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Notes

STUDENTS AND THE UNIVERSITY: GROUP INTERACTION AND THE LAW

INTRODUCTION

One of the overriding social phenomena in the United States today is a disorganized but lusty youth movement. This movement is determined not only to be seen and heard, but demands to be listened to as well, even if it means burning buildings.¹ Civil authorities are equally determined to maintain order and to protect lives and property, even if it means gassing, arresting, and shooting students.² A result of the rising number of these confrontations is an eighty percent increase in the annual turnover in college presidents in the last three years.³

During 1969 in Kentucky, protest incidents were reported by 18.7 percent of the institutions of higher education.⁴ Although this percentage is lower than the national average of 29.3 percent,⁵ it nevertheless represents a large body of substantive and procedural legal questions for Kentucky's courts and lawyers. In addition, as decision makers, lawyers must be concerned with both the public and the private good. In pure economic terms higher education is a major industry consuming two percent⁶ of the gross national product of \$930 billion and directly involving four percent of our population. More importantly, our colleges and universities represent the major

¹ Witness the disturbance at the University of Kentucky last May in which an Air Force R.O.T.C. building was burned.

² The recent shootings of students at Kent State University in Ohio and Jackson State University in Mississippi are mute testimony to official reaction to student lawlessness. See generally THE PRESIDENT'S COMM'N ON CAMPUS UNREST SPECIAL REPORT ON THE KILLINGS AT JACKSON STATE and SPECIAL REPORT ON THE KENT STATE TRAGEDY (1970).

³ U.S. NEWS AND WORLD REP., Aug. 3, 1970, at 30. At least one commentator however, Robert Nisbet, professor of sociology at the University of California at Berkeley, has flatly asserted that "the back of the revolution is broken." Washington Post, April 19, 1970, § B, at 5, col. 1. He feels, perhaps with some justice as will be discussed later, that the campus rebellions are over. This may be more aptly described as simply an evolution of tactics.

⁴ Hodgkinson, *Student Protest—An Institutional and National Profile*, 71 THE RECORD 552 (1970).

⁵ *Id.* at 554.

⁶ C. JENCKS & D. REISMAN, *THE ACADEMIC REVOLUTION* 13 (1960) [hereinafter cited as *THE ACADEMIC REVOLUTION*].

cultural depository through which civilization is passed on to each new generation.⁷

Last year there were 2,342 colleges and universities in this country.⁸ This number includes 244 public universities, 61 private universities, 336 four-year public colleges, 411 four-year private, non-sectarian colleges, 292 four-year Protestant colleges, 234 Roman Catholic colleges, 226 two-year private colleges, and 538 two-year public colleges.⁹ Of these schools an estimated 145 or 6.2 percent experienced at least one incident of violent protest, and 379 or 16.2 percent experienced disruptive protests.¹⁰ Although two-thirds of all students attend public schools, two-thirds of all protests occur in private institutions.¹¹

TABLE NO. 1¹²
PROTEST BY TYPE OF INSTITUTION

	Violent Protests	Disruptive Protests
Private Universities	13.1%	43.0%
Private Universities	34.4	70.5
4-Year Public Colleges	8.0	21.7
4-Year Private Non-Sectarian Colleges	7.3	42.6
4-Year Protestant Colleges	1.7	17.8
4-Year Roman Catholic Colleges	2.6	8.5
2-Year Private Colleges	0.0	0.0
2-Year Public Colleges	4.5	10.4

This paper is written from the point of view of the lawyer's decision-making role. In it we shall examine the who, what, where, when and how of student protest; the current state of the law in

⁷ Jencks and Reisman suggest—as we will later discuss—that the conflicting desires of the present generation to use the universities to impose their values on the next who wish to use the universities to find their own values may be one of the reasons underlying student dissent. *Id.* at 36.

⁸ A. BAYER & A. ASTIN, *CAMPUS DISRUPTION: 1968-1969*, 4 ACE RESEARCH REP. 8 (1969).

⁹ *Id.* Arbitrarily defining a major university as one that produced one percent of the total Ph.D.'s for that year, Jencks and Reisman estimate there have been 30 since 1962. *Supra* note 6, at 13. There are of course specialty and professional schools, seminaries, military schools, teacher colleges, medical, law and all forms of graduate schools.

¹⁰ BAYER & ASTIN, *supra* note 8, at 8. Bayer and Astin define violent protest as: burning buildings; damage to buildings or furnishings; destruction of records, files and papers; campus marches, picketing or rally with physical violence; one or more persons killed; some persons injured. Non-violent protests were: occupation of buildings or sections of buildings; barring entrance to buildings; holding officials captive; interruption of school functions; general campus strike or boycott of classes or of school functions. *Id.*

¹¹ Bayer & Astin, *Violence & Disruption on the U.S. Campus*, 1968-69 EDUCATIONAL RECORDS 338 (1969).

¹² BAYER & ASTIN, *supra* note 8, at 8. The authors also break down these statistics further in relation to school size and selectivity. *Id.* at 16.

coping with the problem; and finally how we as lawyers might better resolve university conflicts legislatively, judicially, administratively and personally in the future.¹³ As Professor Paul Carrington of the University of Michigan Law School has said:

An appropriate task for a creative lawyer is fashioning of a response that is suitable to the particular situation, not destructive and sufficiently effective to relieve the public odium. It is appropriately a lawyer's task because it requires control of the emotions of fear, guilt and vanity, which threaten to cause decision makers to indulge themselves in harmful choices.¹⁴

"United we stand, divided we fall" is a good motto not only for the Commonwealth of Kentucky but for pluralistic America. "Individuals may form committees," Benjamin Disraeli once observed, "but only institutions can make a nation."¹⁵ This is true in our own country.¹⁶ This paper shall analyze campus protest in terms of the plural or group approach.¹⁷ We shall assume that campus conflict can be compartmentalized into various groups, with individual motivations, goals and tactics, and that the current problems are generated by clashing interests. It is the purpose of the law to provide for an orderly, but fair and effective, way for the parties to resolve those conflicts.

¹³ Although much has been written about student protest, very few works have pursued our purpose. Those that have usually involve localized situations. See, e.g., THE REP. TO THE N. J. LEGISLATURE CONCERNING THE RECENT EVENTS AND DISRUPTIONS AT THE NEWARK AND CAMDEN CAMPUSES OF RUTGERS, THE STATE UNIV. (1969); REPORT OF THE SELECT COMM. ON CAMPUS DISTURBANCES—CALIFORNIA LEGISLATIVE ASSEMBLY (1969). Other reports have been written only from the point of view of a particular institution. See, e.g., S. LINOWITZ, CH., CAMPUS TENSIONS: ANALYSIS AND RECOMMENDATIONS, REPORT OF THE SPECIAL COMM. ON CAMPUS TENSION OF THE AMERICAN COUNCIL ON EDUCATION (1969) [hereinafter cited as ACE REP. ON CAMPUS TENSIONS]; G. AVERY, CH., REPORT OF THE SUBCOMM. ON EASING TENSIONS IN EDUC. OF THE DEPT. OF HEALTH, EDUC. & WELFARE, OFFICE OF EDUC. (1969) [hereinafter cited as HEW REP. ON EASING TENSIONS IN EDUCATION]. We hope to give an independent and concrete analysis with defined goals for change. See also M. EISENHOWER, CH., NATIONAL COMM. ON THE CAUSES AND PREVENTION OF VIOLENCE, INTERIM STATEMENT ON CAMPUS DISORDERS (1969) [hereinafter cited as INTERIM STATEMENT ON CAMPUS DISORDERS]; D. ZAMBLANCO, STUDENT UNREST ON CAMPUS, LIBRARY OF CONG. LEGISLATIVE REFERENCE SERVICE, 69-159-130 (1969); Bayer & Astin, *Supra* note 8.

¹⁴ Carrington, *Professionalism and Student Protest*, 55 A.B.A.J. 943 (1969).

¹⁵ STAFF REP. TO THE NATIONAL COMM'N ON THE CAUSES AND PREVENTION OF VIOLENCE, 211 (1969) [hereinafter cited as STAFF REP. TO THE VIOLENCE COMM'N]. Compare this with Arthur Bentley's statement, ". . . [T]he society itself is nothing other than the complex of groups that compose it." O. YOUNG, SYSTEMS OF POLITICAL SCIENCE 82 (1968).

¹⁶ THE ACADEMIC REVOLUTION, at 9.

¹⁷ For a succinct statement of this theory and its strengths and weaknesses see YOUNG, at 79. See also G. MCCONNELL, PRIVATE POWER AND AMERICAN DEMOCRACY (1966).

The participants can be divided into two broad categories. First, there is the college community: students, faculty, administrators, trustees, alumni and parents. Secondly, there are special interest groups from the greater community: benefactors, local, state and federal governments, police authorities and other concerned groups.

In the first section of this paper, we shall take each of these groups and survey their motivation, their goals, and the means they use to achieve those goals. The second section of the paper will examine the parameters of student rights and conduct limitation as established by the courts. The third and final section will be a synthesis of all of this basic material in which we will attempt to determine the true interests of each group and how those interests can best be promoted.

I. ANALYSIS OF THE PROBLEM

A. *College Community*

1. Students

The extent of student involvement in disturbances is the subject of some dispute. Most officials, such as Attorney General John Mitchell, assert that the percentage of disrupters is very small—two percent¹⁸ of seven million students at 2,300 colleges and universities in the United States.¹⁹ Others, who until recently were primarily the student radicals themselves, assert that a far larger segment of students have been activated. At the beginning of 1970, an internal report of the United States Department of Health, Education and Welfare asserted that one-third of all college men and one-fourth of all college women had participated in a demonstration.²⁰ The American Council on Education [hereinafter ACE] states that fifteen percent of college students have participated in demonstrations. Part of the disparity in these figures may result from the desire of some groups either to minimize the extent of those involved by counting only the active

¹⁸ *Hearings on Campus Unrest Before the Special Subcomm. on Educ. of the House Comm. on Educ. and Labor*, 91st Cong., 1st Sess., at 861 (1969) [hereinafter cited as *Hearings on Campus Unrest*].

¹⁹ ACE REP. ON CAMPUS TENSIONS, at 9. The staff of the National Comm'n on the Causes & Prevention of Violence number militant students at less than 100,000 or two percent of the total college population, and active sympathizers as an additional four to five percent. STAFF REP. TO THE VIOLENCE COMM'N, at 215-16.

²⁰ HEW REP. ON EASING TENSIONS IN EDUCATION, at 20-21, citing a Gallup survey in the N. Y. Times, May 25, 1969, § B, at 5, col. 4.

leadership, or to maximize the extent by counting even non-involved by-standers.²¹

There are certainly sub-categories among the students. Dr. Fred H. Harrington, former president of the University of Wisconsin, has compiled a comprehensive cataloging of students. Dr. Harrington proposes the following classifications: first, the nihilist who wishes to destroy society; second, the revolutionary who wishes to remake the system and control it; third, the radical who wants reforms instantly; fourth, the committed student who will work actively and constructively for change; and fifth, the concerned student who, although detached on a day-to-day basis, will respond when confronted with an immediate situation. The other categories are self-explanatory—the ambivalent, the indifferent, and the apathetic.²² Action, responsible or irresponsible, will spread like a shock wave from one group to the next, growing larger until it is muted by the nonresponsive.

The nihilists and the revolutionaries are certainly only a tiny fraction of all students. The radicals and the committed form successively larger groups, but are still, in total, a minority. An important question still to be answered is how many students comprise the concerned category. The activists, whatever their numbers, are the most visible and vocal. Their worth is hotly debated: Vice-President Spiro Agnew calls them “effete snobs”; Yale psychologist Kenneth Keniston considers them a moral elite and not a “rabble of rejects.”²³

a. Motivation

Student motivation falls into four general areas. The first of these is ideological, including moral, philosophical and political convictions. According to Keniston, students are not an undisciplined rabble pro-

²¹ ACE REP. ON CAMPUS TENSIONS, at 9. Distinctions must be made, however, as to just what demonstrations, disorders, etc. are. This will be attempted later in the paper.

²² Harrington, *Universities Are Perishable*, 3 COMPACT 17-18 (1968).

²³ Keniston, *Notes on Young Radicals*, CHANGE, Nov.-Dec., 1969, at 32. In the same article the author explains his attitude with a study in morality that used three levels of morals: the pre-conventional based on individual pain-pleasure; conventional, based on social law and order and current community standards; and post-conventional based on long range community good (such as the Golden Rule, etc.). The study showed that fifty-six percent of protestors as opposed to twelve percent of the non-protestors were at the post-conventional stage. Eighty-five percent of non-protestors and thirty-four percent of protestors were merely at the conventional stage. *Id.* at 27. An interesting rejoinder to this view is made by Michael Lerner, a graduate student in political science and psychology at Yale. Mr. Lerner asserted that a reverse bigotry is often at work in such studies and that those who describe the radicals as an elite are blindly using their own class standards and prejudices. Wall Street J., Dec. 30, 1969, at 8, col. 3.

duced by permissive parents, but a moral elite produced by a highly principled family culture instilled in children by their parents.²⁴ These high principles cause the student to seek to remedy the social malaise of American society.²⁵ This malaise includes: inequitable distribution of wealth, power, and prestige;²⁶ racism;²⁷ the military-industrial complex;²⁸ the materialism of society;²⁹ environmental pollution; and, of course, the Indochina War.³⁰ This last point probably best demonstrates the moral thesis. Students cite the Nuremburg trials to bar military recruiters from campus.³¹ Beyond these negative issues the truly idealistic student wants the university to be a positive force for social good, particularly in its immediate environment.³²

The idealistic student is also concerned with the relevancy of his education to the world in which he is living.³³ Psychologist Mervin B. Freedman observed as long as five years ago that the "students are restless and dissatisfied because they recognize—and not always consciously that the education they are receiving is not functional to the world they will be inhabiting in twenty years."³⁴ In addition, students are attacking the "multi-versity" system, the "publish or perish" teacher criteria, and the "undergraduates are a necessary evil" syndrome.³⁵

²⁴ Keniston, *supra* note 23, at 30.

²⁵ ACE REP. ON CAMPUS TENSIONS, at 12-14.

²⁶ HEW REP. ON EASING TENSIONS IN EDUCATION, at 3.

²⁷ *Id.*; *Hearings on Campus Unrest*, at 871.

²⁸ *Id.*

²⁹ *Id.*

³⁰ ACE REP. ON CAMPUS TENSIONS, at 36.

³¹ Anderson, *The Whys and Hows of Student Revolt*, Washington Post, June 30, 1968, § B, at 1-5. One cannot escape moral responsibility by pleading the orders of superiors. Interestingly the author points out that many American teachers are the men, or the sons of men, who fled Nazi Germany. These are the intellectuals who viewed government as ". . . irremediably corrupt itself and corrupting anyone who touches it. The only choices for the moral man are the underground, open resistance or emigration." *Id.*, § B, at 1, col. 1.

³² *Hearings on Campus Unrest*, at 871; STAFF REP. TO THE VIOLENCE COMM'N, at 217-20.

³³ ACE REP. ON CAMPUS TENSIONS, at 12-14; *Hearings on Campus Unrest*, at 871; R. JONES, EXPLANATION FOR STUDENT UNREST IN THE UNITED STATES TODAY: AN ANALYSIS OF SELECTED COMMENTARY, GOV'T & GEN. RESEARCH DIV., LIB. OF CONG. 28 (1969). It should be noted that part, possibly the greater part, of student demand for reform in this area stems from the problems of alienation which we are about to discuss.

³⁴ JONES, *supra* note 33, at 25. It is interesting to compare to this the words of Mario Savio the leader of Berkeley's free speech movement which occurred concurrently. In the introduction he wrote for H. DRAPER, *BERKELEY: THE NEW STUDENT REVOLT* (1965), Savio said:

It is surprising at first after taking a semester of undergraduate courses here—except in the natural sciences or mathematics—to realize how little you have learned. It is alarming to realize how much busy work you have done: so many papers hastily thrown together, superficially read by some graduate-student teaching assistant. *Id.* at 25.

³⁵ STAFF REP. TO THE VIOLENCE COMM'N, at 217-20.

But student idealism does not end at the campus boundary. Increasingly students are frustrated by an outside world that tries to direct their lives but gives them no way to shape society. If the new federal voting law is struck down by the Supreme Court, students may still be sent to die for their country by representatives for whom they cannot vote.³⁶

The next three categories of student motivation are behavioral in nature. The first of these lies in the area of psychology. It is a profound feeling of social alienation.³⁷ It is this feeling, as well as idealism, from which demands for an end to the impersonal "multiversity" spring.

For certain minority groups the basis for this alienation may be discrimination, but clearly for the majority of students it is the growing technocracy and its products.³⁸ Students feel society is being dehumanized—the machine is being put before the man.³⁹ According to the philosopher Herbert Marcuse, hero of the underground young, America is a totalitarian country that used material abundance rather than terror to stifle dissent. Ours is a civilization of the impersonal where massive, rich, inhuman organizations serve the technocracy, destroying men's personalities and wills.⁴⁰

From our technocracy springs the great psycho-social phenomenon that has shaped the mind of this generation—the nuclear bomb⁴¹ and the ever-present awareness that one man may within a matter of moments literally destroy our entire world. Today's students are the children reared during the cold war and the bomb-shelter movement. We may push the fear of nuclear holocaust from our conscious mind, but not from the subconscious.

Put simply, students are rebelling against and also trying to do something about, everything that is remote, impersonal and alienating in human relations. In a significant sense, they are increasingly becoming Dostoevski's Underground Man who protests against the ever-increasing rationalization and centralization and bureaucratizing of human affairs until everything will be so clearly calculated and designated that there will be no more incidents of adventures in the world.⁴²

³⁶ Morris, *Student Participation in Law School Decision Making*, 22 J. LEGAL ED. 133 (1969). [ED. NOTE: As this issue of the Law Journal was going to press, the Supreme Court upheld the power of Congress to lower the voting age in all states to eighteen as to federal elections, but not as to state elections.]

³⁷ ACE REP. ON CAMPUS TENSIONS, at 12-14.

³⁸ JONES, *supra* note 33, at Intro.

³⁹ HEW REP. ON EASING TENSIONS IN EDUCATION, at 3.

