

FREEDOM AND ORDER IN THE UNIVERSITY. Edited by Samuel Gorovitz.<sup>1</sup> Cleveland: The Press of Western Reserve University. 1967. Pp. ix, 218. \$5.75.

Symposia about issues of the "here and now" are rather like collections of graffiti: Although the authors think their words particularly challenging and relevant—not to say clever—at the time, subsequent readers are apt to find them merely tiresome.<sup>2</sup> Portions of the work under review suffer from this infirmity. But the book does examine, however imperfectly, issues about student freedom which recent events have shown to be far from resolved.<sup>3</sup> The book consists of four essays on student freedom by social critic Paul Goodman,<sup>4</sup> philosophy professor and university administrator John Searle,<sup>5</sup> law professor and due process theologian Sanford Kadish,<sup>6</sup> and academic freedom historian Walter Metzger.<sup>7</sup> Mortimer Kadish, a philosophy professor at Western Reserve University, where the symposium was held, has written a reflective conclusion which is easily the best essay in the volume.<sup>8</sup> The editor, philosophy professor Samuel Gorovitz, has contributed an introduction which is by turns stilted and fatuous.<sup>9</sup>

The suggested solutions to the problem of student freedom range wide. Goodman, expressing the "anarchist" view, wants to give students total freedom, as "freedom" is defined in the anarchist hypothesis, stated thus: "In any behavior, force and grace and discrimination can occur only when the organism is spontaneously initiating its own behavior, by some intrinsic motivation."<sup>10</sup> In the world at large, Goodman defines freedom as liberation from all con-

<sup>1</sup> Professor of Philosophy, Western Reserve University.

<sup>2</sup> I have often thought that Plato's *Symposium* hit a high point and that it has been downhill ever since.

<sup>3</sup> See, e.g., *Goldberg v. Regents of the Univ. of Cal.*, 248 A.C.A. 1015, 57 Cal. Rptr. 463 (1967); *Greene v. Howard Univ.*, No. 21,268 (D.C. Cir., Sept. 8, 1967) (per Bazelon, C.J. and Wright, J.), granting student plaintiffs an injunction pending appeal from Civil No. 1949-67 (D.C.C., filed Aug. 28, 1967) (per Holtzoff, J.). The latter case arose out of a confrontation between militant Negro students at Howard and a rather conservative administration. The administration expelled the students without a hearing. The court of appeals, by the order cited above, has ordered the students reenrolled pending decision on the merits of their first amendment and due process claims. The author, among others, served as counsel to the students in the district court and in the court of appeals.

<sup>4</sup> FREEDOM AND ORDER IN THE UNIVERSITY 31-41 (S. Gorovitz ed. 1967) [hereinafter cited as FREEDOM AND ORDER].

<sup>5</sup> *Id.* at 89-103.

<sup>6</sup> *Id.* at 127-40. See S. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319 (1957).

<sup>7</sup> FREEDOM AND ORDER 59-78.

<sup>8</sup> *Id.* at 159-77.

<sup>9</sup> *Id.* at 1-27. The book also reprints the AAUP and ACLU statements on student academic freedom, *id.* at 181, 191. The bibliography, *id.* at 207, is useful but not as discerning as that in *Symposium—Student Rights and Campus Rules*, 54 CALIF. L. REV. 1, 175 (1966). The book's bibliography does not even mention the *Symposium*, which has been referred to as "outstanding" by at least one court. *Goldberg v. Regents of the Univ. of Cal.*, 248 A.C.A. 1015, 1023 n.8., 57 Cal. Rptr. 463, 469 n.8 (1967).

