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Charles A. Wright

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## The Constitution on the Campus

*Charles Alan Wright\**

*This article is the text of the Oliver Wendell Holmes Lectures, delivered by Professor Wright at the Vanderbilt University School of Law in April, 1969. Oliver Wendell Holmes, Jr., left a large part of his estate to the United States at his death in 1935. By Act of Congress in 1955, the disposition of the property was entrusted to a Permanent Committee, which, among other projects, sponsors the annual Holmes Lectures by a distinguished legal scholar.*

*Professor Wright has brought to this topic both profound constitutional scholarship and wide experience in dealing with related problems at his university. His thesis is that the Constitution is and should be applicable to the college campus. Subject to reasonable and nondiscriminatory regulations, the first amendment applies with full vigor to student expression. The student is protected by the due process clause in disciplinary proceedings, but the courts will recognize as being within due process any institutional procedure which is fair and reasonable and which reliably determines the issues. Professor Wright concludes with a discussion of what these developments mean to the modern university.*

### I. THE CONSTITUTION COMES TO THE CAMPUS

Law, by its very nature, tends to change and to grow very slowly. Continuity is an important element of the common-law tradition; development, in any branch of law, is likely to be achieved by one small step after another. Even a seemingly epochal decision, such as *Brown v. Board of Education*,<sup>1</sup> is rarely a surprise to those who have kept a close eye on the omens and who have watched the steady development of a doctrine that ultimately comes into full fruition.

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\* Charles T. McCormick Professor of Law, University of Texas School of Law; Visiting Professor, 1968-69, Yale Law School; author of textbook on Federal Courts. The author is indebted to Michael S. Jacobs, a student at the Yale Law School, for valuable assistance in the preparation of these lectures.

1. 349 U.S. 294 (1954).

Former Justice Tom Clark has only recently pointed out the logical, indeed inevitable, development that led from *Griffin v. Illinois*,<sup>2</sup> where it was held that an indigent defendant must be given a free copy of the transcript of his trial, to *Miranda v. Arizona*<sup>3</sup> laying down a set of rules on the warnings the police must give to arrested persons.<sup>4</sup> It is quite exceptional when one can point to a particular moment in time and say that there the law turned 180 degrees. Because a sudden about-face in the law is exceptional, it is also of particular interest. My subject in these lectures, the extent to which university students are protected by the Bill of Rights and the requirements of due process, is one of these rare instances.

On September 22, 1959, the Court of Appeals for the Second Circuit decided the obscure case of *Steier v. New York State Education Commissioner*.<sup>5</sup> Arthur Steier was a student at Brooklyn College who thought that the college was dominating student organizations. He said so in two letters to the president of the college that were obviously bitter but were quite mild indeed by the standards of campus rhetoric to which we recently have become accustomed. Because of these letters he was suspended from college under a vague rule requiring students to "conform to the requirements of good manners and good morals." Six months later a chastened and penitent Steier was readmitted on probation, after he had agreed to abide by the rules and "generally have a change of spirit." When he subsequently caused to be published in the college newspaper the story of his probation the authorities concluded that his change of spirit had not been sufficient and this time he was expelled.

Steier considered that he had been unjustly treated and thought that he had a grievance under the Constitution of the United States. He went to court to press that grievance, but the Second Circuit agreed with the district court that he was entitled to no relief. There were two opinions for the majority in the *Steier* case. In one of the opinions Steier was told that the federal courts lacked jurisdiction of claims such as his.

Education is a field of life reserved to the individual states. The only restriction the Federal Government imposes is that in their educational program no state may discriminate against an individual because of race, color or creed.<sup>6</sup>

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2. 351 U.S. 12 (1956).

3. 384 U.S. 436 (1965).

4. Clark, Book Review, 36 U. CHI. L. REV. 239, 244 (1968).

5. 271 F.2d 13 (2d Cir. 1959).

6. *Id.* at 18.

The other judge in the majority thought that the federal courts had jurisdiction but that no constitutional right of Steier's had been denied. Steier was indeed constitutionally free, on this view, to say what he pleased, but he was not free to say it as a student at Brooklyn College. He had been admitted to Brooklyn College "not as a matter of right but as a matter of grace after having agreed to conform to its rules and regulations."<sup>7</sup>

The majority in the *Steier* case were undoubtedly right—in terms of the law as it then stood. The highest court in the land had spoken of attendance at a state university as a mere "privilege,"<sup>8</sup> and the decisions were virtually uniform that a student could be expelled for whatever reason and by whatever procedure the university authorities thought proper. The deviations from this usual view were so few that they tended to reinforce the authority of the permissive precedents. There was, indeed, an 1887 decision from the Court of Common Pleas in Cumberland County, Pennsylvania, recently much admired, that pointed in a different direction.<sup>9</sup> Other courts, in dicta, had cautioned educational institutions not to be arbitrary or capricious, and one well-known Tennessee decision had suggested procedures it would be desirable to follow,<sup>10</sup> but dicta it all was. So far as can be found, at the time of the *Steier* decision no court had ordered reinstatement for a student expelled or suspended from college.<sup>11</sup>

Occasionally, very occasionally, a voice could be heard in the wilderness challenging the old orthodoxy. The most notable was that of Professor Warren Seavey, who, in 1957, said:

our sense of justice should be outraged by denial to students of the normal safeguards. It is shocking that the officials of a state educational institution, which can function properly only if our freedoms are preserved, should not understand the elementary principles of fair play. It is equally shocking to find that a court supports them in denying to a student the protection given to a pickpocket.<sup>12</sup>

Doubtless the answer to this by the supporters of the old order would have been that they were, indeed, paragons of fair play, that they leaned over backwards to give the student every possible doubt and

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7. *Id.* at 20.

8. *Hamilton v. Regents of the University of California*, 293 U.S. 245, 261 (1934).

9. *Commonwealth ex rel. Hill v. McCauley*, 3 Pa. C.C. Rep. 77 (C.P. Cumberland Cy. 1887).

10. *State ex rel. Sherman v. Hyman*, 180 Tenn. 99, 171 S.W. 2d 822 (1942).

11. Byse, *Procedure in Student Dismissal Proceedings: Law and Policy*, *JOURNAL OF COLLEGE STUDENT PERSONNEL*, March 1963, at 131-36.

12. Seavey, *Dismissal of Students: "Due Process."* 70 *HARV. L. REV.* 1406 (1957).

to act only in his best interest, but that it was no business of the courts to look into these matters to see just how fair the universities had actually been. To support their position, the administrators could draw on a whole grab-bag of conceptualisms: that attendance at the university was a privilege rather than a right; that the university stood *in loco parentis* to the student; or that the vague rules, so commonly found in university catalogues, that a student could be dismissed whenever the institution thought this advisable, constituted a contract that the student had accepted.

In retrospect the surprising thing is not that Steier lost his case, but that he lost it to a divided court. My former boss and dear friend, the late Chief Judge Charles E. Clark, dissented from the dismissal of Steier's action. In a memorable opinion he argued that Steier's conduct had called for patient response rather than discipline and expulsion. And he rejected the view that

the Fourteenth Amendment to the United States Constitution is a paltry piece of class legislation limited, it seems, to according protection to Negroes in the South and Jehovah's Witnesses in other areas. Surely the noble privileges therein embodied are not to be thus denigrated.<sup>13</sup>

The dissent was eloquent—but it was a dissent only. Steier remained expelled. But the victory for institutional autonomy that the *Steier* decision represented—if indeed it was a victory—was the final gasp of a dying order.

Five months after the Second Circuit refused relief to Steier, and two days after the Supreme Court declined to hear his case,<sup>14</sup> a group of students from Alabama State College for Negroes conducted a sit-in when they were refused service in the lunchroom of the county courthouse in Montgomery. In the next few days some or all of these students participated in mass marches and engaged in hymn singing and speech making on the steps of the State Capitol. On March 4th nine students were notified that the State Board of Education had ordered their expulsion because of "this problem of Alabama State College." Twenty other students were placed on probation. The students were given no hearing. Indeed they were never specifically advised of the ground for disciplining them, although it appears that it was intended to rest on a catalogue regulation providing for expulsion for "conduct prejudicial to the school and for conduct unbecoming a student or future teacher in schools of Alabama, for

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13. 271 F.2d at 23.

14. *Steier v. New York State Education Commission*, 361 U.S. 966 (1960).

insubordination and insurrection, or for inciting other pupils to like conduct.”

These students, like Steier, went to court to challenge their expulsion and, like Steier, they were unsuccessful in the district court. So courageous and innovative a judge as Frank M. Johnson, Jr., could find no escape from the force of the precedents and felt obliged to hold that “the right to attend a public college or university is not in and of itself a constitutional right.”<sup>15</sup> Accordingly there was no constitutional barrier to expulsion without notice and hearing. From there the case went to the Court of Appeals for the Fifth Circuit and, on August 4, 1961, the law on this question turned 180 degrees, when the opinion was handed down in *Dixon v. Alabama State Board of Education*.<sup>16</sup>

The path-breaking opinion for the Court was by one of the great judges—and great men—of our times, Richard T. Rives, and was joined in by an outstanding colleague, Judge John Minor Wisdom.

The fundamental principle on which *Dixon* rests is that “whenever a governmental body acts so as to injure an individual, the Constitution requires that the act be consonant with due process of law.”<sup>17</sup> Judge Rives thought that even if attending a public university is only a “privilege,” rather than a right, “it nonetheless remains true that the State cannot condition the granting of even a privilege upon the renunciation of the constitutional right to procedural due process.”<sup>18</sup> Language in the regulations of the Board of Education allowing expulsion of any student “with whom the relationship becomes unpleasant and difficult” could not reasonably be read as a waiver of notice and hearing before expulsion. Thus he found that “the right to remain at the college in which the plaintiffs were students in good standing is an interest of extremely great value” and that there were “no considerations of immediate danger to the public, or of peril to the national security, which should prevent the Board from exercising at least the fundamental principles of fairness by giving the accused students notice of the charges and an opportunity to be heard in their own defense.”<sup>19</sup>

In what appears to be carefully considered dictum, Judge Rives

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15. *Dixon v. Alabama State Board of Education*, 186 F. Supp. 945, 950 (M.D. Ala. 1960).

16. 294 F.2d 150 (5th Cir. 1961).

17. *Id.* at 155.

18. *Id.* at 156.

19. *Id.* at 157.

outlined the kind of notice and hearing due process requires. It could "vary depending upon the circumstances of the particular case"<sup>20</sup> and there was no requirement of "a full-dress judicial hearing, with the right to cross-examine witnesses."<sup>21</sup> Nevertheless "the rudiments of an adversary proceeding"<sup>22</sup> must be provided.

Judge Ben Cameron, who thought that the *Dixon* decision would require that the federal courts become "a Gargantuan aggregation of wet nurses or baby sitters,"<sup>23</sup> dissented. But the dissent went virtually unnoticed. The opinion by Judge Rives had the force of an idea whose time had come and it has swept the field. There are, and doubtless will be, differences in the application of the *Dixon* principle and about particular details of the procedures it recommended. But, with the exception of dictum in one district court case,<sup>24</sup> there has been no challenge by any court, state or federal, to the basic proposition for which *Dixon* stands, that students at a public institution of higher learning do have constitutional rights that the courts will recognize and protect.

