.

Still more disturbing is a bill like S. 1929, which would make it a federal criminal offense to disrupt the operation of federally assisted colleges and universities. The bill is disturbing in two respects. First, any act which it would make criminal is already covered by a host of state laws. We simply have no evidence that these laws are not being enforced, that they are inadequate, or that we need to clutter up the already burdened federal courts with hundreds of new offenses ranging from throwing a rock at the dean to arson. I wonder what value making these matters a federal case could possibly have over the present situation.

Second, the power of the Federal Government to reach these offenses is premised on the fact of some federal financial assistance, whether directly to the college in the form of grants, loans, or contracts, or indirectly in the form of students paying tuition out of federal grants or loans. Very few institutions of higher education would not be reached this way. The premise is a tenuous one, however, and the precedent it would set for federal interference in and control over the day-to-day operations of these institutions is unnerving. If federal jurisdiction is so easily asserted, then we may be closer to the unitary form of government throughout the nation than many of us had thought.

These two proposals are only the forerunners of others that can be seen down the road we are traveling if the disturbances continue. And that prospect can only please the so-called militant minority which wishes to provoke the ultimate "confrontation" of government and dissidents.

A criminal jurisdiction the United States Government might well exercise, however, in a productive and helpful way, lies in the enforcement of sections of the 1968 Civil Rights Act.²¹ These sections prohibit the utilization of the facilities of interstate commerce in order to foment or to incite, or to abet in fomenting or inciting a riot, or to commit any act of violence in furthering a riot. If indeed there are people in this country who are planning and encouraging violence on our campuses, if indeed there are ringleaders of chaos, then it seems to me that the Federal Government ought to prosecute.

These sections are not directed at peaceful advocacy or peaceful protest. They do not reach marching and picketing protected by the First Amendment. They cannot restrain legitimate assembly and speech in the pursuit of change. What they can penalize is the advocates of

²¹ 18 U.S.C. Secs. 2101, 2102.

destruction for destruction's sake, the misguided followers of Mao and Fanon, the eager insurgents who want to polarize our society.

There have been all sorts of allegations about planning and fomenting on a nationwide basis. If there is sufficient evidence, the Attorney General should cause the convening of a grand jury to consider indictments. Whichever way such a case turned out it might well clear the air and take from the shoulders of those pressing for needed change the suspicion that they are implicated in illegality and the burden of guarding their flanks from the disrupters.

The Future

I believe that student unrest is symptomatic of the current *malaise* confronting our country. It has been referred to as "the revolt of the diminished man." Archibald MacLeash believes that the younger generation has conceived a "new humanism."

It is an angry generation, yes, but its resentment is not the disgust of the generation for which Beckett speaks. Its resentment is not a resentment of our human life but a resent on behalf of human life; not an indignation that we exist on Earth but that we permit ourselves to exist in a selfishness and wretchedness and squalor which we have the means to abolish. Resentment of this kind is founded, can only be founded on belief in man, and belief in man—a return to a belief in man—is the reality on which a new age can be built.²²

I came to Washington with a mandate from the citizens of Ohio to seek alternatives to our present dilemmas. We are currently faced with the revolt of the student and the revolt of the taxpayer. The two are related. Since the end of World War II, we have spent approximately one trillion dollars on armaments and armed forces. Today our Federal expenditures for defense and defense related costs are greater than all Federal, state, and local outlays for social security, health, education, housing, and agriculture, and yet the military budget continues to grow, spurred by a seemingly self-propelled mechanism which operates with little or no attention to merit or national needs.²³

We are presently in the midst of a missile gap scare—the third such scare since 1960. All three have been groundless. Nevertheless, we are on the brink of a new round in the arms race—more costly and more dangerous than any which preceded it. What, then, have we purchased with our money? How will the next generation of college students react when they are raised in an era of "first strike capability," Anti-Ballistic Missile Systems (ABM), and Multiple Independently

²² MacLeash, *The Revolt of the Diminished Man*, Saturday Review, June 7, 1969.

²³ Report of the Congressional Conference on the Military Budget and National Priorities 3, 4 (Washington, D.C.).

Targetable Reentry Vehicles (MIRV)? To maintain our current foreign policy is, to me, a ticket on the Titanic!

Therefore, I have continually spoken out against the ABM and proposed a moratorium on MIRV testing, expressing my doubts about military effectiveness, enormous cost, and adverse effect on possible disarmament talks. I believe that we should immediately proceed with strategic armament talks with the Soviet Union.

We cannot be the policemen for the entire world. Gunboat diplomacy ended with the creation of nuclear weapons. An arms race in a nuclear age is unthinkable. A halt to the nuclear arms race does not require unilateral disarmament. We can maintain our nuclear deterrent provided by our Intercontinental Ballistic Missiles (ICBM), bombers, and Polaris submarines, while we negotiate in good faith with the Soviet Union. This is what I mean when I say that we must confront the assumption of risk and turn it from a risk of war to a gamble for peace. This decision need not be irrevocable. It is a calculated risk—one that can be reversed if conditions or events change.

Because the present generation of students has come of age in one of the most turbulent eras in world history, an era marked by foreign and domestic violence, I believe that the elimination of a foreign policy characterized by violence may reduce the level of domestic discord.

Furthermore, I will continue to listen to the grievances of students. Many have refreshingly constructive ideas. Others have nothing to say. You can only learn what they have to say by listening to them. Maybe then they will realize that our democratic form of government does institutionalize a process of change in a peaceful political manner.