<sup>10</sup> FREEDOM AND ORDER 31. Goodman concedes that "in the conditions of life, this is not always possible." *Id.*

straints by others, that is, the theoretical ability to do what one wants. He apparently conceives of freedom in the academic community as an absence of organized course content, grading, and administration.<sup>11</sup>

Sanford Kadish replies to this essay by denying one of Goodman's major premises, namely that authority's right to dictate to all of us rests upon a claim of rightness or truthfulness. According to Kadish, restraints are not only self-evidently necessary to "make men free," but their content may be prescribed without having to make disputed claims about "truth."<sup>12</sup> If he is right, then much lawful authority is value-free and its power over our lives is not subject to Goodman's objection that authority makes "right and wrong" judgments which it is no more competent to make than the rest of us.

Kadish's answer is not only wrong in itself, however; it fails to meet Goodman's central thesis. Of course some values concerning the organization of human society have endured long enough to appear necessary to societal existence. The prohibition against taking the life of another is one. But when we contemplate the various ways of classifying homicides as punishable or not, as murder, manslaughter or otherwise, we see that Kadish cannot so easily assume the rightness of any particular system of restraint from the propriety of its objective.

The tendency to answer Goodman by missing his point is visible at other points in Kadish's reply. For example, in answer to Goodman's generalized attack on grading, Kadish asserts that it would be impossible to abolish grading at the University of California at Berkeley, as presently constituted.<sup>13</sup> Again, Kadish smuggles in his conclusion by artful statement of his premise. In this case, having assumed the necessity of maintaining the present system of education at the University of California, he shows how Goodman's proposal would disrupt that system.

No, Goodman must be subjected to a broader attack, one directed at his hopelessly utopian view of freedom and of the structure of the University. This view proceeds from his definition of freedom as the elimination of all restraints. Although Goodman is willing to concede that we must tell three year old children not to run into the street and even forcibly prevent them from doing so,<sup>14</sup> he refuses to generalize from this isolated concession. He must refuse, for to generalize would be to admit that what we want to do at any given time is the product of knowledge that is socially determined. And the more of this socially determined knowledge (like "don't run into the street") we have, the better able we are to deal with the world as it is. In other words, humans maximize their choices and their adaptive behavior by increasing their knowledge. Though the acquisition of this knowledge puts one under certain constraints of the kind Goodman is complaining about, it opens the way to a freedom which is far more important to social living than Goodman's brand of freedom.<sup>15</sup> The prerequisites to freedom are also socially determined. For example, the method by which goods and services are distributed plays a central role in determining how free we are, and that method rests in turn upon our technology and upon

<sup>11</sup> *Id.* at 31-41. This compact essay is well worth reading all the way through.

<sup>12</sup> FREEDOM AND ORDER 42.

<sup>13</sup> *Id.* at 45-46.

<sup>14</sup> *Id.* at 31-32.

<sup>15</sup> See A. SCHAEFF, A PHILOSOPHY OF MAN 68-74 (1963).

our organization of men and method into the system of production.<sup>16</sup> Thus, we cannot resolve complaints about lack of freedom by behaving as though we are unconstrained; rather, we must organize attacks upon aspects of the social system which produce inequities.

Our dependence upon one another and upon the form of our society is reflected in the organization of our universities. Goodman wants to reduce the university to its simplest element—teachers and students who are free to work out the content of their studies without interference. His idyllic vision of the academic community is, of course, the product of his own thought, unperturbed by the realization that we live in midtwentieth century America. In the real world universities generally exist, and justify their existence to their financial backers, because they prepare people to live and work in the world as it is. Granted, graduates and professors project ideas out into the community, and tension between thinking and doing at the bar of reality produces marginal progress. By and large, however, the content of a university experience is structured by the existing needs and values of contemporary America. At the most elementary level, graduates, professors, and alumni expect that people with degrees will fill one of the available jobs. Goodman's universities, by contrast, would either be places where radicals are trained to fight for different ways of doing things—in which case these universities, necessarily few in number, could not make a substantial impact upon the system of higher education as a whole—or places where a kind of intellectualized navel-gazing is carried on by people as impatient and out of touch with the world as Goodman is.

