January 15, 1970

TO: Ray Goldstone
FROM: Leon Letwin

In Schwartz's article that we used in the first session, he says that Perkins in "The University and Due Process, December 8, 1967" (a reprint of an address to the American Council on Education, Washington, D.C.) "conjures up a chamber of horrors involving incompetent charges rendering decisions on student grades, personal behavior and a multitude of other matters. It pleads for a respect for the autonomy of the University. . . ."

Do you have the speech? It might be useful as a statement of the argument against court involvement in University affairs which comes up in a second session.

LL: ep
SEMINAR ENROLLMENT

Winter 1970

✓ ALPERIN, Tony
✓ BAKAL, Judy
✓ CUTROW, Allan
✓ DEIGHT, Blanche
✓ DOBROTH, John E.
✓ FORKNER, Larry
✓ FRY, Judy
✓ MATONAK, Ronald (?)
✓ MOMMAERTS, Bob
✓ MOSS, Robert (?)
✓ RUBIN, Larry (?)
✓ RUSSELL, Alan (?)
✓ WALKER, Wallace
✓ Anderson, Marvin
It is a commonplace that the campus today is an incredibly different place today than it was when populated by "the silent generation" of the 1950's. Student concern with the gap between professed human values and the real world runs far broader and deeper. And there have been impressive changes in attitude as to personal responsibility for participating in efforts to produce change. While these attitudes have rarely, if ever, moved a majority of students into action, they have episodically moved fairly large numbers and, perhaps equally important, the impulse motivating the activist has from time to time received widespread, though passive, support of the majority. Accompanying these changes have also come important changes in attitude toward what constitutes effective or appropriate forms of political action, and toward the appropriate degree of deference or respect due to the "established order," the "status quo," the "system."

In such a setting it seems artificial to begin a review of student-university legal relationships by focusing on, say, procedural due process on the campus. While this was a frontier issue but a few years ago, it is today regarded by significant numbers of students as of minor importance, not the "real issue." It seems worth spending the introductory session surveying aspects of the general campus atmosphere.

The current literature on "civil disobedience" helps in two respects: the content and intensity of present-day student social concerns, and it presents some of the attitudes toward appropriate mechanisms of social change and toward legality and authority.

In reading these materials you may wish to keep before you the following questions:

1) What are the differing attitudes toward "the system" represented by the conflicting viewpoints presented on "civil disobedience"—what it is and what it implies? Is "civil disobedience" revolutionary? What are the varying positions toward the appropriateness of demanding "amnesty" for acts of disobedience or illegality? To what degree are these differences reducible to more fundamental differences in assumption or objectives of those ranged on either side of the issue?

2) Are the justifications that might be offered for civil disobedience stronger or weaker in the campus context than elsewhere? Should the response to acts of civil disobedience be any different on the campus than in other sections of the community? How?

3) What kinds of arguments would those who have engaged in politically inspired acts of violence be inclined to offer as justification for such course of action?

4) What are the implications for the lawyer defending those charged with acts of civil disobedience? What are the implications and responsibilities of the lawyer whose client insists on engaging in civil disobedience within the courtroom, e.g. refusing to accord the traditional forms of respect to the judge, etc.

* * *

On reserve:

Fortas, Concerning Dissent and Civil Disobedience
Zinn, Disobedience and Democracy
Retrospective Comment on Week 2

I now think we should proceed entirely differently than we had in the introductory weeks. We should drop the introduction on civil disobedience, and drop Week 2 as it now stands.

All, or at least a major part of the seminar, should be structured along problem-solving lines.

Week 1 could start, for example, with the facts of Jones v. Board of Education for the State of Tennessee, 279 F.2d 190 (1968). These facts raise a variable parade of horribles, suggesting every possible objection that people might have to any university disciplinary proceeding: the absence of adequately spelled out standards of conduct; promulgation problems; the substance of the rules; the way in which they were applied; procedural flaws; constitutional flaws; and the like. One could spend an entire introductory session giving people the opportunity to react on a level to the issues raised. Session 2 could involve asking half the class, say, to draft a complaint and the other half to draft a motion to strike the complaint for failure to state a cause of action. One could give them § 1983 of the Civil and Rights Act, other code provisions. One could, to complicate the issue, assume that the school was a private school so as to raise the state action question. One could give them a variety of cases to which we now have represented in Week 2 dealing with right/privilege, state action, contract theories as applied to private schools to give them a basis for thinking
through the theory on which the complaint would be founded.

One could also include issues of _____ ness
whether exhaustion of remedies, the propriety of preliminary injunctions, etc.

The whole enterprise could be entitled "Jurisdiction" to illustrate that the point is to raise the threshold questions of the theory on whether one can even get into court on such claims and, if so, on what theories?
II.

These materials are intended to serve a number of purposes.

A. Background. Wright, The Constitution on the Campus, and Van Alstyne, The Judicial Trend Toward Academic Freedom, describe the trend toward constitutionalization of campus relationships, til recently left largely to the unfettered discretion of "the University"--i.e., its faculty and administration. The cases included are samples of various approaches, old and new.

For background purposes 2 other items not included here may be useful.

- Developments in the Law, Academic Freedom, 81 Harv. L. Rev. 1045 (1968) (extremely comprehensive)

B. The Broad Legal Concepts. The debate as to whether there were constitutional limits on how universities could conduct themselves in relation to students (and faculty) took place in the context of several legal issues. In the public universities the debate focused on the privilege/right distinction, discussed in a general way by Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law.

In the area of the private schools, the debate tended to focus on the scope of "state action" (were the private schools to be viewed as public institutions for constitutional purposes?), or on whether contract or tort theory could somehow be stretched to impose, in effect, constitutional restrictions on private schools that were however not operative by their own force.

C. The Broad Policy Issues. Is it desirable to impose a regime of external legal norms upon the workings of the university? What are the classic arguments against it? This is dealt with to one or another degree in each of the cases included in the materials.
III.

The first document, "A Judicial Document on Student Discipline," is an interesting opinion, first, for its legislative quality, and secondly, for philosophic premises it relies on in specifying the due process requirements of a campus adjudicatory system. A somewhat different philosophy (at least as to what is desirable if not constitutionally required) presumably underpins the "UCLA Code of Procedures Regarding Student Conduct." Please read both documents now, not for their detailed provisions but to get a sense of the general viewpoints they seem to represent. Next week we will return to a more leisurely consideration of particular problems in relation to the UCLA Code.

The Goldstone and Lovell article comments in a general way on the UCLA Code. It also discusses the issue raised by the fact that the UCLA Campus Conduct Committee's decision is merely advisory to the Chancellor, not binding upon him.

The remaining materials raised issues 1) as to the right of counsel in a campus proceeding and the role of non-lawyer student advisors. You may wish to consider the legal and ethical problems facing law students participating in such proceedings; 2) arising out of selective enforcement of rules of conduct by the university administration; and 3) as to the relationship between a student conduct committee hearing and a criminal trial arising out of the same transaction.