⁴⁰ Anderson, *supra* note 31, § B, at 1, col. 1.

⁴¹ Morris, *supra* note 36, at 130; Harrington, *supra* note 22, at 17.

⁴² Morris, *supra* note 36, at 133.

The next area of relevant motivational factors is sociological in nature. They stem from two sources: American economic affluence and the conflicts between young and old.

A distinctive youth sub-culture has been created by the division between young and old, and by delayed job-seeking caused by the demands for greater job skills and made possible by our affluence.⁴³ The image of this sub-culture is reinforced by the communal living of a residential college and by the preoccupation of the entertainment media with the youth cult. Television⁴⁴ is particularly influential. With McLuhan-like magic it creates a youth image of power, and spreads the example of youthful disorder with contagious dispatch.⁴⁵

In addition, students enter school more mature physically and intellectually than ever before.⁴⁶ They then begin an extended period of adolescence that socially and emotionally delays the adulthood they are already embarking upon.⁴⁷ The students arrive in this limbo after years of intense social and academic pressures.⁴⁸ They begin to seek more control of their own lives—"freedom of personality." This leads to a desire to play a more leading role in the functioning university⁴⁹—and greater freedom in their personal living.⁵⁰

Those who view these demands as undesirable, or at least the means taken to gain them undesirable, often blame the students' failure to obey authority on permissiveness in the American home. They believe insufficient authoritarianism during the formative years causes a lack of proper submissiveness in institutions of higher education.⁵¹ However, a number of studies have been made which tend to discredit the

⁴³ JONES, *supra* note 33, at Intro.; Carrington, *supra* note 14, at 943-44.

⁴⁴ Which is a product of the technology we have previously cited as being a source of alienation.

⁴⁵ JONES, *supra* note 33, at 29. This point is well analyzed by Dr. S. L. Halleck in his article *Hypothesis of Student Unrest*, PHI DELTA KAPPA, Sept. 1968, at 31.

⁴⁶ Harrington, *supra* note 22, at 17.

⁴⁷ *Id.* Dr. Bruno Bettelheim, prominent psychologist and psychiatrist at the University of Chicago says, ". . . [W]hat makes for adolescent revolt is the fact that a society keeps the next generation too long dependent in terms of mature responsibility and a striving for independence—thus antagonizing and promoting the conflict of generations." *Id.*

⁴⁸ Harrington, *supra* note 22, at 17; Anderson, *supra* note 31, § B, at 2, col. 1. Interestingly enough the study of the Select Committee of the California Legislature showed student demand for improvements in the primary and secondary school systems in preparing them for college. REPORT OF THE SELECT COMM. ON CAMPUS DISTURBANCES OF THE CAL. LEGIS. ASSEMBLY 16 (1969).

⁴⁹ *Hearings on Campus Unrest*, at 871.

⁵⁰ STAFF REP. TO THE VIOLENCE COMM'N, at 217-20.

⁵¹ Professor Nisbet says, "Having become accustomed in their homes to getting attention to whatever was on their minds, and of course incessant and lavish praise for their brightness, is it not to be expected that when the children go off to the university the same attention should be given their interests and needs?" The Washington Post, Apr. 19, 1970, § B, at 5, col. 2.

permissiveness theory by showing that many students are motivated by a highly developed moral conscience.⁵²

Another interesting hypothesis is that this youth culture has been infested with a blind faith in "scientism."⁵³ Students reared in the belief that, with enough money, "American know-how" can solve any problem are wondering why cultural, economic and social problems still exist. They ask why our scientist-priests and engineer-wizards permit such things as poverty or pollution unless a taint of evil infects adult society.

Two other conflicting hypotheses about youth culture are that the students have been acclimated to a world of social flux,⁵⁴ and more pessimistically that constant change has introduced cultural shock.⁵⁵ The people who believe the first theory fall into two groups. Those who are worried about a society in which values are in constant flux fear that the young, who have adapted to social flux, no longer have any values. Conversely, those who see this adaptation as healthy feel that our young have acquired the ability to evolve their values to meet new situations. The people who believe the second theory maintain that a human being cannot adapt to a world of incessant change. They assert that our culture has driven our children into a path of psycho-neurotic hysteria.

Whatever theoretical variation one accepts, there can be no doubt that there is a "generation conflict."⁵⁶ As Aristotle wisely asserted: ". . . [T]he young . . . love honor and victory 'more than they love money, which indeed they love very little, not having yet learnt what it means to be without it . . .'"⁵⁷ The great modern proponent of "generation conflict" is Dr. Lewis S. Feuer, Professor of Sociology at the University of Toronto.⁵⁸ He points to:

. . . a desire on the part of the younger generation to assume the authority of the older; from a rejection of the values which have motivated the old.⁵⁹ Such conflicts occur when historical circumstances combine to "de-authorize" the older generation in the eyes

⁵² Keniston, *supra* note 23, at 29-30.

⁵³ JONES, *supra* note 33, at 29. It would be an interesting paradox for students to be alienated by technology but grounding their philosophy of life on scientism.

⁵⁴ Morris, *supra* note 36, at 128.

⁵⁵ JONES, *supra* note 33, at 29. See also A. TOFFLER, *FUTURE SHOCK* (1970).

⁵⁶ JONES, *supra* note 33, at Introduction; ACE REP. ON CAMPUS TENSIONS, at 12-14.

⁵⁷ Feuer, *Conflict of Generations*, SAT. REV., Jan. 18, 1969, at 67.

⁵⁸ See L. FEUER, *THE CONFLICT OF GENERATIONS: THE CHARACTER AND SIGNIFICANCE OF STUDENT MOVEMENTS* (1969).

⁵⁹ This of course reflects back to the moral motivation of students. This theory in fact explains part of their identification with the underdog. Feuer says: "Conceiving of themselves as deceived, exploited sons, they feel a kinship with the deceived and exploited of society as a whole." Feuer, *supra* note 57, at 66.

of the young; to invalidate the cultural, social or political myths which have served to guide the past.⁶⁰

The generation conflict theory as explained by Feuer calls for a youth movement to be a carrier wave of a "peasant, labor, nationalist, racial or anti-colonist movement."⁶¹ This pattern is followed by the Students for a Democratic Society [hereinafter SDS] in proposing a "Student-Worker Alliance."⁶²

Whether or not there is validity to the theory of "generation conflict," there is, as Christopher Jencks and David Reisman have pointed out, conflict on whether the students shall use the college to find their own values or whether society will use the school to mold values for the students.⁶³ Other groups, however, de-emphasize "generation conflict." Michael Miller, who was a graduate student at Berkeley and is now a visiting scholar at Columbia, says that "generation conflict" is an arch-type social mechanism to all revolutions. It is much more important to realize, for example, that the 1964-66 Berkley troubles were "the latest and most explicit confrontation at Berkeley between two antagonistic political styles."⁶⁴

Although Keniston also accepts the "generation conflict" theory, he sees it much more likely to produce a drop-out, *i.e.* the alienated, hippie, drug user, inward or selfishly oriented student. He prefers the students who conform to his own "red diaper theory" where a new generation of young identifies with the positive radical values of their parents.⁶⁵ This concept should be comforting to those whose expensive town houses and "committed" children are being blown up while producing home-made bombs.

The last group of student motivational factors is a compilation centering around what can be termed "misfits," people who are motivated to attend college by non-academic reasons or who would be better served by pursuing some other worthwhile endeavors. Bruno Bettelheim of the University of Chicago describes them:

⁶⁰ JONES, *supra* note 33, at 36.

⁶¹ Feuer, *supra* note 57, at 54-55.

⁶² R. JONES, *THE NEW LEFT: STUDENTS FOR A DEMOCRATIC SOCIETY, A SUPPLEMENT, GOV'T & GEN. RESEARCH DIV. LIB. OF CONG. 1* (1969). It seems in fact they were trying to create their own carrier wave. Carl Davidson, a former SDS national officer, wrote that the work in project was "the beginning of a long-range endeavor to 'radicalize' the working class—to permeate industry with revolutionary-minded workers." *Id.* at 2.

⁶³ *THE ACADEMIC REVOLUTION, supra* note 6, at 36.

⁶⁴ S. GILMORE AND M. MILLER, *REVOLUTION: THE CRISIS IN AMERICAN EDUCATION* 59 (1965).

⁶⁵ Keniston, *supra* note 23, at 28. See also K. KENISTON, *THE UNCOMMITTED: ALIENATED YOUTH IN AMERICA* (1969); and *YOUNG RADICALS; NOTES ON COMMITTED YOUTH* (1965).

There are, today, far too many students in the colleges who essentially have no business to be there. Some are there to evade the draft,⁶⁶ many others out of a vague idea that it will help them to find a better paying job,⁶⁷ though they do not know what jobs they want, and again many go to college because it is expected of them. Their deep dissatisfaction with themselves and their inner confusion is projected against the institution first, and against all institutions of society secondarily, which are blamed for their own inner weakness.⁶⁸

In addition there are many who attend college because there is no other way to advance their education⁶⁹ since adequate vocational⁷⁰ and technical training is lacking in America.

Finally, there is the paranoid, as Bettelheim classifies the nihilists. "Consumed by a self-hatred they try to escape by fighting *any* establishment . . . Their true motive is hate, not a desire for a better world."⁷¹

b. Goals

The following is a listing of the top ten protest issues ranked by frequency both for violent and non-violent protest as listed by Bayer and Astin in their ACE Report.⁷²

VIOLENT

1. Special educational programs for minority groups, *e.g.*, black studies, compensatory programs

NON-VIOLENT

1. Special educational programs for minority groups

⁶⁶ It will be interesting to see the effects if any of the new draft lottery on college attendance.

⁶⁷ This is a serious consideration. It has been observed that "given the fact that much of society has made education a prerequisite to participate in its most lucrative occupations, the desirability of attending an accredited institution is greatly enhanced." Comment, *Antitrust Law-Group Boycotts-Private Association*, 21 CASE W. RES. L. REV. 314 (1969).

⁶⁸ JONES, *supra* note 33, at 23.

⁶⁹ Wall Street J., May 21, 1970, at 14, col. 2.

⁷⁰ All citizens should receive as much liberal arts training as they can absorb, that they may develop their humanity, but if in addition they have a talent for being a mechanic or carpenter they should be able to develop that talent free of the reverse snobbery of college education. This attitude may have been a necessary shield in an earlier America where an "honest day's work" was better than school, but hopefully we are leaving such short sightedness behind and will recognize it is just as bad to go overboard in the other direction. Our society needs men of talent in finance, law, painting and auto-tuning. It is extremely foolish to let an artificial attempt to create status cause us to waste any of our human resources.

⁷¹ JONES, *supra* note 33, at 18.

⁷² BAYER & ASTIN, *supra* note 8, at 22-23.

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| 2. Students participation in decision making, <i>e.g.</i> , inclusion on committees | 2. Student participation in decision making |
| 3. Institutional student disciplinary practices | 3. U.S. Military Policy, <i>e.g.</i> , Vietnam, CBW, ABM |
| 4. Lack of administration attention to previous protest | 4. Institutional student disciplinary practices |
| 5. Administrative indifference or inaction concerning local community problems | 5. Institutional procedure |
| 6. U.S. Military policy | 6. On-campus recruiting by government |
| 7. R.O.T.C. programs | 7. Lack of administration attention to previous protest |
| 8. Special admissions policies for minorities | 8. Institutional student disciplinary practices |
| 9. On-campus recruiting by government or industry. | 9. Special admissions policies for minorities |
| 10. Faculty, <i>e.g.</i> , academic freedom, hiring, tenure | 10. Selective Service policies |

As indicated by the above listing of issues, students are not necessarily pursuing one goal but rather a variety of causes. It is interesting to note that all but one of the top ten issues of violent protest (U.S. military policy) are campus oriented issues. Likewise, only two of the ten leading non-violent protest issues are non-campus oriented. Of course such things as ROTC and campus recruitment do reflect on broader issues. One should also differentiate between the protests of black students and white students and among the various factions within these two groups.⁷³

Among activist students opinion is sharply divided. There are conservative students⁷⁴ who battle the leftists. There are the great majority of committed or concerned students who are motivated toward reform but who are not necessarily violence-prone until radicalized by the extreme left or right. These students want changes. Their desires include the following: an end to poor and indifferent undergraduate teaching, courses more relevant to the "real" world in which they will live, the rights of adults in their personal lives, more respect from the

⁷³ HEW REP. ON EASING TENSIONS IN EDUCATION, at 17.

⁷⁴ Fraternity men and athletes seem fertile ground for the counter liberation of liberated buildings.

faculty and administration, a greater participation in the leadership of the university, a detailed student code with due process protection, more information on the university decision-making process, confidentiality of student records, social concern inside and outside of the university (*e.g.*, policies and active programs to deal with racism, poverty, militarism, sexual discrimination, and ecology), an end to excessive force and harassment by police, and greater political influence in society to combat specific issues.⁷⁵

These are the goals for which radical students mobilize student opinion. However, even the so-called new left is not a unified group. The new left is a loose term stretched to include black students, drug cultists, white students, Marxists, social idealists, existentialists, pacifists, anarchists, draft protesters, dissenters, nihilists, and disciples of C. Wright Mills,⁷⁶ and Herbert Marcuse.⁷⁷ Some are not even students. They include faculty or drop outs who continue to live around campuses, and such groups as the yippies.

The black students' goal in general is to "make the system work better for their specific needs and interests."⁷⁸ They are concerned with black studies programs, admission standards and special facilities.

⁷⁵ YOUNG, *supra* note 11, at 22-23; STAFF REP. TO THE VIOLENCE COMM'N, at 217-20; ACE REP. ON CAMPUS TENSIONS, at 19. "They expect, and demand, that a university pursue knowledge for its own sake, not for self-aggrandizement or military purposes. They expect, and demand, that faculty members seek the truth for their love of it, not for prestige, government, consultation or promotion. They demand that an educational community of scholars with ordinary human relationships not be rigidly controlled by rules, regulations and IBM machines. Perhaps most of all they expect people to take all of our democratic ideals seriously just as they do." Morris, *supra* note 36, at 134.

⁷⁶ See C. MILLS, *THE POWER ELITE* (1956). Mills maintains that our institutions are controlled by a small, elite group who went to the same schools, share the same values, and manipulate society to suit themselves. "The people of the higher circles may also be conceived as members of top social status, as a set of groups whose members know one another, see one another socially and at business, and so, in making decisions, take one another into account." *Id.* at 11. David Reisman is one of those opposing this view, asserting that the activities of our institutions are subject to the veto of many special interests, both in the particular institutions and in society as a whole. *THE ACADEMIC REVOLUTION*, *supra* note 6, at 10.

⁷⁷ His views have previously been discussed in the text. See text accompanying note 40, *supra*. See also H. MARCUSE, *ONE DIMENSIONAL MAN* (1956); P. DOWNING, *STUDENT DISORDERS: A STUDY OF CULTURAL AIMS, GOV'T & GEN'L RESEARCH DIV., LIB. OF CONG. I* (1969); Stanmeyer, *The New Left and The Old Law* 55 A.B.A.J. 320 (1969).

⁷⁸ HEW REP. ON EASING TENSIONS IN EDUCATION, at 19-20. It would seem that as far as university activity goes the black student is content to leave more general racial-social protest to groups oriented more to off-campus situations. It is interesting to compare black student demands for higher black admission rates, remedial and tutorial programs, and monetary aid, REPORT TO THE N.J. LEGISLATURE CONCERNING THE RECENT EVENTS AND DISTURBANCES AT THE NEWARK AND CAMDEN CAMPUSES OF RUTGERS, THE STATE UNIVERSITY (1969), with the Black Panther ten point demands:

1. We want freedom. We want power to determine the density of our Black Community.

(Continued on next page)

Drug cultists can be considered part of the estranged group. For the most part, they seem to have no social or university goals. They are not interested in reforming the campus or society, but in "doing their own thing" which generally is passive and self-centered.⁷⁹

The Marxists want a change in the national social structure, although they are vague about the specifics of their new order. They are the most divisive group, splintering and re-splintering among themselves. A notable example of this division over objectives is the split of the SDS into two movements at its national convention, and the subsequent split within one of the resulting segments.

The first division in the SDS occurred between the progressive labor faction and the national officer faction. The progressive labor group espouses the classical Marxist doctrine of international proletariat revolution. Its leaders seek to establish the student-worker alliance previously mentioned. Their international orientation brings them into conflict with the goals of the black student movement, the women's liberation movement, and other similar groups which they view as primarily nationalistic and subversive to their own goals.

While they strongly oppose what they call 'racism' on campuses and elsewhere, Progressive Labor leaders . . . scoff at demands for black student control of black studies programs because such programs only build student power and nationalism and fail to 'fight the super-exploitation of black working people.'⁸⁰

The members of the national officer faction, although the smaller of the two SDS divisions, retained most of the original assets. Their

(Footnote continued from preceding page)

2. We want full employment for our people.
 3. We want an end to the robbery by the *capitalist* of our black community.
 4. We want decent housing, fit for shelter of human beings.
 5. We want education for our people that exposes the true nature of this decadent American society. We want education that teaches us our true history and our role in the present day society.
 6. We want all black men to be exempt from military service.
 7. We want an immediate end to police *brutality* and *murder* of black people.
 8. We want freedom for all black men held in federal, state, county and city prisons and jails.
 9. We want all black people when brought to trial to be tried in court by a jury of their peer group or people from their black communities as defined by the Constitution of the United States.
 10. We want land, bread, housing, education, clothing, justice and peace. And as our major political objective, a United Nations-supervised plebiscite to be held through the black colony in which only black colonial subjects will be allowed to participate, for the purpose of determining the will of black people as to their natural destiny.
- R. JONES, THE BLACK PANTHERS, GOV'T & GEN. RESEARCH DIV., LIB. OF CONG. 6-7 (1970).

⁷⁹ THE ACADEMIC REVOLUTION, *supra* note 6, at 49.

⁸⁰ JONES, *supra* note 62, at 5.

view was that the revolution must be forged from a grand youth alliance of revolutionaries, blacks, women liberationists, and the young. The Revolutionary Youth Movement [the name adopted by the national officer faction, hereinafter the RYM] decided its first step was to enlist the high schools. Their tactics to achieve this goal promptly split the RYM into the RYM-I and the RYM-II.