This turnabout by the law was not accomplished in a vacuum. It mirrored, perhaps was even compelled by, dramatic changes in the nature of education itself. A college education is no longer regarded as a luxury for the fortunate few but as a necessity for most high school graduates. College students are no longer children who need or want to be spoonfed but are older and more self-reliant than in earlier times. In a recent opinion, Judge James E. Doyle, of the Western District of Wisconsin, spoke eloquently about these changes. There has been, he wrote,

a profound shift in the nature of American schools and colleges and universities, and in the relationships between younger and older people. These changes seldom have been articulated in judicial decisions but they are increasingly reflected there. The facts of life have long since undermined the concepts, such as *in loco parentis*, which have been invoked historically for conferring upon university authorities virtually limitless disciplinary discretion.

I take notice that particularly in recent years the universities have become theaters for stormy and often violent protests over such matters as war and peace, racial discrimination in our cities and elsewhere, and the quality of American life; that this phenomenon adds new and unanticipated dimensions to the regulation of conduct in the universities; and that those charged with

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20. *Id.* at 158.

21. *Id.* at 159.

22. *Id.*

23. *Id.* at 160.

24. *Greene v. Howard University*, 271 F. Supp. 609 (D.D.C. 1967), *dismissed as moot*, No. 21,267 (D.C. Cir., June 17, 1969).

governance of these institutions have been struggling to preserve the many competing values involved.

The world is much with the modern state university. Some find this regrettable, mourning the passing of what is said to have been the old order. I do not share this view. But whether the developments are pleasing is irrelevant to the present issue. . . . What is relevant is that in today's world university disciplinary proceedings are likely to involve many forms of misconduct other than fraternity hazing or plagiarism, and that the sanctions imposed may involve consequences for a particular student more grave than those involved in some criminal court proceedings.<sup>25</sup>

There are those, as Judge Doyle said, who think that the change in the universities, and in the relationships between the universities and the courts, is regrettable. I shall address myself to that issue in the final section. For now it is enough to recognize the fact that, for good or for ill, the Constitution has come to the campus. The fourteenth amendment is no longer "a paltry piece of class legislation." Two developments at the end of 1968 demonstrate how far we have come since the *Steier* case. Since November, 1968, there has been a monthly publication, *College Law Bulletin*, so that those interested in this field may keep up to date on developments, just as is done by their colleagues who are interested in taxation or labor law.

The other development was a quite extraordinary proceeding in the Western District of Missouri. The judges there already had several difficult cases involving universities, and, doubtless with reason, anticipated that more might come. Rather than address the issues presented on a case-by-case basis, they convened en banc, solicited briefs from lawyers for interested educational institutions, the American Civil Liberties Union, the state attorney general, and from recognized student governments and faculty associations, and on the basis of these presentations promulgated a 16-page *General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education*.<sup>26</sup> It is a thoughtful and well-intended document, and contains no small measure of wisdom, though those who are old-fashioned in these matters may think that the *General Order*, and the process by which it was prepared, smack more of a legislative committee or an administrative agency than they do of a court of law.

A vast literature has already sprung up on this subject, to which the contributions of Professor William W. Van Alstyne, of the Duke

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25. *Soglin v. Kauffman*, 295 F. Supp. 978, 987-88 (W.D. Wis. 1968).

26. 45 F.R.D. 133 (W.D. Mo. 1968).

Law School, have been most notable.<sup>27</sup> There are also a multitude of decisions from the lower courts, and one from the Supreme Court, as the judges have sought to define the contours of the new doctrine. Amid this wealth of precedent the decisions of Judge Johnson,<sup>28</sup> Judge Doyle,<sup>29</sup> and Judge William E. Miller,<sup>30</sup> of the Middle District of Tennessee, have been especially insightful and influential. Although most students have gone to the federal courts for relief, on occasion the state courts have been resorted to, and they also have fully accepted the new doctrine.<sup>31</sup>

Although so much has already been written, it is clear that the last word has not been said, and that there remain many vexing questions on what it is that the Constitution requires. With no thought that this either will be the last word, but in the hope that something of value can still be said on this subject by one who has been deeply involved in issues of this kind for the last several years, I undertake to set out, in the next two sections, my understanding of what the law is, with regard to the constitutional rights of college students. For this purpose I accept the definition of the great judge whom this series of lectures memorializes, that law is "the prophecies of what the courts will do in fact."<sup>32</sup> I have endeavored to heed the admonition of Professor Clark Byse "not to fall into the trap of equating the requirements of the Fourteenth Amendment with one's personal views of desirable procedure."<sup>33</sup> But there is a corollary to this, as Professor Byse himself has noted on a different occasion, and

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27. Van Alstyne, *Procedural Due Process and State University Students*, 10 U.C.L.A. L. REV. 368 (1963); Van Alstyne, *Political Speakers at State Universities: Some Constitutional Considerations*, 111 U. PA. L. REV. 328 (1963); Van Alstyne, *Student Academic Freedom and the Rule-Making Powers of Public Universities: Some Constitutional Considerations*, 2 LAW IN TRANSITION Q. 1 (1965); Van Alstyne, *The Judicial Trend Toward Student Academic Freedom*, 20 U. FLA. L. REV. 290 (1968); Van Alstyne, *The Student as University Resident*, 45 DENVER L.J. 582 (1968).

28. *Dickey v. Alabama State Board of Education*, 273 F. Supp. 613 (M.D. Ala. 1967); *Moore v. Student Affairs Committee of Troy State Univ.*, 284 F. Supp. 725 (M.D. Ala. 1968); *Brooks v. Auburn University*, 296 F. Supp. 188 (M.D. Ala. 1969).

29. *Goldman v. Olson*, 286 F. Supp. 35 (W.D. Wis. 1968); *Soglin v. Kauffman*, 295 F. Supp. 978 (W.D. Wis. 1968); *Marzette v. McPhee*, 294 F. Supp. 562 (W.D. Wis. 1968); *Breen v. Kahl*, 296 F. Supp. 702 (W.D. Wis. 1969); *Stricklin v. Regents of the University of Wisconsin*, 297 F. Supp. 416 (W.D. Wis. 1969).

30. *Knight v. State Board of Education*, 200 F. Supp. 174 (M.D. Tenn. 1961); *Jones v. State Board of Education*, 279 F. Supp. 190 (M.D. Tenn. 1968), *affirmed*, 407 F.2d 834 (6th Cir. 1969).

31. *E.g.*, *Goldberg v. Regents of the University of California*, 248 Cal. App.2d 867, 57 Cal. Rptr. 463 (1967); *Woody v. Burns*, 188 So. 2d 56 (Fla. App. 1966).

32. HOLMES, *COLLECTED LEGAL PAPERS* 173 (1920).

33. Byse, *supra* note 11, at 140.

as others have pointed out. Americans often become so obsessed with questions of constitutionality that they give insufficient attention to considerations of wise policy.<sup>34</sup> The next two sections consider what the Constitution requires. A wise university may well make a prudential judgment that it ought to give its students greater freedom, or more procedural protections, than the Constitution demands of it.<sup>35</sup>

This distinction between what is required and what is wise permits me to avoid the difficult issue of the "private" university or college as distinguished from the public institution. Orthodox learning has it that it is only the state institution that is bound by the fourteenth amendment, and the courts, in applying the *Dixon* doctrine, continue to so hold.<sup>36</sup> Many writers have doubted whether there can today really be a "private" educational institution, and have suggested lines of reasoning by which the same rules could be held applicable to Vanderbilt as to the University of Tennessee.<sup>37</sup> In last year's lectures under the auspices of the Permanent Committee for the Oliver Wendell Holmes Devise, Judge Henry J. Friendly examined that entire question in detail, and found reason to doubt that so sweeping a rule will or should be adopted.<sup>38</sup> Although I find Judge Friendly as persuasive on this as he is on so many things, I think the matter need not now be resolved. Historically private colleges and universities have allowed more freedom to their students than has been true at public institutions,<sup>39</sup> and, in the turbulent

34. Byse, *The University and Due Process: A Somewhat Different View*, 54 AAUP BULL. 143, 147 (1968); Heyman, *Some Thoughts on University Disciplinary Proceedings*, 54 CALIF. L. REV. 73 (1966). See *Dennis v. United States*, 341 U.S. 494, 555-556 (1951) (concurring opinion).

35. *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, 148 (W.D. Mo. 1968).

36. *Browns v. Mitchell*, 409 F.2d 593 (10th Cir. 1969); *Grossner v. Trustees of Supp.* 609 (D.D.C. 1967) *dismissed as moot*, No. 21,267 (D.C. Cir., June 17, 1969). Cf. *University of Miami v. Militana*, 184 So. 2d 701 (Fla. App. 1966). But cf. *Hammond v. The University of Tampa*, 344 F.2d 951 (5th Cir. 1965).

37. Goldman, *The University and the Liberty of Its Students—A Fiduciary Theory*, 54 KY. L.J. 643, 650 (1966); Johnson, *The Constitutional Rights of College Students*, 42 TEXAS L. REV. 344, 349 (1964); McKay, *The Student as Private Citizen*, 45 DENVER L. J. 558, 560 (1968); Van Alstyne, *The Judicial Trend Toward Student Academic Freedom*, 20 U. FLA. L. REV. 290, 291-292 (1968); *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1056-1064 (1968); Note, *Reasonable Rules Reasonably Enforced—Guidelines for University Disciplinary Proceedings*, 53 MINN. L. REV. 301, 305-310 (1968); Comment *Private Government on the Campus—Judicial Review of University Expulsions*, 72 YALE L.J. 1347, 1381-1386 (1963). Cf. Byse, *supra* note 34, at 143.

38. H. FRIENDLY, *THE DARTMOUTH COLLEGE CASE AND THE PUBLIC—PRIVATE PENUMBRA* (1969).

39. WILLIAMSON & COWAN, *THE AMERICAN STUDENTS' FREEDOM OF EXPRESSION* 152-153 (1966).

atmosphere on today's campuses, it seems to me unthinkable that the faculty and administration of any private institution would consider recognizing fewer rights in their students than the minimum the Constitution exacts of the state universities, or that their students would long remain quiescent if a private college were to embark on such a benighted course.<sup>40</sup> Thus, while the discussion is cast in terms of the state university, I should expect the private institutions to do at least as much.

One final word before I plunge into the specifics of the Constitution on the campus. I fear that very few people will like, or be satisfied with, what I shall say. Embattled university administrators, aware of the reaction of legislatures and alumni to the present manifestations of student militancy, can understand the need to honor constitutional protections but will not accept enthusiastically the notions that demonstrations are a form of constitutionally-protected expression and that even the SDS has rights. Deans of students who grew up in the good old days of *in loco parentis* still like to think of themselves as "a friend to the student"<sup>41</sup> rather than as a prosecutor in an adversary proceeding.

At the same time my prophecy of "what the courts will do in fact" will seem hopelessly reactionary to those who believe that every Supreme Court decision involving free expression and procedural due process in what Judge Doyle has termed "the non-university society"<sup>42</sup> is applicable, *mutatis mutandis*, to the situation on the campus.<sup>43</sup> I am unable to persuade myself that the courts will take so doctrinaire a view or that they will fail to perceive that "the unique character of the university as an institution makes translation of policies difficult."<sup>44</sup>

Finally, what I have to say will be irrelevant, if not incomprehensible, to those who believe that any form of conduct is justifiable if intended as a form of protest by highly motivated people. As Justice Fortas has recently reminded us, the individual "cannot substitute his own judgment or passion, however noble, for the rules of

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40. Beaney, *Students, Higher Education, and the Law*, 45 DENVER L. J. 511, 518-519 (1968).