Goodman is right about one thing, however: Today's universities are rather repressive institutions.<sup>17</sup> It is at first glance refreshing therefore, to encounter the "maximalist" view of freedom on the campus espoused by another of the essayists, John Searle.<sup>18</sup> Searle's vision is far narrower than Goodman's for he refers almost entirely to student political freedom, more specifically to the issues about political freedom raised by Berkeley's Free Speech Movement. At the time Searle wrote his essay, in November 1965, these problems required explication, and the free speech theories which Searle propounds were much in need of defense.

Subsequent events, however, have shown Searle's major premise to require reexamination: That premise is that the university's principal functions—defined by Searle as teaching and research—are inherently worth protecting, and that rules about the time, place and manner of public speech on campus can be sufficiently neutral in character to avoid controversy between an administration and a student body, both of whom desire to adjust their differences. This assumption, which lay at the foundation of the detente achieved by the Free Speech Movement and the Berkeley administration, has proven false.

For Searle, the meaning of "time, place, and manner" is related to his view that the "normal" functions of the university are self-evidently worth protect-

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<sup>16</sup> This is not a novel insight. Aeschylus, for example, makes much the same observation through the character Prometheus. AESCHYLUS, *PROMETHEUS BOUND* lines 505-82 (E. B. Browning transl. 1952). See also G. THOMSON, *AESCHYLUS AND ATHENS* 305-07 (3d ed. 1966).

<sup>17</sup> See Tigar, Book Review, 4 *LAW IN TRANS.* Q. 163 (1967). A recent statistical study reveals the enormous lack of freedom on our campuses. *THE AMERICAN STUDENT'S FREEDOM OF EXPRESSION: A RESEARCH APPRAISAL* (J. Cowan & E. Williamson eds. 1966).

<sup>18</sup> *FREEDOM AND ORDER* 92.

ing. It should have been obvious that they are not and that there will continue to be controversy over which functions are to be regarded as "normal" and who is to make that determination. Because the ultimate question is "Who runs the university?," it was utopian to assume that free speech problems could be isolated and solved by adoption of the "time, place, and manner" formula. The formula fails because Searle's definition of "teaching" and "research" refers to a system of instruction whose content and organization are largely governed by the university administration. The "times" and the "places" for student-generated political and other activity are those left over after the administration has used all the times and places it needs for programs which it devises.

The problem thus created cannot be solved wholly within the framework of constitutional analysis. The first amendment may be held to require only that the administration refrain from restricting the freedom of effective speech; this duty can be honored by insuring maximum freedom in areas suitable for communication between speakers and hearers.<sup>19</sup> A broader inquiry is needed. I suggest that for the purpose of allocating facilities teaching and research must at times give way to student-generated activities. After all, teaching and research are not sacrosanct. Academic freedom does not demand, for example, that a professor of anthropology who embraces the teachings of Genesis not as mere sacerdotal whizbang<sup>20</sup> but as literally true be given tenure and turned loose on sophomores. Similarly, the merits of university involvement in biological warfare research, or CIA projects, or hydrogen bomb manufacture, are open to serious debate. And if the administration will concede, as it must, that it makes tacit or express judgments about the "rightness" or "wrongness" of what is taught or researched when it allocates facilities, there is no reason not to include students in this decisionmaking process.<sup>21</sup>

To return to the framework of Searle's paper, we can see that "teaching" and "research" are not terms which end analysis concerning the use of university facilities. On the contrary, they call into play myriad judgments about facts and values. Thus, Searle's "maximalist" theory solves only questions on the edge of the controversy and may have the effect of insulating the heart of the university—its decisionmaking structure—from student demands for participation.