The RYM-I, better known as the "weatherman"⁸¹ faction, contends that "to win high school students to their cause, they must fight to prove they are not timid, physically ineffective intellectuals."⁸² Those are the bomb makers. The RYM-II holds, however, that peaceful tactics are imperative in forging the youth alliance and mobilizing high-schoolers, because violence might alienate the middle class and cause a backlash.

The Marxists along with the anarchists, nihilists and yippies are not trying to reform the university. Their goal is not academic but political. They wish to overthrow the existing social order,⁸³ and one step toward this objective is to destroy and close the schools.

Pacifists seek an end to all forms of militarism. They join the draft protestors in opposing selective service, and they attack the "military-industrial" complex. They want an end to defense research on campus, R.O.T.C., and recruiting by the military and industries which produce military goods. Their activity centers mainly on opposing the Indo-china War.

Young teachers involved in protests largely fit into one of the above categories. A special word, however, needs to be said about the drop-outs who form a "drone" colony on various campuses. To a great extent they are drug cultists, nihilists, anarchists and revolutionaries. Although not registered for class they come on campus and join and sometimes ferment student protest. From this group is probably drawn the widely publicized nomadic revolutionary fringe which allegedly moves from campus to campus inciting disturbances.

All of these new leftist groups contribute to the radical leadership on American campuses today. In addition to their individual purposes they unite on certain common goals, such as amnesty, student power, barring police from campus and radicalizing the moderate students for confrontation.⁸⁴ According to a recent Presidential Report this last

⁸¹ From the song, "Subterranean Homesick Blues," Bob Dylan.

⁸² JONES, *supra* note 62, at 9.

⁸³ Nisbet, *supra* note 51, § B, at 5, col. 1; HEW REP. ON EASING TENSIONS IN EDUCATION, at 19-20.

⁸⁴ YOUNG, *supra* note 11, at 22-23; ACE REP. ON CAMPUS TENSIONS, at 19. A Stanford University graduate student who had been involved at Berkeley, exhorted his fellow students "to take the power away from the trustees of this university." Anderson, *supra* note 31, § B, at 3, col. 3.

goal is being achieved, in large part, because of the issues raised by the invasion of Cambodia, and because of the actions of police and National Guard at Kent State and Jackson State Universities.⁸⁵

The small number of students involved in demonstrations shows that a majority of students still seek an education. This majority is producing its own moderate leadership. For example Steve Kelman, a Harvard student, said in a commencement speech:

There is only one way we can gain the respect and overcome the hostility of the American people. And that is by addressing ourselves to the unromantic and unexciting problems which just happen to be the problems which affect the ordinary American in his day-to-day life. . . . [F]or in the final analysis it can only be the American people, not a student elite pledged to one-party dictatorship [that can bring about change].⁸⁶

c. Tactics

Students possess time and "the numbers."⁸⁷ A distinct and necessary student tool has been faculty support. And at least a part of the students have been studying revolutionary tactics. Another advantage to students has been the quasi-sanctuary status of the campus and administrators' reluctance to expel because it has been charged by some students that they would be expelled to a "death sentence" in Vietnam.

"One of the distinguishing features of student life is that its participants are allowed to make mistakes without paying too heavy a price."⁸⁸ In addition students have a psychological appeal to Americans—the appeal of youth and the passion of moral righteousness.

To achieve their goals students usually seek an alliance with faculty members. The student tactic now most familiar is the "protest". A typical successful campus movement involves eight steps:⁸⁹

1. "The building of conscience" in which leaders establish presence, recruit a radical nucleus and raise a moral issue on university policy.
2. A physical act is committed to confront the administration.
3. A group of tenured professors are found who will support stu-

⁸⁵ U.S. NEWS AND WORLD REP., Aug. 3, 1970, at 28.

⁸⁶ N.Y. Times, June 12, 1970, at 38, col. 3. It is interesting to compare this statement with the distinction between maturity and immaturity made by J. D. Salinger: "The mark of the immature man is that he wants to die nobly for a cause, while the mark of the mature man is that he wants to live humbly for one." J. SALINGER, *THE CATCHER IN THE RYE* 170 (1945).

⁸⁷ In The Doors song "Five To One."

⁸⁸ *THE ACADEMIC REVOLUTION*, *supra* note 6, at 49.

⁸⁹ Anderson, *supra* note 31, § B, at 1, col. 3.

dents against administrators who attempt to maintain their authority. The faculty meets and votes on the issue.

4. A faculty committee offers to mediate.
5. Even token punishment is resisted, by demands for amnesty, to show that the administrators are in the wrong.
6. The student majority is radicalized for amnesty.
7. Faculty votes amnesty discrediting administrators to the trustees.
8. Faculty, now having second thoughts about destroying the university, are cold to the next student plea, immunizing the university.

"But the formula does not work automatically. It is extremely vulnerable to chance and circumstances. (Students sense this vulnerability; they talk endlessly about tactics while they only rarely discuss ideology.)"⁹⁰

Students are not asserting power but rather are obstructing it.⁹¹ Table Number 2 is a list of tactics used in demonstrations and the percentage in order of frequency of all schools in the United States in which they were used.

TABLE NO. 2⁹²

PERCENTAGE OF INSTITUTIONS EXPERIENCING A GIVEN PROTEST TACTIC

Act	Percentage of Institutions
Occupation of a building or a section of a building	11.7%
Interruption of a school function	11.1
General campus strike or boycott of a school function	6.0
Barring entrance to a building	3.5
Damaging buildings or furniture	3.4
Campus march, picketing or rally with physical violence	2.6
Persons injured	1.9
Burning of buildings	1.8
Holding of an official captive	1.0
Destruction of records, files, papers	0.9
Killing	1.3

In 1968 Tom Hayden, SDS founder, made these pertinent comments foreshadowing student tactics:

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² CAMPUS DISRUPTION: 1968-69, *supra* note 8, at 20. Feuer observes that "[w]herever a set of alternative possible routes toward achieving a given end presents itself, a student movement will usually tend to choose the one which involves a higher measure of violence or humiliation directed against the older generation." Feuer, *supra* note 57, at 68.

Columbia opened a new tactical stage in the resistance movement which began last fall: from overnight occupation to seizures; from mill-ins to the creation of revolutionary committees; from symbolic civil disobedience to barricade resistance. Not only are these tactics already being duplicated on other campuses but they are sure to be surpassed by even more militant tactics.

In the future it is conceivable that students will threaten destruction of buildings as a last deterrent to police attacks. [Other tactics might be] raids on offices of professors doing weapons research. . . .⁹³

These tactics have already been surpassed. Still other proposals included: "[a]rson in schools, burning or blowing up of government property, dumping and setting garbage afire at subway exits, prompting guerrilla warfare in American cities . . . [and] using Molotov cocktails and 'thermite bombs' and actual sabotage."⁹⁴

The great majority of students who eventually become demonstrators do not accept such suggestions immediately.⁹⁵ First they are "radicalized", meaning concessions on the part of the administrators will be met with accelerated demands by the radicals until a confrontation is brought about by using such tactics as the non-negotiable demand "by which a group of justified grievances is linked with another set of completely unrealistic proposals in an indissoluble package."⁹⁶

The activists are frequently aided in mobilizing uninvolved students by the administrators' hasty use of police in campus confrontation.⁹⁷

The extremists' ability to lead large numbers of students, however, is diminishing. But the days that a small group of extremists can lead masses of students like sheep seem limited. Sociology Professor Robert Nisbet of Berkeley emphatically states, ". . . the back of the revolution is broken."⁹⁸ Instead, idealistic students are replacing the

⁹³ RAMPARTS, June 15, 1968, at 32.

⁹⁴ Stanmeyer, *supra* note 77, at 320.

⁹⁵ *Id.* at 321.

⁹⁶ JONES, *supra* note 33, at 20. Besides the deliberate calculated effect of making the administrator seem inflexible, the administrator has another problem in that "the loose organizational structure of the disrupting group(s) and the lack of continuous spokesmen make negotiations in a formal sense almost impossible." ACE REP. ON CAMPUS TENSION, at 21-22.

⁹⁷ Carrington, *supra* note 14, at 944. "Columbia was a lesson for both sides. Radicals saw the catalyst they needed to create disorder and gain bargaining power in the use of police force against students. The administration, on the other hand, saw that police force was to be avoided at all costs if there were to be any chance of keeping campus dissidents factionalized and contained within reason." Comment, *Campus Confrontation: Resolution by Injunction*, 6 COLUM. J. L. & SOC. PROB. 1 (1970).

⁹⁸ Nisbet, *supra* note 51, § B, at 5, col. 2. Another commentator states, ". . . as its estrangement deepens and its tactics become more provocative, the youth movement itself, paradoxically, gradually seems less innovative—and indeed, less novel." Wall St. J., Jan. 31, 1969, at 10.

nihilists and revolutionaries as the leaders in the youth movement. With them has come a new tactic, an assault on specific problems in the context of the present political system. Students from thirty schools have donated \$70,000 to twelve anti-war candidates.⁹⁹ Some students are working in support of candidates in opposition to the President, and seek to recess from their studies immediately before elections to work actively in the campaigns.¹⁰⁰

Conservative students tactics vary. Sometimes a direct attack on radical students will be carried out by other students. Moderate students at the University of Kentucky, as at some other colleges, are trying a different approach. They have formed an organization called the Student Coalition which is designed to preserve educational opportunities by taking an active role in the university life. This group has said that in cases of future student disturbances that it will seek injunctions in order to force the administration to keep the university open.¹⁰¹

Reaction to student violence has been rapid. In addition to the threat of punitive legislation it has brought counter-violence.¹⁰² Table Number 3 illustrates the percent of changes brought about by protest:

TABLE NO. 3¹⁰³
CHANGES BROUGHT ABOUT BY PROTESTS

	As A Direct Result Of Protest Incident			Not As A Direct Result Of Protest Incident	
	Campuses With Violent Protest	Campuses With Non- Violent Protest	Campuses With Violent Protest	Campuses With Non- Violent Protest	Campuses With No Protest
Changes In Racial Policy	55.2%	23.3%	42.1%	50.2%	23.3%
Changes Increasing Student Power	25.5%	29.6%	71.7%	69.1%	58.4%
ROTC Terminated Or Made Elective	13.8%	6.8%	2.8%	3.8%	1.2%

⁹⁹ Courier-Journal, July 14, 1970, § B, at 1, col. 1.

¹⁰⁰ Lexington Herald, July 14, 1970, at 1. See also Washington Post, June 14, 1970, § C, at 7, col. 3, for comments by Margaret Mead and the New York Times, May 9, 1970, § P, at 9, col. 1, for Keniston's, Jencks' and Reisman's comments on the new developments.

¹⁰¹ Additional propaganda will be found in the Courier-Journal, July 22, 1970, § A, at 9, col. 2.

¹⁰² Bayer & Astin, *Violence and Disruption on the U.S. Campus, 1968-69 EDUCATIONAL RECORDS* 338 (1969). At Berkeley campus police have doubled in size. Cornell is up by a third and has given its men guns and mace. Comment, *Campus Confrontation: Resolution by Legislation*, 6 COLUM. J.L. & SOC. PROB. 32, 33 (1970).

¹⁰³ Bayer & Astin, *supra* note 8, at 20.

Other possible reactions to violence include that which was pointed out by Kentucky Governor Louie B. Nunn in August, 1970, when he stated: "The fear that I have is that an aroused public will demand an end to appropriations for support of colleges—or rules, regulations and laws that could infringe upon academic freedom."¹⁰⁴ Reaction to the new student tactic of involvement in campaigns remains to be seen. It may help elect new men, or it may result in a backlash. Certainly one reaction to vandalism to professors' offices has been loss of faculty support.¹⁰⁵ Another reaction has been a fantastic increase in the turnover of college presidents.¹⁰⁶ And still another result is rising costs for police operations. For example, city and county governmental expenses in California attributable to college disturbances have been nearly one million dollars since 1964.¹⁰⁷

One of the long range effects of student disturbances is that parents are sending their children to "safe" community colleges.¹⁰⁸ Following the same reasoning, state legislators are redirecting their funds to community colleges because of their low disturbance rate. This, coupled with the large turnover in top college administrators,¹⁰⁹ may harm four year public colleges and universities, further endangering many student goals. And if college students succeed in ending the concept of *in loco parentis*, they may well be placing themselves firmly under civil and criminal law, thus ending past special tolerances.¹¹⁰

The only positive good that may come from student violence and misuse of the first amendment rights of others¹¹¹ may be new laws to strengthen everyone's constitutional rights. A bill based on this idea has already been introduced in Congress.¹¹²

¹⁰⁴ Courier Journal, Aug. 5, 1970, § B, at 1, col. 1. A fear perhaps justified by an inflammatory petition of the "SKEI" Committee (Saving Kentucky's Educational Institutions) in the Lexington Herald-Leader, July 30, 1970, at 16, which provides in part: ". . . identify and expose to the public, professors and outside agitators who represent a threat to our government."

¹⁰⁵ Nisbet *supra* note 51, § B, at 5, col. 1.

¹⁰⁶ U.S. NEWS & WORLD REP., *supra* note 3, at 30.

¹⁰⁷ REPORT OF THE SELECT COMM., *supra* note 48, at 154.

¹⁰⁸ THE ACADEMIC REVOLUTION, *supra* note 6, at 51.

¹⁰⁹ U.S. NEWS & WORLD REP., *supra* note 3, at 30.

¹¹⁰ INTERIM STATEMENT ON CAMPUS DISORDERS, *supra* note 13, at 5.

¹¹¹ See MARCUSE, *supra* note 77, at 19; Stanmeyer, *supra* note 77, at 322.

¹¹² See INTERIM STATEMENT ON CAMPUS DISORDERS, *supra* note 13, at 8, which called for such a bill. The four Congressional members of the National Commission on the Causes and Prevention of Violence (McCulloch, Boggs, Hruska and Hart), on June 16, 1970, proposed legislation that would allow federal court action against anyone interfering with a citizen's right of free speech. In a joint statement, the bills' sponsors said: "To our surprise, the commission members found that in our extensive compendium of civil rights law, there is only a century-old statute that deals in a limited and inadequate way with official denials of First Amendment rights. And there is no statute whatsoever dealing with private denials of those rights." Press Release, June 16, 1970, Offices of Congressmen McCulloch and Boggs, Senators Hart and Hruska.

Unfortunately the RYM tactic of radicalizing high schools may be working. There are 26,000 high schools with 21 million students in this country. Between November, 1968, and February, 1969, incidents of student protest in high schools tripled each month.¹¹³

2. Faculty

There are a number of divisions within faculty ranks. For our purposes two general categories suggested by an ACE study¹¹⁴ will suffice. One is the senior faculty, including department chairmen, older faculty members, those with tenure and those with a vested interest in the status quo. The second group is the junior faculty which may include the younger, less established men, assistants and instructors. The individuals within these groups align, shift, and rearrange according to external pressures and internal ambitions. The power structure of the faculty always remains fluid and at smaller institutions divisions are minimal because the faculty is under more pressures to present a united front.

a. Motivation

Faculty motivation is important because their support or nonsupport can make or break a protest.¹¹⁵ Some reasons for supporting students that have been cited by faculty are: liberal devotion to civil rights and academic freedom; resentment against inept or arrogant administrators; guilt feelings toward students for neglect of teaching; and shame for not being involved in moral causes.¹¹⁶ Another view which is less charitable is that faculty support is a naked power play by academicians to increase their own authority.¹¹⁷

One must also consider personal motivations and ambitions. Senior faculty might wish to embarrass administrators in order to undermine their positions, and junior faculty might wish to gain greater status in the faculty pecking order. There is also the possibility of identification by junior faculty and instructors who are still close to the students in age, and possibly were themselves activists as students. Eventually however, certain faculty supporters react to student radicalism as they begin to fear for the university itself¹¹⁸ or are themselves subjected to student vandalism.¹¹⁹

¹¹³ HEW REP. ON EASING TENSIONS IN EDUC., at 19; JONES, *supra* note 62, at 19-20.

¹¹⁴ ACE REP. ON CAMPUS TENSIONS, at 23-26.

¹¹⁵ Anderson, *supra* note 31, § B, at 2, col. 2.

¹¹⁶ *Id.*

¹¹⁷ The Washington Post, May 24, 1970, § B, at 1, col. 1.

¹¹⁸ Anderson, *supra* note 31, § B, at 2, col. 1.

¹¹⁹ Nisbet, *supra* note 51, § B, at 5, col. 3.

b. Goals

Some faculty goals that have been articulated are: more funds and better use of funds,¹²⁰ a larger faculty voice in school government,¹²¹ and more influence on the goals and priorities of the school.¹²² Paradoxically in view of student complaints that the faculty are not communicating with them, faculty members claim that increased contacts with students are too demanding of their time.¹²³ Faculty members also want more flexibility in the institution for such activities as interdisciplinary study.¹²⁴ In addition junior faculty members generally want more influence, and are tremendously pressured by the demands to publish.¹²⁵

Faculty support for student power against the administration and the establishment ends quickly when it reaches faculty jurisdiction: Arval A. Morris, in a recent law journal article, stated:

. . . [I]f we surrender up the principle that it is the proper province to the faculty alone and not that of students, alumni or the general public to settle questions of academic affairs, then law schools will suffer a series of defeats which may subject them to political pressures and weaken their intellectual character.¹²⁶

According to Morris, faculty control of academic affairs results because they are particularly competent and because such responsibility is institutionally assigned to them.¹²⁷ He continues: "We must reject the notion that merely because a person is affected by a decision he, therefore, has a right to vote on it."¹²⁸ Obviously, not all faculty members blindly support student protest, especially when their own interests are involved.

Opinion of conservative faculty ranges from the realization that the universities are too vulnerable to be effective political power bases¹²⁹ to the attitude typified by Dr. Jacques Barzun of Columbia who said, "Teaching is the central calling of the academies; activities which fail to complement that function are subversive of the university

¹²⁰ HEW REP. ON EASING TENSIONS IN EDUCATION, at 16.

¹²¹ REPORT OF THE SELECT COMM., *supra* note 48, at 24-26.