41. Johnson, *supra* note 37, at 352, quoting a rule at The University of Texas not abandoned until 1967.

42. *Soglin v. Kauffman*, 295 F. Supp. 978, 984 (W.D. Wis. 1968).

43. *E.g.*, Lucas, *Comment*, 45 DENVER L. J. 622, 626-631 (1968).

44. *Comment, Private Government on the Campus—Judicial Review of University Expulsions*, 72 YALE L. J. 1347, 1391 (1963).

law. . . . [He] cannot demand of his government or of other people obedience to the law, and at the same time claim a right in himself to break it by lawless conduct, free of punishment or penalty.’<sup>45</sup> As a prediction of what the courts will do in fact, nothing is safer than to say that the courts will not—and should not—issue their writ at the behest of those who would “subordinate the ‘rule of law’ in favor of more ‘fundamental principles’ of revolutionary action designed forcibly to oust governments, courts and all.”<sup>46</sup>

So it is with confidence only that no one is likely to find congenial all that I shall have to say that I turn to the specifics of the problem.

## II. THE FIRST AMENDMENT AND STUDENT EXPRESSION AND BEHAVIOR

It would, of course, be a mistake to suppose that the only substantive rights possessed by, or of importance to, university students are those recognized in the first amendment. The right not to be discriminated against on account of race has been protected for three decades.<sup>47</sup> Its contours are now well-defined, although new problems may arise as universities are asked to practice benign discrimination on behalf of minority groups and to provide separate facilities within the institution. I leave that subject, however, to others. It may be that students have rights of privacy and of personality, derived from the ninth amendment or found in the “penumbra” of other constitutional provisions,<sup>48</sup> that universities must respect. Here, however, the basic constitutional doctrine is ill-defined, and there is as yet no case law applying it to the university situation. Thus I limit myself in this chapter to the most important and controversial rights, those that are the battleground today on many a campus, the rights of expression and association embodied in the first amendment.

My thesis here is a simple one, though it presents an apparent paradox. The first amendment applies with full vigor on the campus of a public university. To paraphrase only slightly what the Supreme Court said in February of this year in the important case of *Tinker v. Des Moines Independent Community School District*,<sup>49</sup> it can hardly be argued that either students or professors shed their constitutional

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45. A. FORTAS, CONCERNING DISSENT AND CIVIL DISOBEDIENCE 33 (1968).

46. *Grossner v. Trustees of Columbia University*, 287 F. Supp. 535, 545 (S.D.N.Y. 1968).

47. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

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

49. 393 U.S. 503 (1969).

rights to freedom of speech or expression at the campus gate.<sup>50</sup> And it is the full first amendment that must be recognized, not some subjective, watered-down version of the great protections of that amendment. But, as I suggested at the end of the last section, this does *not* mean that precedents about the meaning of the first amendment in other areas of life can be indiscriminately transferred to the university setting. Instead, as the Court said in *Tinker*, first amendment rights must be "applied in light of the special characteristics of the school environment."<sup>51</sup>

We cannot think constructively about what the first amendment means on campus unless we have some coherent understanding of what the first amendment means. Here, despite the wealth of precedents, we plunge into one of the murkiest issues of current constitutional law. The struggles the Supreme Court has had with the concept of obscenity, for example, and the division between those who assert that the first amendment is an absolute and those who think the rights recognized in it may be balanced against other governmental interests, merely suggest the complexity of the problem. I will not retrace the process by which I have attempted to think through these matters and say only that I end up by finding the most useful analysis to be that presented by my former professor and current Yale colleague, Thomas I. Emerson, in his thoughtful and comprehensive book, *Toward a General Theory of the First Amendment*. It is a disservice to present his thesis in a paragraph or two, but other elements of his approach will emerge as I indicate how I think the general theory should be applied to specific situations. He tells us that

the essence of a system of freedom of expression lies in the distinction between expression and action. The whole theory rests upon the general proposition that expression must be free and unrestrained, that the state may not seek to achieve other social objectives through control of expression, and that the attainment of such objectives can and must be secured through regulation of action.<sup>52</sup>

This test seems to me to fit as closely as any single formula can the bewildering variety of precedents and to be most responsive to the set of values the first amendment is intended to protect. Indeed this distinction between expression and action has been increasingly recognized in so many words by recent decisions of the Supreme Court.<sup>53</sup> If that distinction is a workable one, it will carry us a long

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50. *Id.* at 507.

51. *Id.* at 506.

52. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 115 (1966).

53. *Cox v. Louisiana*, 379 U.S. 536, 555 (1965); *United States v. O'Brien*, 391 U.S. 367,

way in considering particular problems. Expression must be wholly free. Neither the state in general, nor the state university in particular, is free to prohibit any kind of expression because it does not like what is being said. Reasonable and nondiscriminatory regulations of time, place, and manner are the only restrictions that can be put on expression. Action is quite different. It carries no first amendment shield and can be regulated in any way that the public health, safety, morals, and welfare require.

Objection will be heard immediately that the distinction is an illusory one, that, as Harry Kalven has said, "all speech is necessarily 'speech plus.' If it is oral, it is noise and may interrupt someone else; if it is written, it may be litter."<sup>54</sup> Of course this is true. But the fact that a distinction is blurred and imprecise does not mean that it should not be attempted at all. Professor Emerson has addressed himself to this point in a more recent article.

To some extent expression and action are always mingled; most conduct includes elements of both. Even the clearest manifestations of expression involve some act, as in the case of holding a meeting, publishing a newspaper, or even merely talking. At the other extreme, a political assassination includes a substantial measure of expression. The guiding principle must be to determine which element is predominant in the conduct under consideration. Is expression the major element and the action only secondary? Or is the action the essence and the expression incidental? The answer, to a great extent, must be based on a common sense reaction, made in light of the functions and operations of a system of freedom of expression.<sup>55</sup>

In applying this concept of the first amendment to the problems of the university, the fact that the state has a proprietary interest in the land and the buildings is an irrelevancy. Years ago Justice Holmes, speaking for the Supreme Judicial Court of Massachusetts, saw no constitutional problem in an ordinance prohibiting any public address on Boston Common except by permit from the mayor. "For the Legislature absolutely or conditionally to forbid public speaking in a highway or public park," he wrote, "is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house."<sup>56</sup> This decision was affirmed by the

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376 (1968); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 508 (1969).

54. Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 23.

55. Emerson, *Freedom of Expression in Wartime*, 116 U. PA. L. REV. 975, 996-997 (1968).

56. *Commonwealth v. Davis*, 162 Mass. 510, 39 N.E. 113 (1895), *affirmed*, 167 U.S. 43 (1897).

United States Supreme Court but it is now regarded as "one of the less admired efforts of Justice Holmes,"<sup>57</sup> and time has long since sapped the decision of any vitality. If, as is now clearly the law, there are first amendment rights that may be exercised in publicly-owned places, such as a park,<sup>58</sup> the grounds of a state capitol,<sup>59</sup> or a bus terminal,<sup>60</sup> and in privately-owned places such as a company town<sup>61</sup> or a shopping center,<sup>62</sup> the campus can hardly be an exception, and the cases so hold.<sup>63</sup>

But it does not advance the analysis to suggest that because a university is owned by the public and ordinarily open to the public, decisions on what must be permitted in other places are automatically applicable to the university. As Justice Fortas wrote last year:

public use does not authorize either the general public or the university faculty and students to use them in a way which subverts their purpose and prevents their intended use by others. The public character of a university does not grant to individuals a license to engage in activities which disrupt the activities to which those facilities are dedicated.<sup>64</sup>

The state may be required to tolerate discussions intended to publicize antiwar views in the Port Authority Bus Terminal.<sup>65</sup> It need not tolerate such discussions in the reading room of the university library. The factors to be considered, such as "the character of the place, the pattern of usual activity, the nature of its essential purpose and the population who take advantage of the general invitation extended . . . are essentially the same."<sup>66</sup> But examination of these factors leads to different results in different cases.<sup>67</sup>

At the same time, it answers very few questions to say that "the

57. Kalven, *supra* note 54, at 12.

58. *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Fowler v. Rhode Island*, 345 U.S. 67 (1953).

59. *Edwards v. South Carolina*, 372 U.S. 229 (1963).

60. *Wolin v. Port of New York Authority*, 392 F.2d 83 (2d Cir. 1968).

61. *Marsh v. Alabama*, 326 U.S. 501 (1946).

62. *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968).

63. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969); *Hammond v. South Carolina State College*, 272 F. Supp. 947 (D.S.C. 1967). *But see Evers v. Birdsong*, 287 F. Supp. 900, 905 (S.D. Miss. 1968).

64. A. FORTAS, *CONCERNING DISSENT AND CIVIL DISOBEDIENCE* 46-47 (1968). *See also Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 320 (1968).

65. *Wolin v. Port of New York Authority*, 392 F.2d 83 (2d Cir. 1968).

66. *Id.* at 89.

67. *See O'Neil, Reflections on the Academic Senate Resolution*, 54 CALIF. L. REV. 88, 91 (1966).

campuses of state universities are public buildings dedicated to a special function: education. As such, there is no first amendment objection to limiting the use of these state-owned facilities to the purpose to which they have been dedicated.’<sup>68</sup> An important state court opinion develops the same thought when it says: “the function of the University is to impart learning and to advance the boundaries of knowledge. This carries with it the administrative responsibility to control and regulate that conduct and behavior of the students which tends to impede, obstruct or threaten the achievements of its educational goals.’<sup>69</sup> These formulations do not help me because there is no single meaning of “education” that can be read into such statements. I agree that “the methods of formal education—lectures, discussion, research, writing—deserve respect,’<sup>70</sup> but not because these and these alone are “education.” Mark Hopkins on a campus log, a dormitory bull-session, a demonstration in support of Biafra—all of these are surely forms of education. Indeed, though I regard the events a year ago at Columbia as illegal, deplorable, and unjustifiable on any view of the first amendment, they were also surely “educational” in many respects. At the same time, if the university is free to regulate only those things that tend to impede its “educational” goals, must it stand by and watch idly as demonstrators bar access to recruiters, whether from Dow Chemical or from Vista? A court has held that it need not,<sup>71</sup> and I think this clearly right, but is recruiting “educational”? I would be hard put to argue that the “educational goals” of The University of Texas would be impeded if demonstrators were to swarm on the field and prevent us from playing football against Arkansas—but I have no doubt of our right to prevent such conduct.

It seems to me closer to the mark to say, as the judges in the Western District of Missouri have done, that a university is not obliged to tolerate interference with “any lawful mission, process, or function of the institution,”<sup>72</sup> or, in a simpler phrase, that “the

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68. *Snyder v. Board of Trustees of the University of Illinois*, 286 F. Supp. 927, 933 (N.D. Ill. 1968).

69. *Goldberg v. Regents of the University of California*, 248 Cal. App. 2d 867, 879, 57 Cal. Rptr. 463, 472 (1967).