I suggest that allowing students to participate meaningfully in running universities is the wisest course which an administration can take. We are witnessing today the bankruptcy of many traditional institutions and the abdication by their leaders of responsibility for the problems of poverty, war, pollution of the environment, and the other ills of contemporary America. An increasing proportion of our youth perceive this failing. The preservation of a university

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<sup>19</sup> Citation of authority seems absurd here. See generally, R. M. O'Neil, *Reflections on the Academic Senate Resolution*, 54 CALIF. L. REV. 88 (1966); Comment, *The University and the Public: The Right of Access by Nonstudents to University Property*, 54 CALIF. L. REV. 132, 147-73 (1966). The latter is about the best student work on free speech the author has seen.

<sup>20</sup> The phrase is recalled from somewhere in the works of H. L. Mencken.

<sup>21</sup> I have tried elsewhere to derive this conclusion from administrative rule making premises. M. Tigar, *Student Participation in Academic Governance*, March 1966 (mimeo prepared for 1966 Association of Higher Education Conference, abstracted in 1966 *Current Issues in Higher Education* 169).

system which uses traditional modes of transmitting traditional wisdom is absurd, for those modes reflect the values and institutions which time and the tide of events have shown to be bankrupt. University administrators do not, I am sure, lack the will to end the malady. But they must apply to themselves the words of Herzen, "We are not the doctors, we are the disease,"<sup>22</sup> and give to others the task of building a university suited to the task of social change.

My critique of Searle is not intended to adumbrate a bold new day for student freedom but to suggest that Searle's vision is too limited and that at this stage students must seek reallocation of power within the university. If they do so, they will quickly meet enemies, in the person of trustees, regents, governors, former child actors, and just plain citizens, as well as a phalanx of on-campus vested interests. Despite its limited prospect of success, the fight for a new deal on the campus is worthwhile. Even if it fails to achieve its immediate goal of student power, the movement will advance its imminent and mediate goal of change in society generally. This is certainly preferable to building dream castles with Paul Goodman.

The Metzger and Sanford Kadish essays should be assessed against the preceding background. Metzger urges students and professors to unite and fight for academic freedom. His premise—that *Lehrfreiheit* and *Lehrnfreiheit* have an historical and functional affinity—has been argued at length in many publications<sup>23</sup> and its iteration in this book does not seem to fulfill any valuable function.

Sanford Kadish attempts to define the area within which the university ought to regulate student conduct concerning manners and morals, including the extent to which the university ought to apply its own sanctions to student misconduct which also falls afoul of the criminal law. He would give the university broad powers to punish on-campus student behavior which is criminal, even when public authorities have first taken jurisdiction. This approach is necessarily founded upon a metaphysical notion of "appropriate" university interest which Kadish himself cannot define and which in practice creates rather than solves problems.

Two examples demonstrate the point. Kadish asks us to imagine that students are "exploiting" the university's free speech facilities to plan a civilly disobedient sitdown in front of troop trains. He says that it is "dogmatic foolishness" to assert that this is not the university's concern, and by a blind, unheralded leap, concludes that the university may put a stop to the planning by imposing its own rules and sanctions.<sup>24</sup> Even ignoring the lack of logical connection with its purported premise, the last step in the reasoning is nonsensical. First, there is no reason why the university, if it uncovers a plot, cannot do what a pubkeeper would do if the plot were being hatched on his premises: Call the cops. Second, for the university to embark upon prior restraint of speech—even speech brigaded with arguably prohibitable nonspeech conduct—involves it in problems of rulemaking, policing, and enforcing in the

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<sup>22</sup> Credit for laying this indictment at the door of establishment seers goes to Christopher Caudwell. C. CAUDWELL, *STUDIES IN A DYING CULTURE* xix (1938).

<sup>23</sup> E.g., R. HOFSTADTER & W. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* 383-98 (1955).

<sup>24</sup> *FREEDOM AND ORDER* 137-38.

most difficult and sensitive area of the law. Third, as Kadish himself concedes, the university has virtually no sanctions available between mild reprimand and suspension or expulsion. These latter remedies are of such serious consequence that the typical misdemeanor sentence—for trespass or disorderly conduct, for example—is mild by comparison. Reprimand will not sate the jackals who bay at the university's gates, and both suspension and expulsion inflict far too much damage. Moreover, it is no doubt easier for the university to defend a general "hands off" policy than a series of specific exercises of jurisdiction.