¹²² ACE REP. ON CAMPUS TENSIONS, at 24-26.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Morris, *supra* note 36, at 141.

¹²⁷ *Id.* at 139.

¹²⁸ *Id.* In fairness to the author, he does call for significant new channels of communication and participation by students and for significant student rights. The above was chosen however to show the effect on the attitude of the principle "whose ox is being gored."

¹²⁹ Kalven, *The Right Kind of Anarchy*, 17 U. OF CHI. L. SCH. REC. 8 (1969).

mission."¹³⁰ Conservative professors are unsympathetic to many of the goals of student protestors. Many share the belief that students are

[b]lissfully ignorant of the incredible efforts men have put forth to build political economies that provide people with abundant goods and the orderly freedom to enjoy them, and blandly spouts hatred for an economy that lavishes on him more comforts than earlier societies bestowed on their kings.¹³¹

Some conservative professors, however, support the students in their desire for more faculty emphasis on teaching rather than on research.¹³²

c. Tactics

Faculty use as their main weapons prestige and the ability to cripple the school by refusing to teach. "Where professional opinion is united, trustees and administrators only rarely override, and there, seldom for long."¹³³ Those members of the faculty who attract large research grants, or who bring special honors, are especially influential.¹³⁴

Faculty tactics, however, are basically diplomatic and ideological in nature. Their support of students is a great propaganda weapon against the administration, particularly on the question of amnesty. Professor Nisbet contends:

The major contribution of the faculty to the student revolution has been the priceless insistence that all acts of the students, however vandalistic, however destructive of the civil order be regarded as not the offenses against public law they were in fact, but as academic student behavior deserving of the university's full protection.¹³⁵

In their own interests, however, the faculty can be militant itself, a fact manifested in faculty strikes.¹³⁶

3. Administrators

Although there is some internal competition among executive officers, particularly at larger institutions, we will treat administrators

¹³⁰ McGee, *Universities, Law Schools, Community: Learning or Service or Learning and Service?*, 22 J. LEGAL ED. 40 (1969).

¹³¹ Stanmeyer, *supra* note 77, at 319.

¹³² ACE REP. ON CAMPUS TENSIONS, at 26.

¹³³ *Id.* at 18.

¹³⁴ *Id.* at 14.

¹³⁵ Nisbet, *supra* note 51, § B, at 5, col. 3. An ironic but true note: ". . . [S]ome faculty members have mistakenly joined with students in using coercive force against administrative officers when it is the faculty itself that should deal appropriately and effectively with the issue in question." INTERIM STATEMENT ON CAMPUS DISORDERS, *supra* note 13, at 7.

¹³⁶ A tactic about which the American Association of University Professors is wavering in not endorsing. *Hearings on Campus Unrest*, at 447.

as a unified category in the person of the president or chief executive officer.

a. Motivation

The motivation of administrators is inseparably bound to the individual. A junior officer may be affected by internal ambitions. The president of the school may be motivated by his external ambitions. The desire of the president to have a good college, or to be a dictator, or to be left alone with no one making waves will profoundly affect his actions in a given situation. Strong motivational factors include his authority on campus and his standing with his Board of Trustees, pertinent government officials, the school's money sources, the alumni, parents and the public.

b. Goals

Basically the administrator's goal is to maintain his position against both internal¹³⁷ and external pressure. This often leaves the administrator caught in the squeeze of conflicting groups.

The trustees feel their legal authority is being eroded and their ability to act constrained. The president is caught between opposing forces, none of whom he is likely to please. The faculty, with other fish to fry, resents the endless meetings and diversions and the students think that all the others are really only delaying and procrastinating in an effort to avoid doing anything meaningful. Meanwhile, legislators, alumni, parents and others on the outside looking in grow increasingly certain that nobody is in charge and that everybody is irresponsible.¹³⁸

Reaction by university administrators to the problems raised by students vary. Dr. Clark Kerr called for the university to "provide service to the cities, the lower classes and the poor,"¹³⁹ and noted that "it is a question whether universities should serve the people in the urban ghettos or the military-industrial complex."¹⁴⁰

Dr. Hayakawa, however, was more concerned with restoring order on campus. He proclaimed:

. . . [T]he essential purposes of police in a democratic society is not to suppress our freedoms but to protect them, and I am glad to say our policemen have acted in just that way to our great comfort and gratification.¹⁴¹

¹³⁷ Washington Post, Feb. 8, 1970, § A, at 3, col. 1.

¹³⁸ STAFF REP. TO THE VIOLENCE COMM'N, at 232; U.S. NEWS & WORLD REP., Aug. 3, 1970, at 30.

¹³⁹ McGee, *supra* note 130, at 40.

¹⁴⁰ *Id.*

¹⁴¹ *Hearing on Campus Unrest*, at 52.

In contrast to Morris' opinion, administrators resent faculty usurpation of their power. In the view of one law school dean, who is sympathetic to student idealism, teachers are now trying to run the law school. The faculty, he says, should leave the administration to those hired to administer and go back to teaching and research.¹⁴²

Some problems that university presidents would like to see solved include: harrassment and non-support by the faculty; some institutional consensus of what to do about student unrest; an easing of the power struggle and more tolerance among the segments of the college community; an end to ceaseless rehashing of supposedly settled issues; and a way to finance the changes being demanded.¹⁴³

c. Tactics

Administrators have direct executive power and administrative control of the budget. Their tactics can be just as unreasonable as those of the students.¹⁴⁴ Nevertheless the intelligent administrator wishes to avoid radicalizing his students. Paul Carrington states that a measured response to protest can be very successful. He cites the University of Chicago where the administration, although steadfastly refusing to negotiate with trespassing students and even expelling some of the more aggressive ones, avoided using the police and indiscriminate group discipline. They were successful in avoiding major campus trouble.¹⁴⁵

If the radicals are to be thwarted in their efforts to create a crisis, the administration must act quickly, avoiding if possible the use of police, and using a tribunal that is firm, humane and impeccably fair.

The students destroying property must pay for the damage or perform compensatory labor for the school. Carrington proposed the levying of fines for interfering with other students' studies. Intransigent students, he says, should be expelled if the tribunal is not successful, and then an injunction should be sought against their return as nonstudents.¹⁴⁶

The injunction is an efficient weapon in the administrator's arsenal.

¹⁴² Coffman, *Campus Unrest—Why?*, 42 N.Y. ST. B. J. 106 (1970).

¹⁴³ ACE REP. ON CAMPUS TENSIONS, at 28-30.

¹⁴⁴ "The call to reason and self-control is likely to be irksome to those who have borne years of hardship in order to attain positions of power and who now seek the satisfaction of wielding it." Reason is also irksome to the public and the students because the public prefers momentary gratification and the students "elevate emotional self-indulgence to a virtue." Carrington, *supra* note 14, at 945.

¹⁴⁵ *Id.* at 944.

¹⁴⁶ Some are reluctant to expel students since that has been equated, albeit somewhat irrationally, to condemning them to a death sentence in Vietnam. INTERIM STATEMENT ON CAMPUS DISORDERS, at 6. However with the modifications in the Selective Service System, this argument will lose much of its force.

At the critical moments of trespass the administrator can obtain a temporary restraining order which will issue at a hearing without the presence of the opposing party when the complaint alleges a threat of future irreparable harm.¹⁴⁷ The injunctive process brings instant court pressure without a show of force. The court uses its own marshalls instead of university or local police. It puts the blunt of pressure on the organizers and removes the possibility of amnesty bargains. "Isolated from his supporters, deprived of the audience of moderate students he wished to radicalize, and stripped of his bargaining powers, the radical student leader does not relish the opportunity to face he court whose order he has violated."¹⁴⁸ This technique also has the advantage of discouraging counter-violence by the conservatives.

Other administration techniques include arbitration, mediation,¹⁴⁹ and the ombudsman.¹⁵⁰ Jaw-boning and other inventive techniques can be used "to split off the ideologues from their misled followers."¹⁵¹ Police can also play a role. Dr. Hayakawa describes their use at San Francisco:

On the days on which we anticipate most trouble, we have from six to eight officers assigned to each classroom building. The fact that these officers are there has almost completely stopped this business of classroom disruption. So academic freedom of teachers to teach and students to learn has been preserved by the presence there of those six or eight policemen in each building.¹⁵²

4. Trustees

a. Motivation

Divisions among trustees or regents at public institutions, besides those arising from personality conflicts, are usually political in nature. This is particularly true where state law allows the governor to appoint the members and where their terms overlap from one administration to the next. The motivation of the trustees as a unit is important for only one consideration. Do they wish to attempt close supervision over implementing policy or will they delegate authority? Beyond

¹⁴⁷ Comment, *supra* note 97, at 3-4.

¹⁴⁸ *Id.* at 6-9. The Student Coalition has said that in the case of campus disruptions this fall at the University of Kentucky, it will seek injunctions if the administration does not. Courier-Journal, Aug. 4, 1970, § A, at 1, col. 3.

¹⁴⁹ A study by the Dept. of Health, Education & Welfare rejects this approach. See HEW REP. ON EASING TENSIONS IN EDUCATION, at 17.

¹⁵⁰ Carrington, *supra* note 14, at 945.

¹⁵¹ Stanmeyer, *supra* note 77, at 323.

¹⁵² *Hearings on Campus Unrest*, at 52; the HEW report discourages use of police as being counterproductive. HEW REP. ON EASING TENSIONS IN EDUCATION, at 17.

that, unless politics become involved, motives of the trustees must be considered as those of individuals rather than of a group.

b. Goals

The trustees are also troubled by money and the question of a more representative university administration.¹⁵³ Nine out of ten trustees view teaching as more important than research.¹⁵⁴ Most trustees wonder if the university should and can spread its services thin enough to meet all the objectives of student unrest.¹⁵⁵ Likewise the trustees resist the ideas that the students should establish their own goals and that the faculty should set institutional goals on social relationships. It is their position that the president should implement the policies of the board,¹⁵⁶ and they are disturbed at the tendency of outside groups to by-pass them and the administrators in handling problems.¹⁵⁷

c. Tactics

Trustees are by law vested with ultimate authority in governing the university and controlling the budget. This gives them great power both directly, by regulation, and indirectly, by how they apportion or withhold funds.

5. Alumni

The alumni can be divided into five groups: the indifferent, the concerned, the activists, small contributors and large donors. The last two categories may overlap the first three.

Alumni interest in the school varies. For some it is sentimentality and loyalty, for others a feeling of obligation to pass on the opportunity they had. Certain alumni wish to protect the standing and status of a degree from their college or university. Others want to mold the next generation in their own image. Their basic goal is maintaining the prestige of the institution and their basic weapon is the threat of curtailment of financial support.

6. Parents

Parents will fall into two categories, active and indifferent. This will be determined, among other things, by the parent-child relationship; whether the child lives at home; and the age, sex and financial condition of the child. There are several factors which influence parents. For some, providing a college education is simply a duty performed or a way of getting the children married. It may constitute

¹⁵³ *Id.* at 31-35.

¹⁵⁴ *Id.* at 33.

¹⁵⁵ *Id.* at 31-35.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

a valuable cultural gift. Nevertheless for a great many middle-class Americans, and particularly many Americans who went through the depression era, putting a son or daughter through college involves a precious economic investment which in the end may only result in a severe motivational misunderstanding of a child reared in a more affluent era.¹⁵⁸

Basic parental goals are to see that their children receive a good education and wish the school to perpetuate their own social and moral values. Parents as voters have considerable political influence and also have direct authority over those students who are minors or are financially dependent on them.

B. *The Greater Community*

1. Benefactors

This category is composed of both small and large donors, individual and institutional. These are further classified as those whose giving is affected by student disorder and those whose giving is not so affected.

The individual donor of money is usually motivated by his own moral, political and psychological views. The corporate givers vary according to their purposes, from the great public foundations to special interest groups. A factor affecting individuals is their personal relationship with the school, and in the case of the corporate groups, their public image.

The goals of the benefactor will vary with his purpose; his tactic being simply the giving or withholding of money.

2. Government

All three levels of government are involved, particularly state government where political pressure lies heavily on the state legislature which must fund public institutions. The federal government is also deeply involved because of extensive federal education programs and the current "law'n'order" political climate.

a. Motivation

All three levels of government, particularly local and state authorities, face policing problems. State and local governments are influ-

¹⁵⁸ Morris, *supra* note 36, at 129-30. "For them, the campus activist represents the height of ingratitude, folly, and unwillingness to work for the treasured good of economic security. On the other hand, our students have grown up in a world where almost everyone they have known has taken affluence for granted, and this affluence has provided them with an inner sense of economic security utterly unknown to their parents plus the expectations that a college education is merely another passing phase of life." *Id.*

enced by public pressure, and some officials affect a false morality toward student behavior for public consumption. Throughout the governmental pyramid are rifts of competition between the various levels, branches and agencies of government. Not to be ignored are those officials who wish to bring the barons of education, the "communist" faculty and the motley students to heel. There also are genuinely dedicated public servants trying to fulfill their oaths of office to the best of their ability. These men perplexed and dismayed by the cantankerous behavior and attitude of the human animal.

b. Goals

Government is concerned with both the quantity and quality of education. All levels of government make extensive studies on ways to improve education. One state legislative investigation has called for improvements in communication.¹⁵⁹

Federal authorities have called for a greater student and faculty participation in school affairs.¹⁶⁰ An HEW study group has also said that government "should not support the educational establishments' desire to maintain current allocation of power and control within schools and universities."¹⁶¹

c. Tactics

Government at all levels exercises considerable financial and policing authority through its executive, legislative and judicial branches. Government tactics, other than the use of police and injunctions, center around its financial and legislative powers. Congress has proposed to deny funds to institutions not controlling disorder,¹⁶² to deny funds for failure to submit rules concerning disturbances,¹⁶³ to enact criminal penalties¹⁶⁴ and to provide a federal mediation service.¹⁶⁵ A study committee for HEW urged government officials not to focus public attention on student disturbances to overshadow the need for "rebuilding our educational system."¹⁶⁶ A number of states have en-

¹⁵⁹ REPORT TO THE N.J. LEGIS., *supra* note 78, at 3.

¹⁶⁰ HEW REP. ON EASING TENSIONS IN EDUCATION, at 4. *See also* J. ALLEN, ON EDUCATION: QUOTES & SUMMARIES OF ARTICLES & SPEECHES BY DR. JAMES E. ALLEN, JR. PRIOR TO BECOMING ASS'T SEC'Y FOR EDUCATION & COMMISSIONER OF EDUCATION 2 (1969).

¹⁶¹ ACE REP. ON CAMPUS TENSIONS, at 17.

¹⁶² H.R. 10136, 91st Cong., 1st Sess. (1969); H.R. 11653, 91st Cong., 1st Sess. (1969).

¹⁶³ H.R. 11941, 91st Cong., 1st Sess. (1969); S. 2803, 91st Cong., 1st Sess. (1969).

¹⁶⁴ H.R. 11802, 91st Cong., 1st Sess. (1969); H.R. 12060, 91st Cong., 1st Sess. (1969); S. 1929, 91st Cong., 1st Sess. (1969); S. 1988, 91st Cong., 1st Sess. (1969).

¹⁶⁵ H.R. 10570, 91st Cong., 1st Sess. (1969).

¹⁶⁶ HEW REP. ON EASING TENSIONS IN EDUCATION, at 7.

acted punitive legislation.¹⁶⁷ Other pressure can be exerted on the campus by the judicial system and by federal and state financial programs.

Short range results of the tactics used by the various groups include the following possibilities. If those who wish to penalize institutions financially are successful, they will aid the students who wish to destroy our schools.¹⁶⁸ Much of the proposed punitive action would bind the hands of administrators so that they could not tailor their responses, thus possibly promoting riots.¹⁶⁹ According to the American Civil Liberties Union, other results would be the punishment of an innocent majority for the acts of a minority, the radicalization of student and faculty, possible abandoning of the use of due process by colleges, the chilling of academic freedom, the assistance of the radicals in their destructive goals, and giving the appearance of a college-federal government conspiracy to repress freedom of dissent.¹⁷⁰

Public hard-line statements by government officials have eroded the college administrators' power to deal with students.¹⁷¹ The national guard killings at Kent State have made governors more reluctant to employ the national guard.¹⁷² In addition, coupled with the Cambodian incursion, the Kent State shooting significantly increased student participation in protests.¹⁷³ Any softness by university presidents toward student demands, according to Dr. Robert Martin, President of Eastern Kentucky University, only results in greater demands.¹⁷⁴ And, as indicated earlier, while two-thirds of our students are in public schools two-thirds of all protest is in our private schools.¹⁷⁵ This means that most of the punitive legislation will miss its mark and needlessly harm our public institutions.

¹⁶⁷ See, for example, N.Y. Sen. Bill 524, 192d Sess. (1969). (Denial of Funds to Student Demonstrators.); N.Y. Ass. Bill 6877, 192d Sess. (1969). (Criminal Penalties); 1969 Cal. Sess. Laws. Ch. 1427, § 5, adding §§ 31291-31294 to CAL. EDUC. CODE (West Cal. Leg. Serv. at 2783 (1969)). See also Comment, *Campus Confrontation: Resolution by Legislation*, 6 COLUM. J.L. & SOC. PROB. 32 (1970); Comment, *Higher Education and the Student Unrest Provisions*, 31 OHIO ST. L.J. 111 (1970). For a comprehensive survey of state riot legislation see ROSENTRATER, STATE AND FEDERAL LAW ON RIOT: A COMPILATION OF PERTINENT STATUTES (1969).

¹⁶⁸ INTERIM STATEMENT ON CAMPUS DISORDERS, at 3.

¹⁶⁹ Carrington, *supra* note 14, at 944.

¹⁷⁰ *Hearings on Campus Unrest*, at 873.

¹⁷¹ HEW REP. ON EASING TENSIONS IN EDUCATION, at 2-3.

¹⁷² Washington Star, May 16, 1970, at 15.

¹⁷³ Courier-Journal, July 30, 1970, § B, at 1, col. 2.

¹⁷⁴ Courier-Journal, July 14, 1970, § B, at 1, col. 3. "Dr. Martin blamed some of the tumult on 'spineless, weakened college presidents' who have 'given their authority away.' 'They (presidents) give them (students) what they want and they are back for more the next day,' he said. 'The most liberal schools are those that are destroyed first.'"