70. *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1132 (1968).

71. *Buttney v. Smiley*, 281 F. Supp. 280 (D. Colo. 1968).

72. *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, 145 (W.D. Mo. 1968).

normal activities of the University"<sup>73</sup> are protected. On this view, the quiet of the library reading room, the decorum of the classroom, and the pageantry and drama of the stadium are given preference, not because these are more or less "educational" than a "teach-in" on Vietnam would be, but because these are the "normal activities" of the university as defined by those to whom the state has entrusted the governance of the university. Other activities, to the extent that they are protected by the first amendment, must be permitted but they need not be permitted at a time or place that will interfere with the normal activities.

On the view I take of the matter, that the first amendment applies with full vigor on the campus, it is a false dichotomy to suggest, as some have, that there are circumstances in which a university can limit or forbid "the exercise of a right guaranteed by the Constitution or a law of the United States to persons generally."<sup>74</sup> I do not think such a conflict ever can arise, because I do not read the first amendment as granting rights in a vacuum, but rather as granting rights that exist at a particular time and place. "The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time."<sup>75</sup> To revert to an example I suggested earlier, a rule barring loud discussions in the reading room of the library does not limit "the exercise of a right guaranteed by the Constitution . . . to persons generally," for no one has a constitutional right to speak in a place so clearly inappropriate. The nature of the university, and the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable, but the first amendment is no bar to reasonable regulations of that kind.<sup>76</sup>

There is another way in which different results may be reached on the campus although the first amendment is fully applicable. A

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73. *Buttny v. Smiley*, 281 F. Supp. 280, 286 (D. Colo. 1968). *Cf. Jones v. State Board of Education*, 279 F. Supp. 190, 204 (M.D. Tenn. 1968), *affirmed*, 407 F.2d 834 (6th Cir. 1969).

74. *General Order on Judicial Standards*, *supra* note 72, at 146. *See also* Van Alstyne, *Student Academic Freedom and the Rule Making Powers of Public Universities: Some Constitutional Considerations*, 2 LAW IN TRANSITION Q. 1, 23 (1965); Note, *Reasonable Rules Reasonably Enforced—Guidelines for University Disciplinary Proceedings*, 53 MINN. L. REV. 301, 327 (1968).

75. *Cox v. Louisiana*, 379 U.S. 536, 554 (1965).

76. *Cox v. New Hampshire*, 312 U.S. 569 (1941). *See Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 321 (1968); *Davis v. Francois*, 395 F.2d 730, 736 (5th Cir. 1968); *Wolin v. Port of New York Authority*, 392 F.2d 83, 93-94 (2d Cir. 1968).

law, or even a university regulation, prohibiting people from reading Chapman's translation of Homer would be clearly unconstitutional. But suppose that a professor of Greek were to make a rule that students enrolled in a course in which Homer was being studied in the original must deny themselves for the time being the pleasures of which Keats wrote so eloquently. The right to read is ordinarily among the freedoms of expression protected by the first amendment,<sup>77</sup> but for the students in the course in Greek, reading Chapman would represent action rather than expression—the use of Chapman as a high-class “crib”—and it would be subject to regulation.<sup>78</sup>

We return, then, to the proposition that the first amendment imposes on the state university, fully as much as on the state itself, these three rules: (1) Expression cannot be prohibited because of disagreement with or dislike for its contents. (2) Expression is subject to reasonable and nondiscriminatory regulations of time, place, and manner. (3) Expression can 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. These principles can best be understood by seeing how they apply, and how the courts have interpreted them, in several specific contexts.

The most important of these contexts in terms of what is happening at our universities today is the right of students to demonstrate on the campus. Some forms of demonstrations, such as picketing and parading, are “methods of expression, entitled to first amendment protection.”<sup>79</sup> It would clearly be unreasonable, and unconstitutional, to seek to ban demonstrations from the campus entirely.<sup>80</sup> A Study Commission at Berkeley has well-described the situation:

The university is the major community affiliation of students during the years they are here. The campus (and its immediate geographical periphery) is the center of their professional and social lives; it is where they eat, sleep, study, argue, or organize.

It is therefore both natural and appropriate that when students want to have meetings, circulate petitions, raise money, or organize activities, they should turn to campus facilities, just as citizens of other communities use its public parks, sidewalks, schools, churches, or clubs for similar communal purposes.<sup>81</sup>

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77. *Stanley v. Georgia*, 394 U.S. 557 (1969); *Lamont v. Postmaster General of United States*, 381 U.S. 301 (1965).

78. O'Neil, *supra* note 67, at 93.

79. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 152 (1969).

80. *Hammond v. South Carolina State College*, 272 F. Supp. 947, 951 (D.S.C. 1967).

81. UNIVERSITY OF CALIFORNIA AT BERKELEY, REPORT OF THE STUDY COMMISSION ON

This form of expression cannot be barred altogether, nor can it be barred because those in authority are not sympathetic with the purpose of a particular demonstration. A requirement that there be advance permission for a demonstration, with no standards for when permission is to be given, would be invalid,<sup>82</sup> since it would allow expression to be prohibited because of its content. Advance notice of a demonstration can validly be required, since "notice affords a desirable opportunity for the administration and the demonstrators to work out detailed methods for the conduct of the protest in a manner compatible with the legitimate interests of all."<sup>83</sup> It is true that requirements of notice must be examined with care, since they can be abused,<sup>84</sup> and the notice rule ought to have enough flexibility to accommodate the truly spontaneous demonstration in response to such tragic events as the assassination of Dr. King.<sup>85</sup> Even advance approval can be required,<sup>86</sup> if there are "narrow, objective, and definite standards to guide the licensing authority."<sup>87</sup>

The only justification for licensing rules is to permit implementation of the rules of time, place, and manner. They cannot be the cloak for censorship of content. Some kinds of regulations of time and place are obviously necessary as a form of what Professor Emerson has called "traffic control."<sup>88</sup> If the Young Americans for Freedom have reserved the West Mall for a demonstration at 1:00 on Friday, Students for a Democratic Society cannot complain if their application for the same place and hour is rejected and they are told to plan on a different time or place. They cannot complain, that is, so long as, both in principle and in practice, the rules "afford equality of treatment as between individuals or groups and allow no discrimination on the basis of the content of the expression."<sup>89</sup> Regulations of manner must be particularly circumscribed. Professor Robert O'Neil has suggested a useful test. "Manner," he says

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UNIVERSITY GOVERNANCE, THE CULTURE OF THE UNIVERSITY: GOVERNANCE AND EDUCATION 36 (1968).

82. *Hammond v. South Carolina State College*, 272 F. Supp. 947 (D.S.C. 1967). *Cf. Kunz v. New York*, 340 U.S. 290 (1951).

83. *Powe v. Miles*, 407 F.2d 73, 84 (2d Cir., 1968).

84. *Wolin v. Port of New York Authority*, 392 F.2d 83, 94 (2d Cir. 1968).

85. *Powe v. Miles*, 407 F.2d 73, 84 (2d. Cir. 1968).

86. Note, *Regulation of Demonstrations*, 80 HARV. L. REV. 1773, 1784-1785 (1967). *See also Kalven, supra* note 54, at 28-29.

87. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969). *Cf. Dickson v. Sitterson*, 280 F. Supp. 486 (M.D.N.C. 1968).

88. EMERSON, *supra* note 52, at 102.

89. *Id.*

should be understood to denote only those physical and procedural incidents of public expression that are neither "time" nor "place"—for example, the size and number of posters that can be displayed in certain locations, the volume of sound amplification, chairmanship of public meetings, identification of persons soliciting funds, methods of distributing literature, and the myriad other matters that must be regulated in order effectively to regulate the speech situation. With this understanding, reference to "manner" should provide no invitation to veiled censorship.<sup>90</sup>

We have seen earlier that the entire campus cannot be declared off-limits for demonstrations. It does not follow, however, that the entire campus is a permissible area for demonstrations. "London does not make all of Hyde Park available for speechifying."<sup>91</sup> Judge Frankel has declared that the controversial rule at Columbia banning all indoor demonstrations was reasonable beyond any question.<sup>92</sup> With deference, I am doubtful about this. Many universities do permit indoor demonstrations and the life of the university has not been harmed by them. I cannot accept Professor Van Alstyne's view that the burden should be on the university to establish that a demonstration at a particular place would be "manifestly unreasonable,"<sup>93</sup> but I do think that a regulation to be reasonable, and thus valid, must show that consideration has been given to "all of the nuances of the time, place and manner."<sup>94</sup> A flat rule that there is not any time when a demonstration can be permitted in any building seems far too sweeping. Indeed testimony by the Vice President of Columbia to the Cox Commission showed that the university never intended to enforce the ban as broadly as it was written.<sup>95</sup> A regulation that goes farther on its face than in its intended application opens the door to selective enforcement and thus to censorship.

There are some buildings—the library seems a good example—in which demonstrations might never be allowed. There are other buildings in which they might not be allowed at particular times, such as a classroom building while classes are in session, or a dormitory during hours when many people are sleeping. It would certainly also be defensible to designate "the specific places within the building where the rights of expression may be exercised."<sup>96</sup>

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90. O'Neil, *supra* note 67, at 104.

91. *Powe v. Miles*, 407 F.2d 73, 85 (2d Cir. 1968).

92. *Grossner v. Trustees of Columbia University*, 287 F. Supp. 535, 552 (S.D.N.Y. 1968).

93. Van Alstyne, *The Judicial Trend Toward Student Academic Freedom*, 20 U. FLA. L. REV. 290, 299 (1968).

94. *Davis v. Francois*, 395 F.2d 730, 736 (5th Cir. 1968).

95. CRISIS AT COLUMBIA: REPORT OF THE FACT-FINDING COMMISSION APPOINTED TO INVESTIGATE THE DISTURBANCES AT COLUMBIA UNIVERSITY IN APRIL AND MAY, 1968 at 70 (1968).

96. *Wolin v. Port of New York Authority*, 392 F.2d 83, 94 (2d Cir. 1968).

What is true of buildings is true also of the open areas of the campus. Although here the justification for declaring particular spots not permissible will be less common, I cannot think that a university transgresses the Constitution if it declares that in one area of the campus demonstrations would endanger ornamental plantings or that another area is set aside as a place for quiet and contemplation. But there are three cautions that must be heeded by an institution so minded. If it intends to prohibit demonstrations in particular places, indoors or out, it must do so by general rule rather than by ad hoc denial of a particular application.<sup>97</sup> Second, if a particular area is off-limits for a political demonstration it must be off-limits also for football pep rallies, art auctions, and other equally noisy or congested activities.<sup>98</sup> Finally, the university must be able to show that it has made available "adequate alternative areas where the demonstrators can effectively confront the audience they seek."<sup>99</sup> To bar demonstrations on the main part of the campus, while providing that they may be held at the intramural field two miles away, would be an unreasonable charade and would stand no better constitutionally than a ban on all demonstrations.