Finally, imposition of sanctions involves the university in conduct grossly inappropriate to its contemporary role and function. Consider the sagacious analysis of Professor Hans Linde in this law review a few years ago:

The intellectual model may still derive from Padua or Oxford; but when a state like California can reasonably foresee serving one million students in public higher education, the legal model is the social service agency and the public building complex—not the ivied embrace, at once protective and exclusive, of alma mater. The university must be prepared to meet the student at arms length. The change is crucial for the concept of university discipline. An ancient malcontent who throws a brick through the window of the social security office, a group of workers staging a sit-in for unemployment checks, a veterans' organization picketing a V.A. hospital, may each commit some punishable offense—but they do not *ipso facto* give the administering agency cause to terminate their eligibility under these programs.<sup>25</sup>

This brings me to another of Kadish's points. Referring to dope peddlers and sexual deviants, he asserts that "the university has an interest in protecting the whole university community against [such] dangers. . . ."<sup>26</sup> Then he drops the point, just where analysis should begin. For of all the areas in which the university's interest coincides with that of the general community, the two he mentions are the most obvious. The community's judicial and quasi-judicial institutions are every day deciding what to do with young defendants who have violated narcotics laws or engaged in illegal sexual behavior. These cases present the law with agonizing choices in two fields where emotions run high. Moreover, we know so little about the social and personal impulses toward narcotic use and sexually aberrant behavior that judgment is difficult. Every lawyer who has ever represented a young person charged with a narcotics or sex crime knows how hard it is to get the prosecutor, the police, the judge, and the probation agency to work out a disposition tailored to the defendant's needs rather than to the generally antediluvian views of officialdom and public opinion.<sup>27</sup>

Kadish now proposes that the university become a party to this process, not as a constructive assistant toward rationality, but as another institution to punish the defendant. The sole justification for this assumption of juris-

<sup>25</sup> Linde, *Campus Law: Berkeley Viewed From Eugene*, 54 CALIF. L. REV. 40, 64 (1966). The potency of Linde's thoughts may be attested by a recent case raising a problem he treats tangentially, concerning a student sit-in at a draft board. Does the draft board have an "interest" of the kind Kadish attributes to the University concerning the use of its facilities? Certainly, but there are first amendment limits on its power to use Selective Service sanctions, as opposed to state trespass laws, for example, to protect that interest. See *Wolff v. Selective Service Bds.*, 372 F.2d 817 (2d Cir. 1967).

<sup>26</sup> FREEDOM AND ORDER 139.

<sup>27</sup> The author's bias may be shaped by his practice, which has included the defense of young people charged with narcotics violations.

diction is "protecting the whole university community." The members of this community, however, in their hapless capacities as recipients of narcotics and victims of sexual assault, are no different from members of the community at large. There is, therefore, no justification for a university's refusal to accept as final the verdict of criminal tribunals. If the judge thinks the defendant should be sent away in order to protect the community, then well enough; if he is willing, after he has used the state's considerable machinery for investigation, to take a chance and let the defendant go free, then the university should abide by that determination. Unless, perhaps, the university can do a better job of predicting the dangers to the community from the defendant remaining at large. I submit that even Kadish will grant that it cannot.

I have chosen only two of Kadish's numerous examples, but I think it is not an unfair selection. On the whole, his essay is shallow and devoid of analytical content. This is not only unfortunate but surprising, for the questions he raises are close to his wonted field of criminal law.

Indeed, in characterizing the book as a whole, "shallow" is the adjective which most quickly springs to mind. This is regrettable because today more than ever we need to think deeply about the role of the university in our society.

*Michael E. Tigar\**

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