¹⁷⁵ Bayer & Astin, *supra* note 102, at 350; ACE REP. ON CAMPUS TENSIONS, at 9.

3. Police Authorities

There are local or municipal police with their assorted departments, the county sheriff or police, state police, F.B.I., national guard, federal marshals and troops, drug control agents, and even at times the C.I.A.—all of which are periodically in cooperation or competition.

a. Motivation

Law enforcement agents are not only malleable to the beliefs, prejudices and wills of their supervisors, they are also responsive to the politically induced wishes of their civilian chiefs. Many Americans remember Mayor Daley's "shoot to maim" command. Other pressures on the police come from the courts through the prosecutors who are required to meet certain legal standards. Perhaps because Americans are aware of the grievous results of lapses in police behavior, we demand superhuman conduct from them. We demand that they remain cool and self-contained in the face of taunts and abuses and even physical provocation. Discipline must be very high to support such steadfastness, or not only are the police in actual danger, they believe that they are risking their lives, a very strong motivational factor. In addition, each police officer reflects his own personal biases and hatreds. As he removes his badge in proceeding to riot duty does he think of his membership in the John Birch Society? Special units, such as the drug squad, act in accordance with the mandate of their special assignments.¹⁷⁶ Perhaps more importantly, a good police officer acts zealously from his desire to protect life and property.

b. Goals

Immediate police goals include a legally enforced exclusion of students and non-students from campuses during times of disturbances; the prevention of campuses being used as sanctuaries; more technical assistance and legal protection for campus police; and financial aide to offset local policing costs.¹⁷⁷

c. Tactics

Police command the weapons of the "establishment" in physically combatting campus disturbances—men, dogs, gas, bayonets, guns—and too often in the past they have unfortunately used them indiscriminately and with relatively little provocation. While these types of police tactics may satisfy some immediate retributive goals of the police

¹⁷⁶ The FBI and military intelligence, for instance, seem to desire to keep tabs on all potentially dangerous students.

¹⁷⁷ SELECT COMM. ON CAMPUS DISTURBANCES, *supra* note 48, at 17.

or the society which they represent, they have been notoriously ineffective in calming the general atmosphere on university campuses.

For excellent material on actual police instruction and national guard orders, the justice department has copies of a report on police preparation to deal with the Washington war moratorium.¹⁷⁸ No additional discussion of guns and gas would serve a useful purpose. Certain F.B.I. tactics, however, are becoming of decided interest. Planting undercover agents in the youth movement is the continuation of a long accepted method. It remains to be seen if intended monitoring of the leaders' lives and indiscriminate accumulation of spy files will be judicially accepted.¹⁷⁹

4. Other Groups

Other participants include civic, fraternal, educational and political groups which for one reason or another are interested in the campus. In addition to the interest of the government which is one of the partners in the "military-industrial" complex, the other two partners also have an interest. Both the military and business are interested in research, training, and recruitment which the university offers. They must now also respond to students hostile to these activities.

This concludes the study of the participants in the current campus situation—their motivations, their tactics and their goals.¹⁸⁰ We now turn to a survey of the law in relation to the university, as a resolution to campus problems cannot be reached without an understanding of the present constitutional framework.

II. STUDENT RIGHTS

In the ten years since *Dixon v. Alabama State Board of Education*¹⁸¹ brought the United States Constitution to the campus through

¹⁷⁸ DEPARTMENT OF JUSTICE, DEMONSTRATION AND DISSENT IN THE NATION'S CAPITAL, June 8, 1970.

¹⁷⁹ *Supra* note 126, at 21-22. Interestingly, FBI studies themselves show that Communists are not behind the youth movement and that the Guardsmen were in large part responsible at Kent State. TIME, Aug. 3, 1970, at 6. Other interesting FBI figures recently released report 1,785 demonstrations for 1969-70. This includes 313 sit-ins or seizures, 281 attacks against R.O.T.C. facilities, 246 cases of arson or attempted arson, 8 arrests made and 462 injuries, 2/3 of which were police and college officials. \$9.5 million worth of damage was done. U.S. NEWS AND WORLD REPORT, July 27, 1970, at 24.

¹⁸⁰ For those interested in additional reading there are several books; R. LORZA, THE RIGHT TO SAY "WE" (1970); M. MYERSON, THESE ARE THE GOOD OLD DAYS: COMING OF AGE AS A RADICAL IN AMERICA'S LATE YEARS (1970); P. COWAN, THE MAKING OF AN UN-AMERICAN (1970); W. DOUGLAS, POINTS OF REBELLION (1970); C. REICH, THE GREENING OF AMERICA (1970). See also *Hearings on Campus Unrest*, the best collection of material on the subject. Dr. MORRIS ABRAN's testimony contained therein and reprinted in the CONG. REC., Aug. 11, 1969, at S9656 is perhaps the outstanding short article on the subject.

¹⁸¹ 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961).

the due process clause of the fourteenth amendment, there has developed a formidable body of law dealing with the constitutional rights of students.¹⁸² No longer can university officials stand before the courts in the tattered raiment of such discarded legal theories as "in loco parentis",¹⁸³ "privilege",¹⁸⁴ or "contract".¹⁸⁵ From a refusal to reduce the length of one's hair,¹⁸⁶ to the wearing of black arm bands in protest to a war,¹⁸⁷ students have found judicial support for conduct hitherto forbidden.

¹⁸² See, e.g., Aldrich & Sommers, *Freedom of Expression in Secondary Schools*, 19 CLEV. ST. L. REV. 165 (1970); Beaney, *Students, Higher Education, and the Law*, 45 DENVER L.J. 511 (1968); Goldman, *The University and the Liberty of Its Students—A Fiduciary Theory*, 54 KY. L.J. 643 (1966); Haskell, *Judicial Review of School Discipline*, 21 CASE W. RES. L. REV. 211 (1970); Johnson, *The Constitutional Rights of College Students*, 42 TEX. L. REV. 344 (1964); McKay, *The Student as Private Citizen*, 45 DENVER L.J. 558 (1968); Monypenny, *The Student as a Student*, 45 DENVER L.J. 649 (1968); O'Neil, *Private Universities and Public Law*, 19 BUFFALO L. REV. 155 (1970); Sherry, *Governance of the University: Rules, Rights, and Responsibilities*, 54 CALIF. L. REV. 23 (1966); Stevens, *Procedural Limitations on the Expulsion of College and University Students*, 10 ST. LOUIS U. L.J. 542 (1966); Van Alstyne, *Student Academic Freedom and the Rulemaking Powers of Public Universities: Some Constitutional Considerations*, 2 L. IN TRANSITION Q. 1 (1965); Van Alstyne, *The Judicial Trend Toward Student Academic Freedom*, 20 U. FLA. L. REV. 290 (1968); Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027 (1969); Comment, *Private Government on the Campus—Judicial Review of University Expulsions*, 72 YALE L.J. 1362 (1963); Note, *Fourteenth Amendment and University Discipline Procedures*, 34 MO. L. REV. 236 (1969); Note, *Judicial Intervention in Expulsions or Suspensions by Private Universities*, 5 WILLAMETTE L.J. 277 (1969); Note, *Reasonable Rules, Reasonably Enforced—Guidelines for University Disciplinary Proceedings*, 53 MIN. L. REV. 301 (1968); Note, *Uncertainty in College Disciplinary Regulations*, 29 OHIO ST. L.J. 1023 (1968).

¹⁸³ See Pugsley v. Sellmeyer, 158 Ark. 247, 250 S.W. 538 (1923); Stetsen Univ. v. Hunt, 88 Fla. 510, 102 So. 637 (1924); North v. Board of Trustees, 137 Ill. 296, 27 N.E. 54 (1891); People ex rel. Pratt v. Wheaton College, 50 Ill. 186 (1866); Gott v. Berea College, 156 Ky. 376, 161 S.W. 204 (1913); State ex rel. Dresser v. School Dist. No. 1, 135 Wisc. 619, 116 N.W. 232 (1908).

¹⁸⁴ See Hamilton v. Regents of the Univ. of Calif., 293 U.S. 245 (1934); Steier v. New York State Educ. Comm'r, 271 F.2d 13 (2d Cir. 1959), cert. denied, 361 U.S. 966 (1960). In Knight v. State Board of Educ., 200 F. Supp. 174 (M.D. Tenn. 1961), the Court rejected the distinctions drawn between privileges and rights and held:

Whether the interest involved be described as a right or a privilege, the fact remains that it is an interest of almost incalculable value. . . . Private interests are to be evaluated under the due process clause of the Fourteenth Amendment, not in terms of labels or fictions, but in terms of their true significance and worth. *Id.* at 178.

¹⁸⁵ See Dehaan v. Brandeis Univ., 150 F. Supp. 626 (D. Mass. 1957); University of Miami v. Militana, 184 So.2d 701 (Fla. Dist. Ct. App. 1966); Robinson v. University of Miami, 100 So.2d 442 (Fla. Dist. Ct. App. 1958); Booker v. Grand Rapids Medical College, 156 Mich. 95, 120 N.W. 589 (1909); Carr v. St. John's Univ., 17 App. Div. 2d 632, 231 N.Y.S.2d 410 (1962); Anthony v. Syracuse Univ., 224 App. Div. 487, 231 N.Y.S. 435 (1928); Barker v. Trustees of Bryn Mawr College, 278 Pa. 121, 122 A. 220 (1923).

¹⁸⁶ Breen v. Kahl, 296 F. Supp. 702 (W.D. Wisc. 1969), *aff'd*, 419 F.2d 1034 (7th Cir. 1969), cert. denied, 38 U.S.L.W. 3478 (June 1, 1970) (high school case).

¹⁸⁷ Tinker v. Des Moines Ind. Comm. School Dist., 393 U.S. 503 (1969) (high school case).

This new constitutional status of students is rooted not so much in the personal perspectives of so called "liberal" judges. Rather the constitutional protections recently afforded students are more properly the product of judicial awareness of the new property right a student enjoys in the *continued* pursuit of his education. Indeed, expulsion or suspension from an institution of higher learning may very well constitute a more severe sanction than a monetary fine or a brief imprisonment imposed by a court in a criminal action.

In today's degree-oriented society, education is the *sine qua non* of material success and social status. Thus, the opportunity for "life, liberty, and happiness" is proportionate to one's deed to this new property.

Throughout the twentieth century we have witnessed the absorption by the modern college and university of the new social and economic functions relating to earning a living which were previously performed by other institutions. The Bar no longer trains its lawyers, the medical association its physicians, industry its technicians, or companies their stenographers. All of these functions have found a place in the college curriculum. The college, rightly or wrongly, has become a vocational ladder not only to the professions and white collar jobs, but also to the blue collar jobs.¹⁸⁸

The Court in *Dixon v. Alabama State Board of Education*,¹⁸⁹ pointed to the reality of this contemporary development:

Without sufficient education the plaintiffs would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens . . . [E]xpulsion may well prejudice the student in completing his education at any other institution. Surely no one can question that the right to *remain* at the college in which the plaintiffs were students in good standing is an interest of extremely great value.¹⁹⁰

Such reasoning becomes compelling when formulated in terms of dollars and cents. The average lifetime income for a college graduate is \$204,000 greater than that of a high school graduate.¹⁹¹

¹⁸⁸ Affeldt & Seney, *Group Sanctions and Personal Rights—Professions, Occupations, and Labor Law*, 11 St. Louis U. L.J. 382, 388-89 (1967).

¹⁸⁹ 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961).

¹⁹⁰ *Id.* at 157.

¹⁹¹ U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: Table No. 155 (90th ed. 1969). See also, *Education Means Money*, Parade Magazine, Feb. 16, 1969, at 10.

A. Procedural Due Process

It is not surprising that the area of student rights most frequently litigated and judicially recognized¹⁹² is that of procedural due process in disciplinary proceedings.¹⁹³ Indeed, while courts in general have been reluctant to interfere in the educational process with its required expertise,¹⁹⁴ the consideration of due process standards of fairness is a most proper subject of judicial review.

. . . [T]he common objections to an enlarged judicial review lose much of their persuasiveness . . . where the challenge is not to remake substantive policy but to supervise the procedures through which laws are enforced upon individuals. The objection that judges lack the expertise and background to make competent judgments of policy falls short of the mark when the policy concerns procedural matters. The main business of courts, after all, has historically been the process of adjudication—applying rules of law to the concrete setting of a case. It is unlikely that any other organ of government will have greater insight into procedural problems.¹⁹⁵

Then too, the importance of a solid procedural foundation cannot be overemphasized in a consideration of the student spectrum of constitutional rights. "The history of liberty," asserted Justice Frankfurter, "has largely been the history of procedural safeguards."¹⁹⁶ To be sure, there would be no point in conferring first amendment rights if some indiscreet or anxious administrator were permitted to make an unreviewable determination that certain behavior was "disruptive" and that "selected", participating students must be disciplined

¹⁹² See, *General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education*, 45 F.R.D. 133 (W.D. Mo. 1968).

¹⁹³ See, e.g., *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961); *French v. Bashful*, 303 F. Supp. 1333 (E.D. La. 1969); *Scott v. Board of Educ.*, 300 F. Supp. 163 (M.D. Ala. 1969); *Stricklin v. Regents of Univ. of Wis.*, 297 F. Supp. 416 (W.D. Wis. 1969); *Esteban v. Central Mo. State College*, 290 F. Supp. 622 (W.D. Mo. 1968), *aff'd*, 415 F.2d 1077 (8th Cir. 1969); *Barker v. Hardway*, 283 F. Supp. 228 (S.D. W. Va. 1968), *aff'd*, 399 F.2d 638 (4th Cir. 1968), *cert. denied*, 394 U.S. 905 (1969); *Zanders v. Board of Educ.*, 281 F. Supp. 747 (W.D. La. 1968); *Jones v. Board of Educ.*, 279 F. Supp. 190 (M.D. Tenn. 1968), *aff'd*, 407 F.2d 834 (6th Cir. 1969), *cert. denied* 396 U.S. 817 (1970); *Esteban v. Central Mo. State College*, 277 F. Supp. 649 (W.D. Mo. 1967); *Due v. Florida A. & M. Univ.*, 233 F. Supp. (N.D. Fla. 1963); *Goldberg v. Regents of Univ. of Cal.*, 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967).

¹⁹⁴ Today even academic decisions may be reviewed by the courts in the case of arbitrary or prejudiced decisions on grading. See, e.g., *Connelly v. University of Vt.*, 244 F. Supp. 156 (D. Vt. 1965); *Mustell v. Rose*, 282 Ala. 358, 211 So.2d 489 (1968).

¹⁹⁵ Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 358 (1957).

¹⁹⁶ *McNabb v. United States*, 318 U.S. 332, 347 (1943).

with expulsion. Ordered liberty demands procedural safeguards. "It is procedure that spells much of the difference between rule by law and rule by whim or caprice."¹⁹⁷

To date, there has been no Supreme Court determination of what procedural safeguards are required in student disciplinary proceedings. However, the procedural standards which were laid down by the *Dixon* court in 1961¹⁹⁸ have been so widely accepted in subsequent litigations of student rights that they have come to be recognized as the minimal standards of due process in disciplinary proceedings. Thus, "while the nature of the hearing should vary depending on the circumstances of the case . . .,"¹⁹⁹ courts now require that a student, faced with serious disciplinary sanction²⁰⁰ (1) be given notice, including a statement of the charge and the grounds which, if proven, would justify a particular sanction; (2) be given the opportunity to be heard in his own defense; (3) be given the names of adverse witnesses; (4) be afforded the findings of the hearing body in a report open to the student's inspection.²⁰¹

Prior to 1961, courts either assumed the right to a hearing or ignored the question because it was not before them. Judicial review was limited to the adequacy of a hearing, if granted, and invariably the sufficiency of the hearing was upheld.²⁰² But the *Dixon* court struck at the core of the issue and required that a student faced with expulsion from a tax supported college be accorded a "due process" opportunity to be heard in his own defense.²⁰³

¹⁹⁷ Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 179 (1951).

¹⁹⁸ *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961), cert. denied, 368 U.S. 930 (1961).

¹⁹⁹ *Id.* at 158.

²⁰⁰ In the case of less serious disciplinary action, less formality could suffice. See *French v. Bashful*, 303 F. Supp. 1333, 1337 (E.D. La. 1969); *Soglin v. Kauffman*, 295 F. Supp. 978, 991 (W.D. Wis. 1968), *aff'd*, 418 F.2d 163 (7th Cir. 1969); *Haskell, Judicial Review of School Discipline*, 21 CASE W. RES. L. REV. 211, 221 (1970).

²⁰¹ *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 159 (5th Cir. 1961), cert. denied, 368 U.S. 930 (1961).

²⁰² See Comment, *Procedural Limitations on the Expulsion of College and University Students*, 10 Sr. Louis U. L.J. 542 (1966).

²⁰³ The *Dixon* court stated that:

Whenever a governmental body acts so as to injure the individual, the Constitution requires that the act be consonant with due process of law. The minimum procedural requirements necessary to satisfy due process depend on the circumstances and the interests of the parties involved. *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 155 (5th Cir. 1961), cert. denied, 368 U.S. 930 (1961).

While a full dress judicial hearing is not required, the rudiments of an adversary proceeding must be observed. *Scoggin v. Lincoln Univ.*, 291 F. Supp. 161 (W.D. Mo. 1968); *Moore v. Student Affairs Comm.*, 284 F. Supp. 725 (M.D. Ala. 1968); *Esteban v. Central Mo. State College*, 290 F. Supp. 622 (W.D. Mo. 1968), *aff'd*, 415 F.2d 1077 (8th Cir. 1969); *Goldberg v. Regents of Univ. of Cal.*, 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967).