The third of my principles, you will recall, is that expression can 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. This is, of course, the hardest proposition to apply to demonstrations. The demonstration is intended as a means of expression. Inevitably it has important elements of action. At what point does it become impermissible action rather than protected expression? I have used the phrase "materially and substantially" interferes since this is the test that the Supreme Court, borrowing from the Fifth Circuit, announced in the *Tinker* case.<sup>100</sup>

No one who reads the cases is likely to think that the courts have erred on the side of being too permissive with regard to disruptive activity. Indeed the case law is nonexistent as a guide to kinds of demonstrations that are constitutionally protected. Almost certainly this is because university administrators have, in general, been restrained and have imposed the kind of severe disciplinary penalties that it is worthwhile challenging in court only in the most aggravated circumstances. "Violent activities," Justice Fortas has said, "should

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97. Cf. *Cox v. Louisiana*, 379 U.S. 536 (1965).

98. Cf. *Niemotko v. Maryland*, 340 U.S. 268, 273 (1951).

99. *The Supreme Court, 1966 Term*, 81 HARV. L. REV. 69, 141 (1967).

100. 393 U.S. at 513.

be regarded and treated as intolerable. Punishment of on-campus violence involves risks. . . . But the toleration of violence involves, I think, even greater risks, not only of present damage and injury but of erosion of the base of an ordered society."<sup>101</sup> His view contrasts with that of Congressman Adam Clayton Powell who argues that "there should be no limits on dissent whatever," since "that's what you go to school for," and who thinks that there is a place even for violence if you have "come to the breaking point when all reason does not succeed and by some act of violence something can be done to bring those who will not reason to a point of reasonability."<sup>102</sup>

The courts plainly agree with Justice Fortas. They have refused to find constitutional protection for a demonstration in which buildings were burned and equipment wantonly damaged.<sup>103</sup> Judge Doyle, who has shown an extraordinary sensitivity in these matters, ordered a hearing for students suspended from Oshkosh State, but held that the institution was duty bound to impose severe sanctions on persons who broke into the president's office, held him prisoner there, made menacing gestures to him, and destroyed substantial amounts of property.<sup>104</sup> Indeed even a little violence is enough to forfeit first amendment protection. A demonstration at Central Missouri State College led to broken windows and destroyed shrubbery, and included throwing eggs, hanging the dean in effigy, and stopping and rocking cars. A federal court found that an educational institution can protect itself "against conduct that would damage or destroy it or its property in total or in part," and upheld suspension of students involved for violation of a rule against participating in mass gatherings that "might be considered as unruly or unlawful."<sup>105</sup>

The case of *Barker v. Hardway*<sup>106</sup> is of particular interest. A peaceful demonstration demanding that students have a greater voice in the administration of the college was held during the halftime of a football game at Bluefield State College. When the game resumed the demonstrators came into the stands and encircled the section where the president and his guests were sitting. They chanted themes denouncing the president and held up placards blocking his view. The

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101. FORTAS, *supra* note 64, at 47.

102. New York Times, March 18, 1969, p.9, col. 1.

103. Evers v. Birdsong, 287 F. Supp. 900 (S.D. Miss. 1968).

104. Marzette v. McPhee, 294 F. Supp. 562, 569 (W.D. Wis. 1968). See also Trillin, *U.S. Journal: Oshkosh*, NEW YORKER, Jan. 4, 1969, p.62.

105. Esteban v. Central Missouri State College, 290 F. Supp. 622, 629 (W.D. Mo. 1968).

106. 283 F. Supp. 228 (S.D.W. Va. 1968), *criticized*, COLLEGE LAW BULL., April, 1969.

police then escorted the president to the other side of the stadium. The demonstrators followed and yelled threats at the president, attempted to grab him, and threw rocks and bottles at police officers. When the president left the stadium, the demonstrators beat upon and rocked his car and attempted to prevent him from driving from the parking lot. Several of the demonstrators were suspended, and a district court refused to set the suspensions aside. It found that by depriving the president and others in lawful attendance "of the right to see and enjoy the game in peace and with safety to themselves, they thereby exceeded this constitutional privilege and forfeited its protection."<sup>107</sup> The Fourth Circuit affirmed,<sup>108</sup> and the Supreme Court refused review.<sup>109</sup> Justice Fortas, who had been spokesman for the Court in the *Tinker* case one week earlier, wrote a concurring opinion to the denial of certiorari in *Barker*. He said that "the petitioners here engaged in an aggressive and violent demonstration, and not in peaceful, nondisruptive expression, such as was involved in *Tinker*."<sup>110</sup>

Even where a demonstration results in no harm to persons or property, and may fairly be regarded as nonviolent, it becomes punishable action, rather than protected expression, if it leads to physical obstruction of access to university buildings. It may be, as has been suggested, that in these cases of nonviolent violation, there is "sense in patient forbearance despite the wrong that the action involves."<sup>111</sup> Patient forbearance, however, is the result of a prudential judgment and is not constitutionally compelled.<sup>112</sup> The occupancy of buildings at Columbia,<sup>113</sup> blocking access to the administration building at Grambling,<sup>114</sup> sitting-in after closing hours at Sproul Hall in Berkeley,<sup>115</sup> and linking arms to block entrance to the placement office at Colorado<sup>116</sup> have all been held to be beyond first amendment bounds.

A case that comes close to the borderline, and that emphasizes

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107. *Id.* at 238.

108. 399 F.2d 638 (4th Cir. 1968).

109. 394 U.S. 905 (1969).

110. *Id.*

111. FORTAS, *supra* note 64, at 47.

112. *See Cox v. Louisiana*, 379 U.S. 536, 555 (1965); Emerson, *supra* note 55, at 1003-1004.

113. *Grossner v. Trustees of Columbia University*, 287 F. Supp. 535 (S.D.N.Y. 1968).

114. *Zanders v. Louisiana State Board of Education*, 281 F. Supp. 747 (W.D. La. 1968).

115. *In re Bacon*, 240 Cal. App.2d 34, 49 Cal. Rptr. 322 (1966).

116. *Buttny v. Smiley*, 281 F. Supp. 280 (D. Colo. 1968).

how permissive the courts have been to the universities, is the recent decision by the Second Circuit in *Powe v. Miles*.<sup>117</sup> That case involved a peaceful and orderly demonstration at an ROTC review at Alfred University. Sixteen demonstrators formed a line between the reviewing stand and the field on which the cadets were to march. The demonstrators were an obstacle to the vision of those in the reviewing stand and the lower tiers of the grandstand and made it necessary to alter certain elements of the ceremony that had been planned. Those of the demonstrators who refused to comply with a request from the Dean of Students that they remove themselves from the field were suspended for violation of a rule that demonstrators must "avoid disrupting classes or other educational activities." The suspensions were upheld by the Second Circuit, in an opinion in which Judge Friendly said:

The fact that the demonstration was much less violent than other unhappy incidents of the recent past does not mean it had not passed the limits that Alfred was required to tolerate; the ROTC cadets and the parents had rights too.<sup>118</sup>

Though I think the case is a close one, I agree with the result the court reached. There was a material and substantial interference with a scheduled activity of the institution. This impermissible action outweighs the expression the demonstrators were attempting.

A case that happily led to no penalties, and did not reach the courts, illustrates the other side of the borderline. Recently demonstrators sat-in at College Hall, at the University of Pennsylvania, for six days. But unlike demonstrators elsewhere, they allowed free access within the building and supervision by the campus police, and classes in the building were not hampered.<sup>119</sup> If there had been a valid university rule prohibiting demonstrations in this particular building or requiring that persons leave it at a certain hour, even this behavior might not have been permissible, but there was no such rule. Since the demonstrators were at most an inconvenience, and their conduct did not materially or substantially interfere with the normal activities of the university, the demonstration remained a form of constitutionally-protected expression.

The cases involving demonstrations, though they have reached what I consider satisfactory results, pose hard problems, in which all three of the rules I have ventured to set forth in defining the meaning

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117. 407 F.2d 73 (2d Cir. 1968).

118. *Id.* at 85.

119. Yale Daily News, March 13, 1969, p.4, col. 5.

of the first amendment may be intertwined. The cases involving bans on off-campus speakers are far simpler, since they commonly fall afoul of the first rule, that expression cannot be prohibited because of disagreement with or dislike of its contents.

American educational institutions have been notoriously timid about off-campus speakers. A survey made several years ago on behalf of the National Association of Student Personnel Administrators showed that George Lincoln Rockwell would have been permitted to speak at only 23 per cent of the institutions and Malcom X at only 33 per cent. Indeed seven per cent of the colleges and universities would have been hesitant about approving an invitation to Chief Justice Warren.<sup>120</sup> As recently as 1964, 65 per cent of the institutions had no written policy on off-campus speakers,<sup>121</sup> and even where written policies existed they usually allowed considerable discretion to administrative officers. In the exercise of this discretion, administrators commonly took counsel of their fears, fears both of what the speaker might say and of what the taxpayers or the alumni might say. They failed to perceive that, as the Court has now told us in *Tinker*:

. . . in 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. . . . But our Constitution says we must take this risk.<sup>122</sup>

Before the state can prohibit a particular expression of opinion, "it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."<sup>123</sup>

Given the contrast between the demands of the Constitution and the practices of the universities, it is hardly surprising that I cannot find a single case decided on its merits in this decade in which a speaker ban has been upheld by a court. Perhaps a university might bar all off-campus speakers, but the issue is hardly worth pursuing since no educational institution worthy of the name can or does follow such a policy. Once some speakers have been allowed, others may not be turned away "according to the orthodoxy or popularity of their political or social views," for to do so is "blatant political censorship."<sup>124</sup> Attempts

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120. WILLIAMSON & COWAN, *THE AMERICAN STUDENTS' FREEDOM OF EXPRESSION* 68 (1966).

121. *Id.* at 78.

122. 393 U.S. at 508.

123. *Id.* at 509.

124. *Brooks v. Auburn University*, 296 F. Supp. 188, 194 (M.D. Ala. 1969).

to bar certain off-campus speakers have failed in recent months at Auburn,<sup>125</sup> Illinois,<sup>126</sup> Louisiana State,<sup>127</sup> and North Carolina.<sup>128</sup> I am strongly tempted to believe that the only good speaker ban is one that has not yet been tested in court. It is not only the speaker invited by a campus group who must be tolerated. A university can have a rule limiting the use of college premises to those invited by student groups, faculty members, or the administration,<sup>129</sup> but if it has a practice of making its facilities available to outside organizations, it cannot refuse the facilities to those organizations or speakers it does not like.<sup>130</sup>

A speaker cannot be refused permission to speak on campus because he has been convicted of a felony<sup>131</sup> or is under indictment for murder,<sup>132</sup> or because he urges or advocates violation of the laws,<sup>133</sup> or because he is an admitted member of the Communist Party.<sup>134</sup> A speaker may not be required to promise that he will not use his speech to publicize the activities of any "subversive, seditious, and un-American organization."<sup>135</sup> A forum cannot constitutionally be denied to "subversive elements"<sup>136</sup> nor even to groups seeking overthrow of the government by force or violence.<sup>137</sup> It will not do to limit speakers to those who "clearly serve the advantage of education" or to lease

125. *Id.*

126. *Snyder v. Board of Trustees of University of Illinois*, 286 F. Supp. 927 (N.D. Ill. 1968).

127. *Student Liberal Federation v. Louisiana State University*, Civ. No. 68-300 (E.D. La., Feb. 15, 1968).

128. *Dickson v. Sitterson*, 280 F. Supp. 486 (M.D.N.C. 1968). *See also* *Smith v. University of Tennessee*, No. 6557 (E.D. Tenn., April 18, 1969).

