D. Allen Remarks on Motion re Student Participation in Student Orgs

Oct 1, 2017

Here is the text of the motion: "The policies of the Harvard College *Handbook for Students* for student organizations pertain to students participating in all student organizations recognized as such by the Commonwealth of Massachusetts. The Faculty recognizes that on a college campus, as in society, basic freedoms and rights can come into conflict with each other. In such situations, the faculty and administration of Harvard College shall establish policies that protect individual freedoms while upholding the educational mission of the College."

Over the course of the past year, many of us have been mainly on the sidelines watching a duel that seemed to be a contest between the claims of the University to regulate toxic student behavior and the claims of an opposed party that student behavior in private

associations is off-limits to University regulation because of the status of the relevant organizations as private associations.

One side has seemed to make mainly a moral and aspirational argument about the sort of behavior and norms that it believes should characterize life on this campus. The purpose of this argument has been to advance an important educational objective – creation of an inclusive environment, where students of all backgrounds can thrive.

The other side has seemed to make an argument about both law and morality—asserting the applicability of a set of associational rights in this context and arguing that the University ought to limit its powers of regulation at the doors of private associations because of the fundamental moral value of associational freedom.

There are problems with both positions. The administration has made a claim for regulation that seems to be, analytically speaking, without

limit. If final clubs, then why not local chapters of political parties consisting mainly of Harvard students, and so on?

The other side has appeared to treat associational rights as if they may never be weighed in the balance against other rights and freedoms. Yet decades ago, for instance in *Rotary International*, the Supreme Court affirmed that states could invoke a compelling state interest in non-discrimination to limit rights of association, and particularly gender exclusive membership practices. From that jurisprudence, we can draw a sturdy moral principle concerning the reasonableness of limiting freedom of association with policies of non-discrimination.

Half-way through the 2016-17 academic year a third party entered the lists. At our December faculty meeting, faculty members, Luke Menand and Skip Gates argued that the relevant aspirational argument should focus not on the clubs' contribution to a toxic environment generally but on the issue of non-discrimination specifically.

One of the great challenges of this issue has been that we faculty are formulating motions, and trying to vote on motions, that bring legal and moral concepts together, but in a forum where it is very hard to clarify all the legal technicalities involved. So, for instance, while the Lewis motion might seem to make good sense on its face, it actually undermines the College's sanctioning power generally. Imagine a hypothetical case in which the *Crimson Pokemon Club* decided to establish an annual ritual that involved a collective commitment to cheat on exams or papers for a day, once a year, each year. The *Crimson Pokemon Club* would not thereby make itself an unlawful organization, but we might well want to sanction students who continued to participate in it.

Most importantly, though, we have gotten ourselves into difficulties because the administration has asked us to think about student behavior, and setting standards for student behavior, and the other

side has asked us to think about the legal status of particular organizations. These two arguments seem never to come into contact with one another.

But they can and should be brought into contact with each other.

As a part of advancing its educational mission, the College has a right to regulate the behavior of students, including their behavior in student organizations. That point is straightforward. As a part of advancing our educational mission, it is also reasonable that the compelling interest in non-discrimination should set constraints on the associational opportunities that students have through student organizations. Now comes of the question of where those powers of the College should apply.

We might say that those powers should apply whenever the organizations are of Harvard, are located effectively on our campus,

and have a demonstrable and negative impact on our learning environment. This would be one way of constraining the application of the principle. But a second avenue is also open to us for answering this question of where the powers of the College to regulate student behavior in student organizations should apply.

I believe that those powers should apply whenever students are participating in an organization recognized by the Commonwealth of Massachusetts as a student organization, as per the text of the Commonwealth's 1989 Anti-hazing Statute.

The Commonwealth of Massachusetts' 1989 Anti-hazing Statute offers, by way of a parenthesis, a definition of student organizations that makes clear that unrecognized and unaffiliated organizations, such as the final clubs, are embraced by the law in its category of student organizations, not because of their formal organizational status but because of their function. You have the text of the law in your papers

for this meeting. That is, the final clubs have a dual conceptual status: even when they are private associations in terms of their governance, they can still be student organizations in functional terms and they can be recognized by the law in both dimensions.

My suggestion is that we, too, following the example of the Law of the Commonwealth of Massachusetts, that is, taking it as a guide to thought, should understand the final clubs as student organizations, even at the same time as they are also, and for other purposes, private associations.

What would it mean for the policies of the College's *Handbook for Students* to regulate student behavior in any student organization recognized as such by the 1989 statute?

(1) It would mean that students currently participating in student organizations that do not adhere to policies of non-discrimination, and other existing campus policies for student organizations, are

currently, as individuals, in violation of the handbook's policies and would be subject to sanctions.

(2) Yet this motion would also mean that the College would not seek to apply its standards for student participation in student organizations to their participation in organizations that are outside this category. In other words, by tracking the natural categorization employed in the law, the motion seeks to define a limit on the College's authority to regulate the associational lives of students.

(3) To what sanctions would students be subject, then, when they do participate in student organizations without adhering to the campus' policies for student organizations? This is precisely the issue we've been debating over the past year, though not formulated in quite this way. Up until May 2016, such students were subject to the sanction of having to participate in unchartered and unrecognized organizations that do not receive privileges of various kinds from the University. That sanction has

proven insufficient to change behavior. The College has now proposed a stage-two sanction. Two different sanctions have been put on the table as possibilities—first, there is the May 2016 policy of withholding of privileges from the students themselves (and not merely from the organizations in which they participate); second, there is something approaching but not identical to the July 2017 policy, suspension or expulsion for continued participation in student organizations that do not adhere to existing campus policies for student organizations.

My own view is that the May 2016 policy is likely to result in arbitrary enforcement, and so I oppose those sanctions despite what might seem to be the value of their incremental approach.

Consequently, I am in favor of the more severe sanction, but only for a failure to bring participation into compliance with the policies governing participation in student organizations. Students who

participate in final clubs and who are able to bring their clubs and their participation in them into compliance with the policies governing participation in student organizations should not be sanctioned. My position is, in this regard, softer than the July 2017 proposal. Those students who participate in final clubs and can win reform for their organization, should be able to keep their clubs. Yet if they cannot win reform, then they must choose between their clubs and continued enrollment at Harvard.

We should expect that this campus will have a diversity of student organizations, including social organizations, and we should expect that many of them will be examples of birds-of-a-feather-flocking-together. But we should require of these flocks that they adhere to policies of non-discrimination and the other policies governing students' participation in student organizations. The reason for constraining our students' associational freedom with the requirements of non-discrimination policies is because we judge such policies to be

necessary for achieving the health and well-being of our student body as a whole, which is itself a foundation for their academic flourishing.

I invite all those with further questions about this motion to reach out to me over the coming month. I'd be glad to explain this motion in further detail and to learn from whatever questions and counter-arguments you might have.