The nature of the hearing should vary depending on the circumstances of the case. The case before us requires something more than an informal interview with an administrative authority of the college. By its nature, a charge of misconduct, as opposed to a failure to meet the scholastic standards of the college, depends upon a collection of the facts concerning the charged misconduct, easily colored by the point of view of the witnesses. In such circumstances, a hearing which gives the board, or the administrative authorities of the college an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved. This is not to imply a full-dress judicial hearing . . . [which] with the attending publicity, and disturbance of college activities, might be detrimental to the college's educational atmosphere, and impractical to carry out. Nevertheless, the rudiments of an adversary proceeding may be preserved without encroaching upon the interests of the college.²⁰⁴

As even a cursory reading must indicate, this general description of the type of disciplinary hearing required by due process standards is less than comprehensive. It has been for courts in subsequent decisions to consider and resolve the various procedural safeguards as they have come up in random fashion. Needless to say, the result is a jigsaw puzzle of decisions, requiring step by step analysis.

While there is precedent to support the general standard of "fundamental fairness" as a cure-all for slighted procedural particulars in a given case,²⁰⁵ there have come to be recognized a number of student-oriented factors indicative of the due process quality of a given proceeding.

1. Notice of Charges

In this age of constitutional preciseness, adequate notice of charges is primary to any real opportunity of defending oneself—so much so that a notice of charges which is not sufficiently specific has been held to be of such import as to render a disciplinary proceeding invalid on this basis alone.²⁰⁶ Moreover, to assure that notice be effective in

²⁰⁴ *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 158-59 (5th Cir. 1961), cert. denied, 368 U.S. 930 (1961). This right of the student to a hearing has been upheld, almost without exception, in cases of student discipline. Even at the high school level, due process standards are becoming operative. In the recent case of *Vaught v. Van Buren Public Schools*, 306 F. Supp. 1388 (E.D. Mich. 1969), a student was expelled from school for possessing a copy of *Argus*, which was allegedly "obscene." The court found that no hearing had been conducted prior to disciplinary action and ordered that a hearing be conducted. See also *Goldwyn v. Allen*, 281 N.Y.S.2d 899 (Sup. Ct. 1967).

²⁰⁵ *Wright v. Texas S. Univ.*, 392 F.2d 723 (5th Cir. 1968); *Due v. Florida A. & M. Univ.*, 233 F. Supp. 396 (N.D. Fla. 1963).

²⁰⁶ *Scott v. Board of Educ.*, 300 F. Supp. 163 (M.D. Ala. 1969); *Scoggin v. Lincoln Univ.*, 291 F. Supp. 161 (W.D. Mo. 1968). See also, *Zanders v. Board of Educ.*, 281 F. Supp. 747, 752 (W.D. La. 1968); *Esteban v. Central Mo. State College*, 277 F. Supp. 649 (W.D. Mo. 1967).

facilitating the preparation of a student's defense, notice must be timely if it is to stand up in court²⁰⁷—and has been required to refer to the particular rule or regulation, the violation of which justifies sanction.²⁰⁸ As early as 1887, the importance of adequate notice was appreciated by the court in *Commonwealth ex rel. Hill v. McCauley*.²⁰⁹

In order to justify his dismissal it must appear that he was notified that a charge of misconduct was made against him, which was so fully, plainly, and substantially described, that he might clearly apprehend it, realize its gravity and the possible harm which might come to him, if it were sustained, and thus be admonished of the necessity of preparing to meet it.²¹⁰

Since the value of adequate notice is the opportunity it affords the accused to prepare an adequate defense, it must appear incongruous to one so engaged not to know the identity of his accusers or the substance of the evidence against him.²¹¹ The arbitrariness of such a "procedure" was rebuffed in *Scoggin v. Lincoln University*,²¹² where the court ordered two suspended students to be readmitted since there was no substantial evidence to support a finding that those particular students had planned anything other than a peaceful demonstration or that they had personally destroyed university property.

2. Requirement of Substantial Evidence

In the volatile atmosphere of today's campus disruptions, certain moral and political causes are not the most popular. Many students are in direct opposition and such disagreement can give rise to less than objective or detached testimony. The Supreme Court has empha-

²⁰⁷ In *Due v. Florida A. & M. Univ.*, 233 F. Supp. 396 (N.D. Fla. 1963), notice "to come" was given over the phone and a letter of notice was read to the accused students when they arrived—a letter the students alleged not having received. Such "notice" was upheld as meeting a test of "fairness and reasonableness." And as recently as 1968, in *Wright v. Texas S. Univ.* 392 F.2d 728 (5th Cir. 1968), it was ruled that all that is required is that a good faith attempt to give notice be made, either by service while violation is taking place or by mailing it to students' residence. *But see* *Esteban v. Central Mo. State College*, 290 F. Supp. 672 (W.D. Mo. 1968), *aff'd*, 415 F.2d 1077 (8th Cir. 1969) (written notice at least 10 days prior to hearing); *Zanders v. Board of Educ.*, 281 F. Supp. 747 (W.D. La. 1968) (written notice at least one week prior to hearing); *Jones v. Board of Educ.*, 279 F. Supp. 190 (M.D. Tenn. 1968), *aff'd*, 407 F.2d 834 (6th Cir. 1969), *cert. denied*, 396 U.S. 817 (1970) (fundamental right to adequate and timely notice); *Schiff v. Hannah*, 282 F. Supp. 381 (W.D. Mich. 1966) (written notice at least 10 days in advance and 10 days for the accused to respond).

²⁰⁸ *Zanders v. Board of Educ.*, 281 F. Supp. 747 (W.D. La. 1968).

²⁰⁹ 3 Pa. County Ct. 77 (1887).

²¹⁰ *Id.* at 82.

²¹¹ In *Wasson v. Trowbridge*, 382 F.2d 807 (2d Cir. 1967), the court determined that a student is so utterly unable to defend against unknown evidence that it violates fundamental fairness.

²¹² 291 F. Supp. 161 (W.D. Mo. 1968).

sized the dangers inherent in such a situation and the protective procedures thereby required:

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy.²¹³

Consequently, there has developed ample precedent to require that serious disciplinary sanction be based upon "substantial evidence."²¹⁴

3. Right to Cross-Examine

It should be noted here that the opportunity to contradict and disprove adverse testimony and evidence can be of little real worth in many instances without the right of cross-examination. "For two centuries, past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law."²¹⁵ Nevertheless, only one case has explicitly held that the student—not his attorney—may cross-examine adverse witnesses.²¹⁶ The importance of the student's active participation becomes of ever greater importance as the heat of campus confrontation grows and public prejudice intensifies accordingly.

4. Right to Counsel

Any consideration of cross-examination raises the issue of right to counsel and the trend here points toward allowing this right. In the recent case of *French v. Bashful*,²¹⁷ wherein ten students at Southern University at New Orleans [SUNO] had been placed on probation and subsequently expelled for participation in demonstrations on

²¹³ *Green v. McElroy*, 360 U.S. 474, 498 (1959).

²¹⁴ *French v. Bashful*, 303 F. Supp. 1333 (E.D. La. 1969); *Scoggin v. Lincoln Univ.*, 291 F. Supp. 161 (W.D. Mo. 1968); *Esteban v. Central Mo. State College*, 290 F. Supp. 622 (W.D. Mo. 1968), *aff'd*, 415 F.2d 1077 (8th Cir. 1969); *Jones v. Board of Educ.*, 279 F. Supp. 190 (M.D. Tenn. 1968), *aff'd*, 407 F.2d 834 (6th Cir. 1969), *cert. denied*, 396 U.S. 817 (1970).

²¹⁵ 5 WIGMORE, EVIDENCE § 1367, at 28 (3rd ed. 1940).

²¹⁶ *Esteban v. Central Mo. State College*, 277 F. Supp. 649 (W.D. Mo. 1967). See also *Zanders v. Board of Educ.*, 281 F. Supp. (W.D. La. 1968); *Jones v. Board of Educ.*, 279 F. Supp. 190 (M.D. Tenn. 1968), *aff'd*, 407 F.2d 834 (6th Cir. 1969), *cert. denied*, 396 U.S. 817 (1970); *Goldberg v. Regents of Univ. of Cal.*, 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967).

²¹⁷ 303 F. Supp. 1333 (E.D. La. 1969).

campus, the expulsions were reversed. The court ruled that where a university uses one of its law students to prosecute, the accused must be allowed retained counsel. While a majority of courts have not as yet recognized a student right to counsel in disciplinary proceedings,²¹⁸ two district courts have emphasized its importance in holding for it.²¹⁹ The presence of counsel at the hearing would "assure not only fairness, but every semblance of fairness . . ."²²⁰ Not only would the assistance of counsel assure the accused student the best possible presentation of his case, but it would stand for the "fundamental fairness" of the hearing in any subsequent judicial review.

5. Rules of Evidence

As to the admissibility of evidence, courts have shown a reluctance to apply trial rules of evidence.²²¹ Moreover, the products of a search and seizure, illegal by criminal law standards, have been admitted in student disciplinary proceedings. While some writers have called for granting students the protection of the fourth amendment on a par with off-campus citizens who enjoy a landlord-tenant relationship,²²² public pressure to suppress the use of marijuana has resulted in invasions of student privacy that would otherwise be constitutionally protected. In *Moore v. Student Affairs Committee of Troy State University*,²²³ the court upheld such a search and seizure without a warrant, relying not on the criminal-law standard of "probable cause" but on a more general standard of "reasonable cause to believe." However, it should be noted that such "reasonable infringement" of a student's right to privacy runs against the grain of recent decisions on both student and non-student right to privacy. The "long-hair" cases which have injected the *Griswold*²²⁴ penumbra of constitutionally protected rights of privacy into the academic arena would indicate that students share with their fellow citizens the "right to be secure in their persons, houses, places, and things."²²⁵ Such is indicated by the decision in

²¹⁸ See *Madera v. Board of Educ. of City of N.Y.*, 386 F.2d 778 (2d Cir. 1967); *Barker v. Hardway*, 283 F. Supp. 228 (S.D. W. Va. 1968), *aff'd*, 399 F.2d 638 (4th Cir. 1968), *cert. denied*, 394 U.S. 905 (1969); *Wasson v. Trowbridge*, 382 F.2d 807 (2d Cir. 1967); *Due v. Florida A. & M. Univ.*, 233 F. Supp. 396 (N.D. Fla. 1963).

²¹⁹ *Zanders v. Board of Educ.*, 281 F. Supp. 747, 752 (E.D. La. 1968); *Esteban v. Central Missouri St. College*, 277 F. Supp. 649, 651 (W.D. Mo. 1968).

²²⁰ *Due v. Florida A. & M. Univ.*, 237 F. Supp. 396, 403 (N.D. Fla. 1963).

²²¹ One case has held specifically that the rules of evidence do not apply. *Goldberg v. Regents of Univ. of Cal.*, 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967).

²²² See, e.g., *Goldman, The University and the Liberty of Its Students—A Fiduciary Theory*, 54 Ky. L.J. 643 (1966).

²²³ 284 F. Supp. 725 (M.D. Ala. 1968).

²²⁴ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

²²⁵ U.S. CONST. amend. IV.

People v. Cohen.²²⁶ This is another case involving marijuana. During a survey of a dorm by police at the request of university officials, a suspicious smell was detected in one of the hallways. Although there was enough time to get a warrant and no danger that the suspected contraband would be destroyed, entrance was made into the room without a warrant and illicit drugs were seized. In refusing to imply consent on the part of the students²²⁷ by reason of their being students, the court ruled that the evidence so seized was inadmissible.²²⁸ Such a position on the part of "the law" not only will result in police operations of a more professional caliber, but will demand the respect of those most skeptical of "the system."

6. Privilege Against Self-Incrimination

Another procedural safeguard that is receiving more and more consideration and interest with the increased use of marijuana, the growing number of campus confrontations, and the accompanying enactment of state legislation in these areas in the fifth amendment privilege against self-incrimination. Students at the college of San Mateo, California, when charged by college authorities with unlawful actions during one or more campus demonstrations were suspended pending disposition of those charges and named as defendants in state court criminal actions growing out of the demonstrations. They sought injunctions against college expulsion hearings until culmination of the criminal proceedings. In response to argument by these students that testifying at the hearing would incriminate them in violation of the fifth amendment, the court, in *Furutani v. Ewigleben*,²²⁹ held that such compulsion to testify at a college hearing is permissible, since the testimony then obtained could not be used against them in a criminal

²²⁶ 57 Misc. 2d 366, 292 N.Y.S.2d 706 (1968).

²²⁷ See *Marcuse v. DeForte*, 392 U.S. 364 (1968). It was held there that the search of a union official's office and the seizure of papers therein without a warrant constituted unconstitutional infringement regardless of whether the official had a "private" office or shared one with another officer. For further argument to suppress evidence so seized, see *Mapp v. Ohio*, 367 U.S. 643 (1960) (fourth amendment applies to the states); *Jones v. United States*, 362 U.S. 257, 267 (1960) (anyone legitimately on the premises may challenge use of "illegally" seized evidence with a motion to suppress).

²²⁸ See also *People v. Overton*, 20 N.Y.2d 360, 283 N.Y.S.2d 22, 229 N.E.2d 596 (1967), *vacated*, 393 U.S. 85 (1968). The Court of Appeals of New York sustained the admission of marijuana seized from a student locker on the consent of the high school principal. The United States Supreme Court vacated the rulings of the New York courts below, remanded the case and suggested re-argument in light of *Bumper v. North Carolina*, 391 U.S. 543, (1968), which held that a search cannot be justified as lawful on the basis of consent when that "consent" has been given only after the official conducting the search has asserted that he possesses a warrant. There is no consent under such circumstances. *Id.* at 546-550.

²²⁹ 297 F. Supp. 1163 (N.D. Cal. 1969).

prosecution.²³⁰ Such court approval of compulsion to testify can only be a reflection of public apprehension and impatience with campus protest. Students today are protected by the fourteenth amendment²³¹ and it is arguable indeed that students thereby enjoy "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence."²³²

7. Interim Suspension

The *Furutani* case also presents us with an issue that is uniquely the product of the contemporary campus situation—namely, interim suspension.²³³ The students in this particular case were suspended without a hearing, though one was later scheduled prior to the criminal trial. The court reasoned that in emergency circumstances where the safety of students, university personnel, or university property is being jeopardized, temporary suspension without a hearing is not only permissible but may be necessary in many instances.²³⁴

Such a rationale, while fitting into the pre-*Dixon* mold, fails to recognize the contemporary student's right to constitutional due process. Certainly, if abuses are to be avoided and unnecessary hardships prevented, the burden of proof must be on university officials to justify the denial of vested constitutional rights. Such was the reasoning of the court in *Stricklin v. The Regents of The University of Wisconsin*.²³⁵ The Board of Regents met on March 6, 1960 and suspended those students named by the campus police chief as participating in campus disorder and violence the week before. These students were put under interim suspension without being present. A formal hearing was set for March 19. The court found such procedure to be in violation of the student's fourteenth amendment right to due process, and

²³⁰ *Garrity v. New Jersey*, 385 U.S. 493 (1967).

²³¹ See *Powe v. Miles*, 407 F.2d 73 (2d Cir. 1968); *Wright v. Texas S. Univ.*, 392 F.2d 728 (5th Cir. 1968); *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961); *Esteban v. Central Mo. State College*, 277 F. Supp. 649 (W.D. Mo. 1967); *Due v. Florida A. & M. Univ.*, 233 F. Supp. 396 (N.D. Fla. 1963).

²³² *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

²³³ A parallel to interim suspension can be found in the preventive detention provision of the District of Columbia Court Reform and Criminal Procedure Act of 1970 [Pub. L. 91-358, 84 Stat. 473 (1970)], recently passed by Congress. It can be anticipated that a decision by the Supreme Court on this stringent technique will be persuasive indication of the eventual resolution of the interim suspension issue.

²³⁴ A number of cases hold that a student may be suspended pending a hearing even in the absence of an emergency; see, e.g., *Powe v. Miles*, 407 F.2d 73 (2d Cir. 1968); *Barker v. Hardway*, 283 F. Supp. 228 (S.D. W. Va. 1968), *aff'd*, 399 F.2d 638 (4th Cir. 1968), *cert. denied*, 394 U.S. 905 (1969).

²³⁵ 297 F. Supp. 416 (W.D. Wis. 1969). The issue being discussed neither involves nor suggests a right to attend college, but rather the right to remain therein as a student subsequent to admission.

ruled that interim suspension is impermissible without a preliminary hearing unless it can be shown to be impossible or unnecessarily difficult to afford it, in which case the hearing should be held as soon as possible.

As with the *Stricklin* restriction on "interim suspension", so with all the procedural safeguards that have been accorded students in disciplinary proceedings, the worth of due process in the constitutional framework of a free people cannot be fully appreciated. Due process is "a fundamental principle of liberty and justice which inheres in the very idea of free government, and is the inalienable right of the citizen of such a government."²³⁶ Moreover, the law must not only be fair, it must appear fair to those who must live under its shadow.

Procedures are subject to refinement and improvement in the never ending effort to assure, not only fairness, but every semblance of fairness . . . the touchstones in this area are fairness and reasonableness.²³⁷

With the current of public opinion becoming more reactionary and repressive in response to student protest of the "system", the war, poverty, etc., due process offers the only real assurance of reasonable resolution. Its safeguards are in the best interest of all Americans—over and under 30, student and non-student alike.

Due process of law is not for the sole benefit of the accused. It is the best insurance . . . against those blunders which leave lasting stains on a system of justice, but which are bound to occur on *ex parte* consideration.²³⁸

B. Substantive Due Process

While procedural constitutional protections have been asserted, debated, and litigated for some ten years, campus-produced litigation involving substantive due process has been of more recent development. The ultimate in judicial recognition of student substantive rights appeared to have been reached in the 1969 Supreme Court decision of *Tinker v. Des Moines Independent Community School District*.²³⁹ This case involved the suspension of two high school students and one junior high student who in contravention of a school regulation had worn black arm bands in protest of the Vietnam War.

²³⁶ *Twining v. State of New Jersey*, 211 U.S. 78, 106 (1908).

²³⁷ *Due v. Florida A. & M. Univ.*, 233 F. Supp. 396, 403 (N.D. Fla. 1963).
See also *Wright v. Texas S. Univ.*, 392 F.2d 728 (5th Cir. 1968).

²³⁸ Byse, *The University and Due Process: A Somewhat Different View*, 54 A.A.U.P. BULL. 143, 145 (1968).

²³⁹ 393 U.S. 503 (1969). *Einhorn v. Maus*, 300 F. Supp. 1169 (E.D. Pa. 1969), applied *Tinker* to the colleges.