129. Van Alstyne, *Political Speakers at State Universities: Some Constitutional Considerations*, 111 U. PA. L. REV. 328, 340 (1963).

130. *Buckley v. Meng*, 35 Misc. 2d 467, 230 N.Y.S. 2d 924 (1962). *Cf.* *Bynum v. Schiro*, 219 F. Supp. 204 (E.D. La. 1963); *American Civil Liberties Union v. Board of Education of City of Los Angeles*, 55 Cal.2d 167, 359 P.2d 45 (1961); *Danskin v. San Diego Unified School District*, 28 Cal.2d 536, 171 P.2d 885 (1946); EMERSON, *supra* note 52, at 110-111.

131. *Brooks v. Auburn University*, 296 F. Supp. 188 (M.D. Ala. 1969).

132. *Student Liberal Federation v. Louisiana State University*, Civ. No. 68-300 (E.D. La., Feb. 15, 1968).

133. *Brooks v. Auburn University*, 296 F. Supp. 188 (M.D. Ala. 1969). *Cf.* *Bynum v. Schiro*, 219 F. Supp. 204 (E.D. La. 1963).

134. *Egan v. Moore*, 20 A.D. 2d 150, 245 N.Y.S.2d 622 (1963), *affirmed*, 14 N.Y.S.2d 775, 199 N.E.2d 842 (1964).

135. *Snyder v. Board of Trustees of the University of Illinois*, 286 F. Supp. 927 (N.D. Ill. 1968).

136. *Danskin v. San Diego Unified School District*, 28 Cal. 2d 536, 171 P.2d 885 (1946).

137. *American Civil Liberties Union v. Board of Education of City of Los Angeles*, 55 Cal. 2d 167, 359 P.2d 45 (1961).

the auditorium only for programs "determined to be compatible with the aims of [the college] as an institution of higher learning."<sup>138</sup>

The lesson of these cases has not been learned everywhere. At my own institution, The University of Texas, we have a rule that begins, soundly enough, by asserting that "freedom of inquiry and discussion are basic and essential to intellectual development," but that quickly goes on to bar from speaking on campus any person "who is known to advocate or recommend, either orally or in writing, the conscious and deliberate violation of any federal, state or local law."<sup>139</sup> The notion that "a prohibition resting solely on the credentials of the speaker seems completely beyond justification"<sup>140</sup> is not easily or painlessly grasped. In a recent survey of more than 200 college presidents, 30.3 per cent said that they "disagree completely" with the propositions that "students should be allowed to hear any person of their own choosing," and that "institutional control of campus facilities should never be used as a device of censorship."<sup>141</sup> Fortunately the legal doctrines here are clear and the tools readily available for those who would challenge restrictive rules.

It seems to me quite instructive to compare the results in the cases involving demonstrations with those dealing with speaker bans. The speaker ban cases involve expression only, and the courts rigidly refuse to permit any censorship of expression. The demonstration cases, on the other hand, involve action as a means of expression, and here the courts have allowed the universities to punish the action as they will.

The next group of cases raise the question of the extent to which an institution's interest in preserving respect for constituted authority and an atmosphere conducive to learning is in itself enough to justify institutional discipline. I approach the cases warily since, with two exceptions, they involve high schools, and I find no more reason to believe that the rules applicable to high schools can be indiscriminately transferred to institutions of higher learning than I do to think that decisions involving non-academic functions of the state can be so transferred. The average university student is more

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138. *Dickson v. Sitterson*, 280 F. Supp. 486 (M.D.N.C. 1968); *Buckley v. Meng*, 35 Misc. 2d 467, 230 N.Y.S.2d 924 (1968). See also *Smith v. University of Tennessee*, No. 6557 (E.D. Tenn., April 18, 1969).

139. RULES AND REGULATIONS OF THE BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM, Part I, c.VI. §§ 7.1, 7.26 (1969).

140. *Developments in the Law—Academic Freedom*, *supra* note 70, at 1133.

141. *Opinion*, College Management, Dec. 1966, p.32.

than 21 years old<sup>142</sup> and is surely an adult. The average high school student is in his mid-teens, and we have been authoritatively taught that even in the area of free expression important consequences can be made to "depend upon whether the citizen is an adult or a minor."<sup>143</sup>

It should be clear, however, that university students do not have fewer rights than high school pupils. Accordingly, to the extent that the cases draw a line beyond which high school authorities cannot go, we are safe in saying that university administrators can surely go no farther. The leading case is the *Tinker* decision handed down by the Supreme Court in February of this year.<sup>144</sup> The holding in *Tinker* was that the Des Moines School District could not punish students for wearing black armbands as a form of protest against the Vietnam war, in violation of a school regulation prohibiting the wearing of armbands. The case was an easy one, since the Des Moines schools did not prohibit the wearing of all symbols of political or controversial significance. Campaign buttons, and even the Iron Cross, had been tolerated. Thus the school authorities appeared to have singled out expression of one particular opinion and to have prohibited that alone. This is clearly invalid, on the same principle that is at the heart of the speaker ban cases.

But the language of *Tinker*, and, I think, its holding, are broader than this. Great emphasis was placed on the fact that the students involved did not interrupt school activities or seek to intrude in the school affairs or the lives of others. Though the armbands led to discussion outside of the classrooms, they caused no interference with work and no disorder.<sup>145</sup> Wearing of armbands was said to involve "direct, primary First Amendment rights akin to 'pure speech.'" <sup>146</sup> A high school student is free to express his opinion, the Court said,

if he does so "without materially and substantially interfering with appropriate discipline in the operation of the school" and without colliding with the rights of others. . . . But 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 classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guaranty of freedom of speech.<sup>147</sup>

The *Tinker* opinion draws heavily on two cases decided by a

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142. *Soglin v. Kauffman*, 295 F. Supp. 978, 988 (W.D. Wis. 1968).

143. *Ginsberg v. New York*, 390 U.S. 629 (1968).

144. 393 U.S. 503 (1969).

145. *Id.* at 514.

146. *Id.* at 508.

147. *Id.* at 513.

panel of the Fifth Circuit in 1966. Principals of two Mississippi high schools had announced that their students could not wear at school "freedom buttons," small buttons supporting civil rights. At each of the schools some students continued to wear the buttons and were suspended. The Fifth Circuit ordered the students reinstated at one of the schools.<sup>148</sup> It found the regulation against "freedom buttons" arbitrary and unreasonable, in the absence of any showing that the buttons had interfered with educational activity or caused a commotion or distracted the other students. But at the second school the same court allowed the suspensions to stand.<sup>149</sup> There the record showed that students had been accosting other students by pinning buttons on them even though they did not ask for one, and the court accepted as a fact in its opinion a statement in an affidavit from the school board that this "created a state of confusion, disrupted class instruction, and resulted in a general breakdown of orderly discipline."<sup>150</sup> I have my doubts about the second case. I think that the court may have been too quick to accept the conclusory statement of the school board about the dire consequences that had been caused, and in any event share the wonder Judge Tuttle later expressed about why the school did not discipline the small number of button-wearers who created noise and disturbance rather than striking at the wearing of buttons itself.<sup>151</sup>

However doubtful the application of the principle in the second "freedom button" case, the principle itself is sound enough, and has been fully accepted by the Supreme Court in *Tinker*.

The three remaining cases on this point suggest what the principle of the "freedom button" cases may mean in practice, since all three of them purported to follow the test as laid down by the Fifth Circuit even before that test was accepted by the Supreme Court in *Tinker*. In one, two high school students were expelled for handing out on the school grounds a mimeographed journal, which, among other things, called the school attendance regulations "utterly idiotic and asinine," accused a faculty member of having a "sick mind," and urged students to refuse to accept "propaganda" published by the school's administration.<sup>152</sup> It was conceded that the distribution of this

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148. *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966).

149. *Blackwell v. Issaquena County Board of Education*, 363 F.2d 749 (5th Cir. 1966).

150. *Compare id.* at 751 *with id.* at 751 n.2.

151. *Ferrell v. Dallas Independent School District*, 392 F.2d 697, 705 n.1 (5th Cir. 1968) (dissenting opinion).

152. *Scoville v. Board of Education of Joliet Twp.*, 286 F.Supp. 988 (N.D. Ill. 1968).

journal caused no commotion or disruption of classes. On the principle of the Fifth Circuit cases, and now of *Tinker*, that would seem to have required that the students be reinstated, but the district court in Illinois ruled to the contrary. It found that the students had engaged in "immediate advocacy of, and incitement to, disregard of school administrative procedures" and that this by itself "constitutes a direct and substantial threat to the successful operation of the school."<sup>153</sup> It concluded that "the interest of the state in maintaining the school system outweighs the protection afforded the speaker by the First Amendment."<sup>154</sup>

The result just described seems to me quite wrong. In the absence of a showing of *any* disruption of the work of the school or *any* disorder or *any* invasion of the rights of others—much less the "material and substantial" interference *Tinker* requires—it seems to me inescapable that these two students were expelled because the school authorities did not like what they were saying, and that this is what the Constitution prohibits. And, on the analysis I have offered, the right to expression of a point of view, so long as it does not merge into impermissible conduct, cannot be outweighed by some other supposed interest of the state.

The two remaining cases deal, at last, with college students. In one, Dickey, the editor of the student newspaper at Troy State College, was suspended for a year for "insubordination." He had prepared an editorial praising the president of the University of Alabama for taking a public stand in support of academic freedom for university students, in the face of criticism of this stand by some state legislators. First the faculty advisor and then the president of Troy State refused to permit publication of the editorial, relying on a rule the president had made against any editorials critical of the governor of Alabama or of members of the legislature. The faculty advisor, incredibly, ordered published in place of the editorial some material on "Raising Dogs in North Carolina." Dickey instead left the editorial column blank, except for the word "Censored" run diagonally across the column. It was for this "insubordination" that he was suspended. The federal court, in a strong opinion by Judge Johnson, ordered his reinstatement.<sup>155</sup> Although the action was later ordered dismissed as moot when Dickey transferred to another college

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153. *Id.* at 992.

154. *Id.*

155. *Dickey v. Alabama State Board of Education*, 273 F.Supp. 613 (M.D. Ala. 1967).

during the pendency of the appeal, and the Fifth Circuit, in ordering the dismissal, made the surprising statement that this took away from the decision below "any precedential effect,"<sup>156</sup> it is interesting to note that Judge Johnson's opinion in the *Dickey* case is twice cited approvingly by the Supreme Court in the *Tinker* case.<sup>157</sup>

Dickey's suspension was purportedly for his insubordinate conduct, but in fact it was because he had exercised his constitutionally protected right of expression. Any damage that Dickey's reinstatement would cause to discipline at Troy State was outweighed by the damage that would result from the imposition of intellectual restraints, such as had been attempted.