The holding of the Court can be broken down into three parts: (1) "Students in school, as well as out of school, are persons under our constitution;"²⁴⁰ (2) the wearing of an arm band as a political expression of dissent, when divorced from actually or potentially disruptive conduct, is akin to "pure speech" and is the type of symbolic act that is within the free speech clause of the first amendment; (3) when there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere" with school discipline, the prohibition cannot be sustained. Certainly, with this decision, the status of the student took on a new constitutional character. But, as with all newborns, its weaknesses were as glaring as its strengths. What was the formula prescribed for its future application in a variety of factual contexts? In shouldering school administrators with the burden of showing the disruptive quality of student conduct, Justice Fortas, speaking for the majority, asserted:

. . . [I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear.²⁴¹

But on the other hand, in making constitutional safeguards available to students "in the light of the special circumstances of the school environment,"²⁴² he explicitly declared:

Conduct by the student in class, or out of it, which for any reason—whether it stems from time, place or type of behavior—materially disrupts class work or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guaranty of freedom of speech.²⁴³

This qualification and limitation of students' constitutional status is continually repeated throughout the opinion. So much so, that question arises as to whether *Tinker* is definitional only, with application relegated to a case by case development. To be sure, no workable test or standard is offered. While "material and substantial" disruption of school order must be found or shown by administrators to justify limitation of students' constitutional rights, this burden appears light indeed in view of subsequent cases.

The recent case of *Norton v. Discipline Committee*²⁴⁴ upheld the

²⁴⁰ *Tinker v. Des Moines Ind. Comm. School Dist.*, 393 U.S. 503, 511 (1969).

²⁴¹ *Id.* at 508.

²⁴² *Id.* at 513.

²⁴³ *Id.* at 506.

²⁴⁴ 419 F.2d 195 (6th Cir. 1969).

suspension of state college students for distributing material which according to the school officials was of a false, seditious and inflammatory nature, calculated to cause disruption and disturbance and to bring about contempt for school authorities. The literature distributed called university officials despots and problem children to be disciplined by students, and urged the students to stand up and fight. In seeking an injunction to compel readmission, the students involved relied on *Tinker*, but to no avail. The court distinguished *Tinker* on the grounds that it involved conduct entirely divorced from violence and disruption and even group demonstrations. The court went on to find that the disruptive quality of the literature in *Norton* appeared on its face and constituted a "substantial and material" interference with school discipline.

In the 1969 case of *Butts v. Dallas Independent School District*,²⁴⁵ the court upheld school officials in Dallas who found armbands to be potentially disruptive in view of counter demonstrations and bomb threats in response to "moratorium" events. Again, the court, as did the court in *Norton*, limited the *Tinker* decision to its passive, non-disruptive circumstances and justified the imposition of disciplinary sanction by setting forth such factors as (1) the handing out of leaflets; (2) the wearing of t-shirts with an upside-down Y printed on them; (3) a demonstration across the street from one of the schools; (4) a bomb threat at another of the district schools. The court concluded from these facts that the administrators anticipated "with good reason" that the wearing of arm bands would substantially interfere with school order.

Norton and *Butts* offer ample evidence that *Tinker* provides no effective restraints on the invasion of constitutionally-protected student rights by school administrators. There is indication that mere allegation of "potential" trouble will justify an imposition of disciplinary sanction—even if the potential trouble is the product, not of the demonstrating students, but of others reacting to them. Part I of this paper should sufficiently indicate that demonstrations and heated reactions to demonstrations are an ever present product of contemporary campus tensions. Does this mean that student constitutional rights—even in the preferred first amendment area—are to lie dormant for the foreseeable future? Does *Tinker*, in light of the special circumstances of the school environment, distinguish the Supreme Court's often reiterated position that the violent reaction of others does not diminish the right to freedom of speech? The answer to these questions will be found in subsequent decisions. But it is reasonably certain that unless

²⁴⁵ 306 F. Supp. 488 (N.D. Tex. 1969).

the Supreme Court places effective restraints on administrators, anxious from the pressure of repressive public opinion, students' substantive constitutional rights will become a meaningless anomaly.²⁴⁶

In the "pure speech" areas of campus activity—guest speakers,²⁴⁷

²⁴⁶ Although it is generally recognized that cases involving the questionable exercise of first amendment rights, e.g. sit-ins, demonstrations, etc., must be judged on a case by case basis, the courts, in their quest for certainty and predictability, have attempted to establish some standards for decision. There are three basic formulas used, the acceptability of which reasonably comports with the era of Constitutional development in which they were formulated.

First, *Schenck v. United States*, 249 U.S. 47, 52 (1919) held that a limitation on free speech will not be upheld unless a clear and present danger can be shown to exist. The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress [or a state legislature] has a right to prevent. It is a question of proximity and degree. Although "clear and present danger" is admittedly vague, the Court has interpreted it to mean that the evil must be very grave and its likelihood of occurring very high before permissible limitations can be established. *Bridges v. California*, 314 U.S. 252 (1941).

Second, another test was propounded in *Dennis v. United States*, 341 U.S. 494 (1950). The so-called "Balancing Test" requires that: In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger. *Id.* at 510, quoting from the opinion below, 183 F.2d 201, 212 (2d Cir. 1950). This standard would question whether a school's interests were of such importance as to justify suppression of a particular, student "preferred" interest in freedom of speech and assembly.

The court used such an approach in *Dickey v. Alabama State Bd. of Educ.*, 273 F. Supp. 613, 617 (M.D. Ala. 1967), in balancing the first amendment rights of a student newspaper editor against the interests of the university in maintaining its restrictive editorial policies. The court said that just as the Constitution requires a balancing of the rights of property owners with the individual guarantees of the Bill of Rights; likewise, in the present case, it demands a balance of the first amendment's application to students, and recognition that rules and regulations are necessary for the maintenance of an educational program most conducive to learning.

The third and final test—the material and substantial interest test—was set forth by the court in *Dickey v. Alabama State Bd. of Educ.*, 273 F. Supp. 613 (M.D. Ala. 1967).

State school officials cannot infringe on their students' right of free and unrestricted expression . . . where the exercise of such right does not "materially and substantially interfere with the requirements of appropriate discipline in the operations of the school." *Id.* at 618.

The test was galvanized when the Court in *Tinker v. Des Moines Ind. Comm. School Dist.*, 393 U.S. 503 (1969), stated that:

Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained. *Id.* at 509.

It would appear that expression can only be prohibited if it takes the form of action that materially and substantially interferes with the normal activities of the institution or invades the rights of others. Yet as the text accompanying this footnote would indicate, even the "potential" of such interference can justify the narrowing of first amendment rights.

²⁴⁷ See *Brooks v. Auburn Univ.*, 296 F. Supp. 188 (E.D. Ala. 1969); *Smith v. University of Tenn.*, 300 F. Supp. 777 (E.D. Tenn. 1969); *Stacy v. Williams*, 306 F. Supp. 963 (N.D. Miss. 1969); *Dickson v. Sitterson*, 280 F. Supp. 486 (M.D. N.C. 1968); *Dunbar v. Governing Bd. of Grossmont Jr. Coll. Dist.*, 79 Cal. Rptr. 662 (Dist. Ct. App. 1969).

the contents of student publications²⁴⁸ and classroom discussion—there must be an absolute minimum of administrative restriction.²⁴⁹ Assuming enlightenment to be one of the goals inhering in the very function of an educational institution, free speech demands judicial affirmation when its exercise is questioned in the academic milieu.²⁵⁰

Just recently in the 1970 case of *Antonelli v. Hammond*,²⁵¹ the court ruled that it is improper for a college to require that material for the campus newspaper be submitted to a faculty advisory board prior to publication to determine if it complied with “responsible freedom of the press,” or was “obscene”. The fact that the newspaper was college sponsored and state supported made no difference in the absence of a showing of circumstances attributable to school environment making necessary more restrictive measures than are generally permissible under the first amendment. In another recent student-press case involving the inflammatory issue of Viet Nam,²⁵² students claimed violation of their first amendment rights and brought an action against the Regents of Wisconsin State University System and the Student Publications Board which sets policy for student newspapers. These students were individuals who submitted “editorial advertisements” to the paper concerning a university employees’ union, race relations, and Viet Nam. The Board had a policy of not printing editorial advertisements, *i.e.*, those dealing with social rather than commercial matters. The court held that a student publication is a newspaper and not an educational exercise. The Board’s distinction between commercial and non-commercial advertising was a form of impermissible censorship of ideas and to justify such a distinction, the university would have to show a “clear and present danger” to society posed by such editorial advertising.

In granting students and faculty at Auburn University a preliminary

²⁴⁸ See *Avins v. Rutgers*, 285 F.2d 151 (3d Cir. 1967), *cert. denied*, 390 U.S. 920 (1968); *Antonelli v. Hammond*, 308 F. Supp. 1329 (D. Mass. 1970); *Zucker v. Panitz*, 299 F. Supp. 102 (S.D.N.Y. 1969); *Scoville v. Board of Educ. of Joliet Twp.*, 286 F. Supp. 988 (N.D. Ill. 1968), *aff’d*, 415 F.2d 860 (7th Cir. 1969); *Dickey v. Alabama State Bd. of Educ.*, 273 F. Supp. 613 (M.D. Ala. 1967).

²⁴⁹ See *Haskell, Judicial Review of School Discipline*, 21 CASE W. RES. L. REV. 211 (1970).

Student conduct involving reasoned expression should be subject to a different standard. The contents of student publications and classroom discussion should be protected as pure speech is elsewhere protected, allowing for the special circumstances of time, place, the age of the students, and the purpose of the public school and the classroom. Intellectual discourse is of much greater importance and value than the use of faddish symbols and styles, and should be accorded a greater degree of protection against the restrictions of the school authorities. *Id.* at 242-43.

²⁵⁰ See, *e.g.*, *Zucker v. Panitz*, 299 F. Supp. 102 (S.D. N.Y. 1969); *Dickey v. Alabama State Bd. of Educ.*, 273 F. Supp. 613 (M.D. Ala. 1967).

²⁵¹ 308 F. Supp. 1329 (D. Mass. 1970).

²⁵² *Lee v. Board of Regents*, 306 F. Supp. 1097 (W.D. Wis. 1969).

injunction, the court in *Brooks v. Auburn University*,²⁵³ ruled that regulations by the university president to the effect that student organizations could not invite a speaker, in this case William Sloan Coffin (well known critic of the Viet Nam War), who could reasonably be expected to advocate the breaking of the law, who had been convicted of a felony, or whose views the university could not sanction, constituted blatant political censorship in violation of the first amendment. The court reasoned that such rules constituted an unconstitutional prior restraint on the exercise of protected speech by threat of punishment. In its holding the court quoted the noted educator, author and philosopher, Alexander Meikeljohn:

When men govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger. And that means that unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe, un-American as well as American. . . . [T]he denial of that right to hear . . . is that mutilation of the community against which the First Amendment of the Constitution is directed.²⁵⁴

Such reasoning would appear to allow for little restraint, but as *Tinker*, the court here includes for future decision a qualification of its holding. It asserts that:

The speech may not be restrained in advance except when there is a clear and unmistakable determination that the speaker will violate the law in the course of the speech.²⁵⁵

One may again question whether the student rights recognized in such a decision as *Brooks* can be of any real worth without the establishment of effective restraints upon those who could be expected by reason of their position or perspective to infringe on those rights. The only criteria even suggested by the court in this regard is that the narrowing of constitutional rights in a given instance must be justified in terms of external, factual data rather than in terms of suspicion and anxious conclusions. As we have seen in *Butts*, however, this can prove to be a light burden.

The real foundation for a solid development of student substantive rights must be found by going back one step further in the disciplinary process—by starting with the educational institution's inherent rule-making authority. For as *Brooks* suggests, while college rules may provide for the reasonable regulation of time, place or manner of speech, and may provide for procedures permitting an orderly

²⁵³ 296 F. Supp. 188 (1969).

²⁵⁴ *Id.* at 198-99.

²⁵⁵ *Id.* at 197.

scheduling of facilities and preclude conflicts with academic events, such rules must be clearly and narrowly drawn. Vague and overbroad regulations of constitutionally protected areas of conduct are impermissible and must be struck down when challenged in court.

In sustaining an action brought by students seeking a declaration of unconstitutionality of disciplinary proceedings instituted by a state university on the grounds of alleged "misconduct," the court in *Soglin v. Kauffman*²⁵⁶ ruled:

. . . [E]xpulsion and prolonged suspension may not be imposed on students by a university simply on the basis of allegations of "misconduct" without reference to any pre-existing rule which supplies an adequate guide. The possibility of the sweeping application of the standard of "misconduct" to protected activities does not comport with the guarantees of the First and Fourteenth Amendments. The desired end must be more narrowly achieved.²⁵⁷

While *Soglin* does not as yet represent a majority rule,²⁵⁸ it offers a reality-oriented approach which can go far toward reversing the ever-increasing number of campus crises. If the rules governing student conduct are set forth in clear and specific language so as to clarify the standards of behavior which a given college or university considers essential, conflicts will be more often resolved within the campus community and less often in the courts. Such a pattern of internal resolution will certainly demand a more elaborate campus appeals system which will provide appropriate relief or sanction, internally and apart from public opinion. This finality of judgment at the campus level could be an all important first step toward peace and order—toward a sense of community without which a living institution cannot prosper and grow.

Still, there will remain those who can only view the recognition of student rights as the main, or a major, contributing factor in the campus conflicts of today. In answer to these persons, one can only offer for consideration the fact that:

Private universities [where due process has not yet been applied] are the most likely to have violent or disruptive protest. . . . [A study by the American Council on Education] said that 34.4 percent of the private universities had experienced violent or disruptive protests, and 70.5 percent had had disruptive protests. Public universities [where due process is applied as a matter of

²⁵⁶ 418 F.2d 163 (7th Cir. 1969).

²⁵⁷ *Id.* at 168.

²⁵⁸ See, e.g., *Esteban v. Central Missouri State College*, 290 F. Supp. 622 (W.D. Mo. 1968), *aff'd*, 415 F.2d 1077 (8th Cir. 1969).

constitutional right] were next in line with 13.1 percent experiencing violence and 43 percent undergoing disruption.²⁵⁹

Such is interesting to contemplate when one considers that approximately two out of every three students enrolled in the fall of 1969 attended public institutions.²⁶⁰ Thus, "in the last analysis, the law must be judged by how well the society functions that is subject to it."²⁶¹

III. RESOLUTION

What we are witnessing today is an abatement of the minimal level of tolerance needed for social cohesion in a pluralistic society. There are certain elements among the young and the old who would die gloriously rather than live humbly in the service of a cause.²⁶² Unfortunately, they are using our universities as funeral pyres. In this concluding section, we will analyze what the true interests of the participants are and how each group might best secure those interests.

Students who dream of an aquarian utopia and the brotherhood of man are the first to shatter such an ideal with bombs and the bating of authority with obscenities. Adults who demand responsibility in the young and see the "next generation" as "sent" to solve the world's problems, wish to shackle and imprison students—not only in physical bonds but in mental ones as well.

The young must learn that the "true education" which gives them power in changing the world involves the long, hard labor of study and reasoning, and not simply cursing injustice and committing shortsighted acts of disruption. In turn adults must realize that education is a process which not only must re-examine the existing answers, but must question the existing questions. No proposition is too sacred for re-evaluation.

A. Students

Student interests lie in five areas:

1. *Educational*—This is still the fundamental interest of the student. The benefits of a college degree are profound.²⁶³ For those less concerned with arguments of material gain, education can still be the key to the fullest development and appreciation of one's mental potential and one's cultural heritage. And if one is wise, education can be a road to a life style offering psychological, as well as material, benefits.

²⁵⁹ CHRONICLE OF HIGHER ED., Sept. 15, 1969, at 8.

²⁶⁰ CHRONICLE OF HIGHER ED., March 24, 1969, at 1.

²⁶¹ Haskell, *Judicial Review of School Discipline*, 21 CASE W. RES. L. REV. 211, 243 (1970).

²⁶² See note 86 *supra*.

²⁶³ See text accompanying notes 188, 189, 191 *supra*.

Finally, education can be a source of power for those who truly desire to build a better world. All of this is true whether one accentuates technical or humanistic instruction.

2. *Academic*—From the student's interest in education arise certain corollary interests. There are needed competent instructors willing to teach as well as an institution with adequate resources and an adequate atmosphere.

3. *Personal*—As with any member of society, the student possesses certain purely personal goals which demand a certain degree of personal freedom. A student needs rights as well as duties and responsibilities.

4. *Social*—It is not only idealism that motivates a student's social conscience—it is the certainty that he must exist in this society.

5. *Power*—All of the above interests create a need from the student's viewpoint to participate in educational decision-making and ultimately in the decision-making process of society as a whole.

Students must realize that violence is self-defeating. Their educational and academic interests are completely disrupted by violent disturbances. It was the students who were most harmed by the widespread shut-down of higher education in 1970. Violence is also counterproductive in terms of a student's personal, social, and power interests. Not only does it discredit the student's announced goals,²⁶⁴ but can result in a repressive backlash. For example, state after state has recently refused to adopt the 18 year old vote. Following disturbances here at the University of Kentucky in the spring of 1970, students who objected to the then student code were "rewarded" for their efforts with a more disagreeable code.²⁶⁵

²⁶⁴ Witness the following commentary by one university official on campus repression:

When I look out my window, when I try to carry on my job, I would simply have to break into hysterical laughter if someone came in and told me that what was happening in the school right then was that students were being repressed. The fact of the matter is they have got me locked in the room; the rocks are coming through the windows; nobody has been punished for anything; the whole judicial process has collapsed; whatever standard you think is important in any area on drugs or law or sex or clothes or anything else has been abandoned; and just under my door has been slipped a copy of an openly published newspaper which says things no newspaper has ever dared to say. A howling mob is outside and nobody is going to do anything about it and I am supposed to believe that students are repressed?

REPORT OF THE PRESIDENT'S COMM'N ON CAMPUS UNREST 7/8-9 (CCH ed. 1970) [hereinafter cited as COMMISSION ON CAMPUS UNREST].