The other case, *Jones v. State Board of Education*,<sup>158</sup> was decided by Judge Miller of this district, whose earlier decision in *Knight v. State Board of Education*<sup>159</sup> is one of the great landmark cases in bringing the Constitution to the campus. The *Jones* case has very recently been affirmed by the Sixth Circuit. In *Jones* three students at Tennessee A. & I. State University challenged their indefinite suspension. The stated ground for suspension of one was that he had distributed literature promoting unrest on campus. A second was found to have caused publicity that tainted the reputation of the institution, to have talked and acted in a manner calculated to cause unrest, and to have disrupted a meeting of the student body and shown gross disrespect for university officials. The third student was found to have treated the president of the university with gross disrespect and to have disrupted an otherwise orderly meeting to the point it could not be continued. The students argued that their cases involved "speech in its pure or pristine form" since there were no accompanying demonstrations or picketing.<sup>160</sup> Judge Miller conceded that there were no demonstrations but found that "there was other conduct of the plaintiffs disrupting and undermining University proceedings," and that they were not punished "because they exercised their First Amendment freedoms."<sup>161</sup> This seems a proper conclusion with regard to the second and third students, insofar as they had disrupted meetings, since this kind of disruption of normal activities is impermissible action rather than protected expression. The

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156. *Troy State University v. Dickey*, 402 F.2d 515, 516 (5th Cir. 1968).

157. 393 U.S. at 506 n.2, 514.

158. 279 F. Supp. 190 (M.D. Tenn. 1968), *affirmed*, 407 F.2d 834 (6th Cir. 1969).

159. 200 F. Supp. 174 (M.D. Tenn. 1961).

160. 279 F. Supp. at 204.

161. *Id.*

case might stand on stronger ground if it were clear that the suspensions were for the disruptive activities only, and did not rest in part on the charges of disrespect to university officials. Even if a threat "to eliminate you and to tear this joint down"<sup>162</sup> might be thought to go beyond constitutional bounds, I have serious doubt whether referring to members of the administration as "Uncle Tom"<sup>163</sup> is a permissible basis for discipline. My greatest difficulty with the *Jones* case is with the first student, who was found only to have distributed literature designed to promote unrest on the campus. If the distribution of literature did disrupt the normal educational activities of the institution, as is briefly suggested at one point in the opinion,<sup>164</sup> discipline would be appropriate. But if, though the literature was intended to promote unrest, its distribution did not have a disruptive effect, the case would seem to me similar to that of the Illinois high school students, and I would classify the behavior as expression rather than action.

As is suggested by my discussion of the high school students who wrote that a teacher had a "sick mind" and the Tennessee A. & I. student who used the phrase "Uncle Tom," it seems to me that speech cannot be punishable on campus simply because it is vigorous or uncomplimentary. I fully share the view of the Cox Commission that the life of a university depends on "the pursuit of truth and knowledge solely through reason and civility,"<sup>165</sup> and that lack of civility leads only to a harmful polarization of opinion,<sup>166</sup> but it is perfectly clear that the first amendment did not enact Mrs. Emily Post's book of etiquette. This does not mean that every form of words is acceptable in university discourse. Surely the holding of the *Chaplinsky* case,<sup>167</sup> that there are some "fighting words" not protected by the first amendment because they inflict injury by their very utterance, has no less force on the campus than on the city street. And, in common with Professor Van Alstyne,<sup>168</sup> I accept the basic holding, though not all of the analysis, of a California court in the *Goldberg* case,<sup>169</sup> that participants in Berkeley's "Filthy Speech

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162. *Id.* at 201.

163. *Id.*

164. *Id.* at 204.

165. CRISIS AT COLUMBIA, *supra* note 95, at 196.

166. *Id.* at 198.

167. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

168. Van Alstyne, *The Judicial Trend Toward Student Academic Freedom*, 20 U. FLA. L. REV. 290, 299 n.31 (1968).

169. 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967).

Movement” were properly suspended for having “repeatedly, loudly and publicly [used] certain terms which, when so used, clearly infringed on the minimum standard of propriety and the accepted norm of public behavior of both the academic community and the broader social community.”<sup>170</sup> There are words that are not regarded as obscene, in the constitutional sense, that nevertheless need not be permitted in every context. Words that might properly be employed in a term paper about *Lady Chatterley’s Lover* or in a novel submitted in a creative writing course take on a very different coloration if they are bellowed over a loudspeaker at a campus rally or appear prominently on a sign posted on a campus tree. To paraphrase Professor Emerson, if a shock effect is produced by forcing offensive language upon a person contrary to his wishes, the harm is direct, immediate, and not controllable by regulating subsequent action. Realistically it can be considered an “assault” on the other person and dealt with as action rather than expression.<sup>171</sup> This, I think, was what the Supreme Court had in mind in the *Redrup* case when it spoke of “an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it.”<sup>172</sup>

The first amendment protects not only rights of expression but also rights of association. These are of great importance in university life, because many of the things students wish to accomplish can be achieved only by organizing. Although these issues are lively ones on many campuses, they have not yet reached the courts in numbers significant enough to create any body of doctrine. Cases dealing with racial discrimination by Greek-letter organizations<sup>173</sup> can be put to one side. The mandate of the equal protection clause, and of federal legislation providing aid to universities, is so clear that universities can hardly lend their recognition or their facilities to discriminatory organizations. In addition, the social group is hardly comparable to an organization of a political nature.

Students feel very strongly that they should not be required to give to a university membership lists of an organization, and many highly respected professional associations, in a *Joint Statement on Rights and Freedoms of Students*,<sup>174</sup> agree. The issue has not come to

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170. *Id.* at 880, 57 Cal. Rptr. at 472-473.

171. EMERSON, *supra* note 52, at 91.

172. *Redrup v. New York*, 386 U.S. 767, 769 (1967).

173. *E.g.*, *Sigma Chi Fraternity v. Regents of the University of Colorado*, 258 F. Supp. 515 (D. Colo. 1966).

174. 53 AAUP BULL. 365, 366 (1967).

the courts directly, although there is an interesting opinion by Judge Doyle holding that a legislative investigation of campus riots could not obtain membership lists of organizations unless it were first shown that the particular organizations had planned or participated in the riots.<sup>175</sup> There is also an unpublished opinion by a state trial court in Wisconsin holding that the university could deny recognition to the local chapter of SDS.<sup>176</sup> The reasoning is that the organization was not suppressed or forbidden to exist, and was merely denied certain privileges as a consequence of the lawful authority of the university to govern its affairs. The argument is unconvincing. An organization surely may be denied campus privileges if it has violated university rules that are in themselves valid. But if these privileges are denied as a form of political censorship, the principle that has controlled in the speaker-ban cases would apply, and the university would be required to treat all groups similarly.

I have now completed my examination of the substantive restrictions imposed on state universities by the first amendment. In the next section I turn to the procedural restrictions necessary to give these meaning.

### III. CONSTITUTIONAL PROTECTION OF PROCEDURE IN STUDENT DISCIPLINARY ACTIONS

“The history of liberty,” Justice Frankfurter noted in a famous sentence, “has largely been the history of observance of procedural safeguards.”<sup>177</sup> Indeed we saw in section I that the path-breaking case of *Dixon v. Alabama State Board of Education*,<sup>178</sup> in which the Constitution was first brought to the campus, dealt entirely with procedural safeguards. The cases reviewed in section II, applying the substantive limits of the first amendment to universities, were a later development. Without procedural safeguards the substantive protections would be virtually useless. There would be no point in an elaborate doctrine that students may be disciplined for disruptive action but not for mere expression if some administrator were permitted to make an ex parte and unreviewable determination that particular behavior was “disruptive action” and that a particular student had participated in it. In a system of ordered liberty, therefore,

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175. *Goldman v. Olson*, 286 F. Supp. 35 (W.D. Wis. 1968).

176. *Saxton v. Board of Regents of State Colleges*, No. 123-165 (Cir. Ct. Dane Co. Wis., May 21, 1968).

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

178. 294 F.2d 150 (5th Cir. 1961).

it is essential that substantive rules be applied through fair and reliable procedures.

My thesis in the preceding section was that the full first amendment, and not some watered-down version of it, applies on the campus. In this section my argument is rather different. It is that the due process clause of the fourteenth amendment does not impose on universities any particular procedural model, whether it be derived from criminal, civil, or administrative proceedings. Instead the courts should accept any institutional procedure so long as it is reasonably calculated to be fair to the student involved and to lead to a reliable determination of the issues. "The touchstones in this area are fairness and reasonableness."<sup>179</sup> To say this is only to recognize what the Supreme Court has told us:

"Due process" is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. . . . Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account.<sup>180</sup>

In another case the Court expressed the same thought:

The Fifth Amendment does not require a trial-type hearing in every conceivable case of government impairment of private interest. . . . The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.<sup>181</sup>

With this general concept of flexibility, tested only in terms of fairness and reasonableness, it is possible to canvass some of the kinds of questions that arise. I turn first to an issue that overlaps the always indistinct boundary between substance and procedure, but one that seems to me of fundamental importance. To what extent may students be disciplined for violation of vague and general rules?

In section II, I discussed the case of *Jones v. State Board of Education*.<sup>182</sup> The regulations at Tennessee A. & I., under which the students were suspended, prohibited: "(1) Disrespect for University authority; (2) Any act in violation of city, county, state, or federal law; and (3) Any other infractions of standards of conduct that

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179. *Due v. Florida A and M University*, 233 F. Supp. 396, 403 (N.D. Fla. 1963). See also *Jones v. State Board of Education*, 279 F. Supp. 190, 205 (M.D. Tenn. 1968), *affirmed*, 407 F.2d 834 (6th Cir. 1969).

180. *Hannah v. Larche*, 363 U.S. 420, 442 (1960).

181. *Cafeteria and Restaurant Workers' Union v. McElroy*, 367 U.S. 886, 894-895 (1961).

182. 279 F. Supp. 190 (M.D. Tenn. 1968), *affirmed*, 407 F.2d 834 (6th Cir. 1969).

require severe disciplinary action.”<sup>183</sup> The students, not unnaturally, challenged these regulations as being unduly vague. In rejecting that challenge, Judge Miller said:

The plaintiffs here are not attacking a state statute. Rather, the attack is upon student regulations found in a university handbook. No case is cited to this Court in which an attack upon a student regulation as being unconstitutionally vague has been sustained.<sup>184</sup>

As a descriptive statement, that was, at the time it was written, wholly accurate. A few samples will give the flavor of the kinds of regulations that have been considered sufficient by the courts. At one institution the rules require students “to respect the rights and privileges of other people; and to conduct themselves in such manner that reflects credit upon the University,” and also prohibit “injury to property on the campus or elsewhere and interference in any manner with the public or private rights of citizens.” These rules, a court said, “set standards for acceptable conduct which are readily determinable and should be easily understood.”<sup>185</sup> Another case upheld a rule requiring “decorous, sober and upright conduct of every student both on and off campus” and prohibiting conduct that “fails to show respect for good order, moral actions, personal integrity, rights of others, or for the care of property.”<sup>186</sup> A California court felt it need not even consider a challenge on vagueness grounds to a rule at Berkeley requiring “good taste,” “proper conduct,” and “acceptable conduct,” since it found that a university has “inherent general powers to maintain order on the campus and to exclude therefrom those who are detrimental to its well being.”<sup>187</sup> A university, on this view, needs no rules at all.

Such sonorous generalities, masquerading as rules, are doubtless to be found in the catalogues of many of our greatest educational institutions. The courts have been extraordinarily tolerant of them. And a student commentator supports the view that “a university regulation can legitimately be couched in general terms” on the ground that to require specific regulations “would force university officials to spend unknown time drafting regulations rather than

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183. *Id.* at 201.