²⁶⁵ In a personal context, one student arrested during the disturbances on the U. of Ky. campus in May, 1970, appealed a disorderly conduct conviction in which he had been fined \$1. In a jury trial he received a sentence of five months and 28 days in jail and a \$500 fine, the maximum for the charge being six months in jail and \$500.

It is easy to see how students may be misled into taking the fruitless path of violence. This nation was mid-wifed by the rebellion of an activist minority. Our society is replete with myths of glorified individualism and asserted rights. We cherish the prerogative of bearing arms, and our history is continuously colored with individual, mob and governmental violence. But it would behoove all Americans to consider the admonition of the Declaration of Independence that physical resistance is the *last* avenue for the redress of unbearable grievances.

Ours is a very flexible society by comparison to other social orders. Positive, responsible action, coupled with imaginative leadership and untiring persistence can result in productive changes within the pattern.²⁶⁶ The newest changes in student tactics indicate a growing awareness of this fact.²⁶⁷

The best way students can advance their interests is by pressing for power positions both internal and external to the campus structure. Fundamental to this is the establishment of an image of responsibility. Students must support decision makers when they are right—even against the opposition of other students.²⁶⁸ Every effort should be made to win the respect and support of faculty, administrators and all other participating groups both by better communication and by providing positive assistance where possible.

Internally, the students must evoke a realistic assessment of the school power structure. A method of mobilizing and uniting student opinion on a particular issue must be found. Ineffectual administrators should be bypassed and pressure placed directly on key administrators. Off campus, students should exercise their political responsibilities and privileges. The ballot box, for students, is just beginning to be appreciated as an effective tool of social change.

At the same time, students must guard their constitutional rights and exercise them freely. But they must be careful to shield those rights from the attacks of small bands of radical students as well as from the attacks of school and civil authorities.

²⁶⁶ Kentucky has permitted eighteen-year-olds to vote for over fifteen years. It was the first state to put students on the board of trustees of state universities. The age of majority has been lowered to eighteen and now students are being placed on the state water and air pollution control boards.

²⁶⁷ See text accompanying notes 100-01 *supra*. COMMISSION ON CAMPUS UNREST at 1/48. The Commission, however, states that while non-violent political activity means the triumph of moderate students as to tactics, radicals have won out as to ends. The radicals are successfully mobilizing universities to protest national policies.

²⁶⁸ COMMISSION ON CAMPUS UNREST, at 1/15.

B. Faculty

Faculty interests are of three types:

1. *Academic*—Doing research and teaching which require adequate resources, reasonably serious students and an academic atmosphere.

2. *Career*—As with any job, faculty members desire security, recognition, advancement, remuneration and good working conditions.

3. *Social*—As with any other system faculty members have a vested interest in societal well-being.

These ends are best served by doing nothing to encourage student violence. Rather the faculty needs to cooperate with administrators while vigorously protecting campus constitutional rights and academic freedoms. Faculty should strive to foster intra-campus communication and to insure that campus decision-making is an open process.

C. Administrators

An administrator's goals must be defined according to the nature of his institution. The primary goal of a school must still be the education of its students. Secondary to that is the mixture of research and social services that is found desirable. There is no way the administrator can avoid becoming the focal point of the conflicting interests of the various groups. This is particularly true of the most fundamental question in the field of education today: shall faculty and students be free to examine without restriction all propositions, or are there certain propositions too fundamental to our social ethic to be re-examined.²⁶⁹ It is easy to understand the ever-growing turn-over rate in university and college presidencies.²⁷⁰ The pressures to satisfy the conflicting demands of all participants are almost unbearable.

The successful administrator must neutralize these conflicts and achieve the fundamental school goal. To do this he must see that the school continues to receive adequate resources, attracts and holds competent faculty, maintains an adequate academic atmosphere and that "educated" students are produced. Above all else this requires positive leadership that acts rather than reacts.

Campus institutional power has been traditionally divided between trustees, administrators and faculty.²⁷¹ Trustees will generally delegate their power to the administrator. The faculty, although very powerful, usually exercise their strength in a negative manner, voting on actions

²⁶⁹ See note 7 *supra*.

²⁷⁰ See U.S. NEWS & WORLD REP., *supra* note 3.

²⁷¹ STAFF REP. TO THE VIOLENCE COMM'N, *supra* note 15, at 231.

already undertaken. The president's power lies essentially in his ability to persuade.²⁷² If he cannot or will not exercise leadership, a power vacuum develops that is ripe for student radicals. There must be clear, known lines of responsibility. Administrators when possible should foresee tension-producing situations and deal with them before they develop.

Effective campus communications is vital.²⁷³ Pending decisions should be made known to all who have an interest, and decision makers should be available to the campus community. The reasons for major decisions should be made known. Where there are conflicting interests, a short written memorandum giving such reasons might be appropriate. The decision-making pattern should involve all segments of the campus community.²⁷⁴ A system of grievance settling must be established. It may be a committee, a petition system, an ombudsman or a special liaison aide.²⁷⁵

Prohibited conduct should be made known in language that clearly states what is specifically required or forbidden.²⁷⁶ Once adopted, such a code must be firmly, consistently, and fairly enforced. Violations must be dealt with in a scrupulously fair hearing, not only because of due process requirements, but in order that a sense of fair play will prevail among the participants.²⁷⁷ A court has outlined the minimum protections required in such a scheme:

- (1) . . . [A] written statement of the charges to be furnished each plaintiff [student] at least 10 days prior to the date of the hearing;
- (2) the hearing shall be conducted before the President [or committee composed of faculty and students in appropriate ratio] of the college;
- (3) plaintiffs shall be permitted to inspect in advance of such hearings any affidavits or exhibits which the college intends to submit at the hearings;
- (4) plaintiffs shall be permitted to have counsel present with them at the hearing to advise them;
- (5) plaintiffs shall be afforded the right to present their version as to the charges and to make such showing by way of affidavits, ex-

²⁷² ACE REP. ON CAMPUS TENSIONS, at 38-51.

²⁷³ Ideas that have been suggested for improving communication include: central files available to all sections of the campus, a rumor center during periods of turmoil, an ombudsman and an official newspaper where pertinent documents and decisions can be published. *Id.* We would also recommend college city conferences such as were held here at U.K. this summer. *Lexington Herald-Leader*, July 26, 1970, at 1, col. 4, and communication seminars for the internal groups of the school.

²⁷⁴ ACE REP. ON CAMPUS TENSIONS, at 39-51.

²⁷⁵ COMMISSION ON CAMPUS UNREST, at 6/32-33. The Commission, however, evaluates the committee system as being too slow, and the petition method as likely to magnify a problem by involving more students. The liaison concept involves a special administrator drawn from the general peer level of students who can serve to neutralize and resolve student-administration conflicts.

²⁷⁶ *Id.* at 4/23.

²⁷⁷ See also *Joint Statement on Rights and Freedoms of Students*, 54 AMERICAN ASS'N OF UNIV. PROFESSORS BULL. 261 (1968).

hibits, and witnesses as they desire; (6) plaintiffs shall be permitted to hear the evidence presented against them, and plaintiffs (not [necessarily] their attorney) may question at the hearing any witness who gives evidence against them; (7) the President [or committee composed of faculty and students in appropriate ratio] shall determine the facts of each case solely on the evidence presented at the hearing therein and shall state in writing his findings as to whether or not the student charged is guilty of the conduct charged and the disposition to be made, if any, by way of disciplinary action; (8) either side may, at its own expense make a record of the events at the hearing.²⁷⁸

It is desirable for the school to get an outside attorney as hearing examiner to serve as an independent decision maker in order to reinforce a sense of fair play.²⁷⁹

The President's Commission on Campus Unrest [hereinafter Commission] suggests that when student conduct violates criminal law, the school should promptly file charges and avoid creating a sanctuary for law breakers.²⁸⁰ The Commission also recommends that the school have some method of disciplining faculty who aide or abet students in violating university regulations or the criminal law.²⁸¹

Administrators should be constantly seeking new ways to relieve the psychological and sociological pressures that create student unrest. Attention should be given to such ideas as "cluster colleges" where the university is broken into small human-relating units.²⁸²

Administrators, however, must be prepared to deal with student disruption. A situation committee should be formed to keep track of student activities and opinions and to formulate contingency plans to deal with various levels of physical confrontation. Detailed plans for using campus and outside resources, with alternative plans, should be drawn up, tested and distributed to all those responsible for maintaining campus order.²⁸³ If campus police are to be used, they must be well trained.²⁸⁴ Prior to any use of force the school might try two other tactics. The injunction²⁸⁵ has been described by Attorney General Mitchell as the school's ultimate legal weapon.²⁸⁶ The fact that a restraining order will issue without an adversary hearing can be of

²⁷⁸ *Estenban v. Central Mo. State Coll.*, 277 F. Supp. 649, 651-52 (1967). [Bracketed material ours.]

²⁷⁹ COMMISSION ON CAMPUS UNREST, at 4/24.

²⁸⁰ *Id.* at 4/19.

²⁸¹ *Id.* at 4/25.

²⁸² *Id.* at 6/24.

²⁸³ *Id.* at 4/17.

²⁸⁴ *Id.* at 4/31.

²⁸⁵ See text accompanying notes 147-48 *supra*.

²⁸⁶ *Hearings on Campus Unrest*, at 861 (An address by Attorney General John Mitchell to the Detroit Bar Association).

great tactical advantage to administrators in the early stages of a violent demonstration.²⁸⁷ The second tactic is closing the school, thus allowing for a cooling-off period. There are problems with this approach such as academic damage to non-involved students and possible liability on the part of the college for breach of contract.²⁸⁸

In its planning, a school should give thought to deterring future student violence. The injunction makes students liable to extensive court costs. Civil suits for damages after a disturbance might also provide the needed deterrent.²⁸⁹ This points up the importance of using photography during disturbances. This technique, however, is subject to abuse as innocent bystanders, as well as participants in the demonstration, may be penalized merely for their presence.

Although we have emphasized the administrator's role internal to the school, he must be just as vigilant in protecting academic freedom and constitutional rights from outside encroachment. He must assure that students can demonstrate and protest peacefully. The President's Commission asserts that the administrator must be an active advocate of student civil rights to the general public.²⁹⁰

D. Trustees

Trustees must avoid the trap of taking a pre-determined and unaltered position on questions affecting the academic community. Instead they should promote an open spirit of inquiry. The status of trustee confers a great honor. It also conveys a heavy obligation to act on high principles rather than personal or public prejudice. Education must be seen as part of an evolutionary search for the absolute.²⁹¹ Every proposition must be open for examination. Education must be

²⁸⁷ The disadvantages of the injunction are discussed by the Commission, at 4/41-44. See also Comment, *Campus Confrontation Resolution by Injunction*, 6 COLUM. J.L. & SOC. PROB. 32 (1970).

²⁸⁸ COMMISSION ON CAMPUS UNREST, at 4/46-48. Recently a New York City small claims court accepted the contention of a father that his son, a sophomore at New York University, had been prevented from attending classes for 19 days during last spring's demonstrations which prompted NYU officials to temporarily close the school. The judge ruled that the university had breached its contract and awarded a \$277 tuition refund. The ruling is naturally being appealed. If upheld, the financial implications could be catastrophic. NEWSWEEK, Oct. 26, 1970, at 65.

²⁸⁹ COMMISSION ON CAMPUS UNREST, at 4/46.

²⁹⁰ *Id.* at 6/38.

²⁹¹ Philosophically this is a synthesis of the objective and subjective views of reality. Teilhard de Chardin, in the PHENOMENON OF MAN, presented an evolutionary view of reality. Such an approach can reconcile the objective and subjective. First there is absolute truth (reality, etc.); second, there are intermediary truths that humans accept as working propositions on the road to the absolute. Thus Newton's theories give way to Einstein's. Each step expresses man's comprehension of reality at that time. Each is discarded when man reaches a better understanding. An incomplete or mistaken truth can be a stepping stone on the road to the absolute.

more than the transmission of facts, it must provide development of the human capacity for studying, knowing and judging. This means that trustees must avoid rigid attitudes²⁹² and intercede with the public on questions of academic freedom and constitutional rights.²⁹³ Finally, the Board of Trustees should be reflective of a cross-section of societal and campus interests rather than just the leadership of the business community. In addition to the university president, the presidents of the faculty senate and student government should be represented.

E. Parents

In a very real sense, a college education can be a parent's endowment for his child's survival. But parents must be careful not to defeat their own ends. Survival is dependent upon adaptability. The life style and values of a given time may have to be discarded for future survival. Looking back we can see and recognize a continuous flux. Some societal values are retained, others modified and others discarded. We must not try to force our answers or even our questions on our children. Rather we must teach our children to question.

F. Government

Education can produce a better and more productive citizenry and should be fostered in the public interest. We should guard against the use of education as a device for political advancement or as a means of perpetuating rigid social institutions. Nevertheless, government must exercise the same police powers and extend the same rights on campus as it does anywhere else in society.

In fostering these interests, government has a number of tools at its disposal. These range from direct police power, to economic controls, to moral authority.²⁹⁴ At all costs government must avoid letting political pressure direct their response to a given campus situation.²⁹⁵

Legislation of the following type could advance governmental interests.

1. A law to require colleges and universities to develop contingency plans for dealing with campus disturbances and file them with an appropriate state authority.²⁹⁶

²⁹² COMMISSION ON CAMPUS UNREST, at 6/40-41.

²⁹³ *Id.* at 4/14, 6/34.

²⁹⁴ *Id.* at 7/4. While pleading for use of moral leadership by political leaders, the Commission warned against laws directed at financial retaliation as being self defeating. Such laws could complicate the administration of discipline and might violate due process, as well as constitute a new grievance. Finally such laws would discriminate against the poor. *Id.* at 7/15.

²⁹⁵ *Id.* at 4/16.

²⁹⁶ INTERIM STATEMENT ON CAMPUS DISORDER, at 6.

2. A law giving the campus police of private schools peace officer status, if they are properly trained.²⁹⁷

3. Updating riot laws to encompass and properly sanction incitement to riot.²⁹⁸

4. A law to bar non-students from campus during periods of disturbances.²⁹⁹

5. A law requiring and establishing a clear identification system for police and national guardsmen engaged in disturbance duty.³⁰⁰

6. A law requiring universities to demonstrate due process in their internal regulation system before a temporary restraining order will issue in a non-adversary situation.

7. A law protecting first amendment and other civil rights.³⁰¹

In addition we must act to develop and expand the opportunities for vocational education.³⁰²

G. Police

Police interests are centered around law enforcement and the maintenance of order. Law enforcement authorities must be careful not to permit personal or public opinion to sway them from this path.

The President's Commission has made many useful recommendations for both police and the national guard.

Police must:

1. Be insulated from political pressure;³⁰³

2. Strengthen internal discipline;³⁰⁴

3. Be given better training;³⁰⁵

4. Be trained to team discipline as opposed to traditional independence of action;³⁰⁶

5. Be given more mobility in internal transfer and advancement;³⁰⁷

²⁹⁷ COMMISSION ON CAMPUS UNREST, at 4/29.

²⁹⁸ Siegel v. Regents of the Univ. of Calif., 308 F. Supp. 832 (N.D. Cal. 1970).

²⁹⁹ Of 674 persons arrested on the Berkeley campus for such crimes as trespass, disorderly conduct, aggravated assault, burglary, arson, narcotics violations and sex crimes, 587 were non-students. COMMISSION ON CAMPUS UNREST, at 4/27.

³⁰⁰ Cincinnati Enquirer, August 13, 1970, at 15.

³⁰¹ Such a bill has been introduced in both houses of Congress by Senators Hruska and Hart and Congressmen McCullough and Boggs, upon the recommendation of the National Commission on the Causes & Prevention of Violence. INTERIM STATEMENT ON CAMPUS DISORDER, at 8. For a more complete discussion of this bill, see note 112 *supra*.

³⁰² Feuer, *Conflicts of Generation*, SAT. REV., Jan. 18, 1969, at 22-23.

³⁰³ COMMISSION ON CAMPUS UNREST, at 5/9.

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 5/7.

³⁰⁶ *Id.* at 5/25.

³⁰⁷ *Id.* at 5/10-11.

6. Be nationally professionalized and given a national association to provide a unified retirement system and formulate standards of conduct and ethics;³⁰⁸

7. Be given greater aide by the Law Enforcement Assistance Administration (hereinafter LEAA) of the Justice Department established by Title I of the Omnibus Crime Control and Safe Streets Act of 1968. The LEAA should prepare model programs for local police agencies in the areas of officer recruitment, training, financing etc.³⁰⁹

National guardsmen should be given:

1. Special training to handle civil disturbances;³¹⁰
2. Protective equipment comparable to that possessed by civilian police;³¹¹
3. Non-lethal weapons;³¹²
4. Standards for use of lethal weapons which would include an absolute ban on bayonets and restrict ammunition to anti-sniper teams and, in case of general armed resistance, to fire teams kept ready, but stationed off campus until needed.³¹³

All police units, campus, municipal, county, state, guardsmen, sheriff, etc. must be used in coordination, under a pre-arranged plan. A task force representing the university, local and state law enforcement officials should formulate such a plan,³¹⁴ and provide for a unified command structure³¹⁵ and communication system.³¹⁶ Local and regional conferences and seminars for all university, local and state law enforcement officials are desirable.³¹⁷

H. The Lawyer

The role of the lawyer in terms of the campus and the student is not an easy one. But our duty is clear. As social engineers we can permit neither destruction nor repression. We must act firmly, judiciously and expediently. In the fire of conflicting interests, the cold hammer of the law will forge greater tranquility for the Commonwealth and all the states.

Louis De Falaise
William T. Robinson III

³⁰⁸ *Id.* at 5/18-19.

³⁰⁹ *Id.* at 5/13.

³¹⁰ *Id.* at 5/44-45.

³¹¹ *Id.* at 5/46.

³¹² *Id.* at 5/46-47.

³¹³ *Id.* at 5/47-49.

³¹⁴ Detailed plans for the proper use of physical force are outlined by the Commission. *Id.* at 5/27-28.

³¹⁵ *Id.* at 5/21-22.

³¹⁶ *Id.* at 5/24.

³¹⁷ *Id.* at 5/27.