184. *Id.* at 202. *See also* *Hutt v. Brooklyn College*, 68 Civ. 691 (E.D.N.Y. July 30, 1968).

185. *Buttny v. Smiley*, 281 F.Supp. 280, 284 (D. Colo. 1968).

186. *Barker v. Hardway*, 283 F.Supp. 228, 235 (S.D.W. Va. 1968), *affirmed*, 399 F.2d 638 (4th Cir. 1968).

187. *Goldberg v. Regents of the University of California*, 248 Cal. App. 2d 867, 881, 57 Cal. Rptr. 463, 473 (1967).

carrying out more pressing administrative duties."<sup>188</sup> Thus it is not surprising to find the judges of the Western District of Missouri, in their *General Order* with regard to student discipline, telling the universities affirmatively that they need do no more. They wrote:

Outstanding educational authorities in the field of higher education believe, on the basis of experience, that detailed codes of prohibited student conduct are provocative and should not be employed in higher education.

For this reason, general affirmative statements of what is expected of a student may in some areas be preferable in higher education. Such affirmative standards may be employed, and discipline of students based thereon.

The legal doctrine that a prohibitory statute is void if it is overly broad or unconstitutionally broad does not, in the absence of exceptional circumstances, apply to standards of student conduct.<sup>189</sup>

With the utmost respect for able judges who have taken this position, I submit that this is wholly wrong. I think the premises for this view are demonstrably unsound, and that I am prophesying what the courts will do in fact, and not reading my own personal view of desirable procedure into the fourteenth amendment, when I say that the conclusion reached is an erroneous one.

Take first the premise that "outstanding educational authorities" think that detailed codes are "provocative and should not be employed in higher education." For that proposition the only authority cited is a 1961 book on student personnel work.<sup>190</sup> Whatever may have been thought in 1961, the whole nature of the student-institution relation has changed since that time. Such outstanding educational authorities as the American Association of University Professors, the National Student Association, the National Association of Student Personnel Administrators, the National Association of Women Deans and Counsellors, and the American Association of Higher Education have recently endorsed a *Joint Statement on Rights and Freedoms of Students*, in which they say that the behavioral expectations of universities should be expressed in "specific regulations" and that "offenses should be as clearly defined as possible."<sup>191</sup>

There may be fears that a detailed code will be "provocative"—but there is painful experience with the price paid for

188. Note, 5 HOUSTON L. REV. 541, 547 (1968).

189. *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, 146 (W.D. Mo. 1968).

190. *Id.*, citing BRADY & SNOXELL, STUDENT PERSONNEL WORK IN HIGHER EDUCATION 378 (1961).

191. 53 AAUP BULL. 365, 368 (1967). See also 51 AAUP BULL. 447, 449 (1965).

vagueness and uncertainty. An able historian of the difficulties at Berkeley says that "one of the most persistent problems for both students and administrators on the campus of the University of California at Berkeley during the fall semester 1964 was that of ascertaining what the prevailing rules and regulations were."<sup>192</sup> The Cox Commission, officially created to look into the troubles at Columbia, found uncertainty about the rules a principal cause. It commented:

The undeniable value of administrative flexibility may be purchased only at the overriding cost of an unclarity, which opens an administration to charges of arbitrariness on the one hand, or weakness on the other, and thus may cost it the moral support that milder and more explicit forms of regulation might enjoy.<sup>193</sup>

At the University of Oregon it has been found entirely workable to proceed on the principles that penalties are to be imposed only for violation of a pre-existing rule and that rules must be sufficiently precise to control discretion and to inform students what may lead to discipline.<sup>194</sup> Professor Hans Linde, in his valuable discussion of student discipline from the perspective of the Oregon campus, says:

It is a fiction that no university code can adequately inform students of all rules duly adopted that carry disciplinary sanctions, and limit all discipline to infractions of rules so adopted and stated, without including some very general catchall rules of good conduct to cover a myriad of unanticipated forms of bad behavior. Such a claim reflects more indignation that bad conduct may escape university sanctions—the urge to punish—than concern with any clearly understood institutional need. True, some highly delinquent students may evade code sanctions (though not legal prosecution) while a code rule is drawn or amended; but the university will likely survive.<sup>195</sup>

These fears that a single student may go unpunished "widen the gap of mistrust on the American campus, breeding greater discord and stronger rebellions."<sup>196</sup>

I am sympathetic to the fear of the student commentator previously quoted that requiring specific regulations requires "unknown time" to be spent drafting regulations "rather than

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192. Sherry, *Governance of the University: Rules, Rights and Responsibilities*, 54 CALIF. L. REV. 23, 37 n.35 (1966).

193. CRISIS AT COLUMBIA: REPORT OF THE FACT-FINDING COMMISSION APPOINTED TO INVESTIGATE THE DISTURBANCES AT COLUMBIA UNIVERSITY IN APRIL AND MAY, 1968 at 70 (1968).

194. Linde, *Campus Law: Berkeley Viewed From Eugene*, 54 CALIF. L. REV. 40, 52 (1966).

195. *Id.* at 63.

196. Note, *Uncertainty in College Disciplinary Regulations*, 29 OHIO ST. L.J. 1023, 1036 (1968).

carrying out more pressing administrative duties." I participated in the drafting of such a code at The University of Texas—though there the task was given, as I think it should be, to a faculty-student committee rather than to administrative officials—and spent more than 300 hours at committee meetings, to say nothing of the time required for independent research and reflection. But what more pressing duty is there for any of us involved in the life of a university than to put our internal affairs into a condition that will narrow "the gap of mistrust" and, hopefully, spare our campus the anguish of Berkeley and Columbia.

What I have said so far, however, may be thought to establish only that specific rules are desirable, not that they are constitutionally required. This is true—but this is only the preamble to my argument. The main thesis is that a general rule of the kind I described earlier, does not meet the touchstones of fairness and reasonableness.<sup>197</sup> Students of common intelligence "must necessarily guess at its meaning and differ as to its application,"<sup>197</sup> and it leaves far too much to the unqualified discretion of those who apply it.<sup>198</sup> A commentator has asked pertinent questions about the Berkeley rule that was cast in terms of "good taste," "proper conduct," and "acceptable conduct."<sup>199</sup>

The thoughtful young man may wonder to whom his conduct must be "acceptable," what is "proper" and what "good taste" requires. Is it in good taste to demonstrate against the Viet Nam War? Or is he required to support it? Is criticism of the general conduct rule "proper"? May the editor of the student newspaper criticize the governor of the state?<sup>200</sup>

If rules of this generality are permissible then students have gained something, but not very much, from the decisions requiring procedural safeguards to be observed. It will do a student very little good to be given every protection of procedural due process ever thought of anywhere if, in the end, he may be expelled because the tribunal is free to apply a subjective judgment about what is acceptable conduct. This would be neither fair nor reasonable. Nor would the hard-won substantive protections be of much help. If the institution is no longer free to discipline a student because he

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197. *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

198. Van Alstyne, *The Judicial Trend Toward Student Academic Freedom*, 20 U. FLA. L. REV. 290, 295 (1968).

199. See *Goldberg v. Regents of the University of California*, 248 Cal. App. 2d 867, 871, 57 Cal. Rptr. 463, 466 (1967).

200. Note, *Uncertainty in College Disciplinary Regulations*, *supra* note 20, at 1023.

peacefully expresses unpopular political views, how easy it would be to proceed against him indirectly on the ground that an unkempt appearance or bizarre clothes violated the interdictions about "good taste" and "proper conduct." For these reasons, I think it no overstatement to say that the single most important principle in applying the Constitution on the campus should be that discipline cannot be administered on the basis of vague and imprecise rules.

This principle, I dare to prophesy, is the one that in the long run the courts will in fact accept. To apply to university rules the same requirements of specificity that are applied to criminal statutes is not to do much. The courts, in the criminal area, have been sympathetic to the problems of drafting involved and have given a generous reading to what is sufficient to avoid the vice of vagueness. Statutes prohibiting "obscene or indecent" matter have been upheld against a vagueness attack,<sup>201</sup> though the Court itself has written 55 separate opinions in 13 cases, endeavoring to explain what obscenity is.<sup>202</sup> A statute barring picketing "near" a courthouse has been praised as "a precise, narrowly drawn regulatory statute" despite "some lack of specificity in a word such as 'near.'"<sup>203</sup> And the Court said of a statute banning "mass demonstrations in such a manner as to obstruct or unreasonably interfere with free ingress to or from any public premises" that it "clearly and precisely delineates its reach in words of common understanding."<sup>204</sup>

The Court has not required that criminal statutes be drawn with the precision of multiplication tables. Even when first amendment freedoms are implicated, the forbidden conduct need not be delineated by metes and bounds. No more will be expected of university rules. No less should be tolerated.

I am helped in my conviction that this is the position the courts will ultimately take by several recent cases. There are first the cases striking down speaker bans on the ground of vagueness.<sup>205</sup> I recognize that these are not on all fours with regulations of conduct, but they do suggest that the void-for-vagueness principle does not disappear

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201. *Roth v. United States*, 354 U.S. 476, 491 (1957).

202. *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 705 n.1 (1968) (Harlan, J., dissenting).

203. *Cox v. Louisiana*, 379 U.S. 559, 564 (1965).

204. *Cameron v. Johnson*, 390 U.S. 611, 616 (1968).

205. *Smith v. University of Tennessee*, No. 6557 (E.D. Tenn., April 18, 1969); *Brooks v. Auburn University*, 296 F. Supp. 188 (M.D. Ala. 1969); *Dickson v. Sitterson*, 280 F. Supp. 486 (M.D.N.C. 1968).

when the Constitution comes in the campus gate. I am helped even more by the very recent opinion of Judge Doyle in the case of *Soglin v. Kauffman*.<sup>206</sup> Judge Doyle specifically rejects the view of the judges of the Western District of Missouri that detailed codes are not required because "outstanding educational authorities" find them "provocative," saying that he "cannot agree that university students should be deprived of these significant constitutional protections on so slender a showing."<sup>207</sup> He holds that "the constitutional doctrines of vagueness and overbreadth are applicable, in some measure, to the standard or standards to be applied by the university in disciplining its students,"<sup>208</sup> and that a general prohibition of "misconduct" is unconstitutionally vague and insufficient as the basis for expulsion or suspension for a significant period.

Judge Doyle also found invalid a poorly-drafted regulation at the University of Wisconsin that, charitably construed, prohibited students from "supporting causes by means which disrupt the operations of the university, or organizations accorded the use of university facilities." This he found defective for failing to speak to the elements of intention, or proximity of cause and effect, or of substantiality, and for lacking even the most general description of the kinds of conduct that might be considered disruptive.<sup>209</sup>

Although I welcome the recognition of the vagueness doctrine in *Soglin*, I have more doubt about the similar acceptance it gave to the "overbreadth" concept.<sup>210</sup> This rule, that one who has violated a clear statute by conduct not constitutionally protected may nevertheless have the statute declared void on its face if it also purports to reach other behavior that is protected by the first amendment,<sup>211</sup> has always seemed to me an exorbitant price to pay to avoid the "chilling effect" it is feared the overbroad statute will have on protected expression. To permit injunctive relief against such a statute makes sense, but to allow this as a defense in a criminal prosecution on behalf of hardcore misconduct seems to me to go too far. It diverts attention away from the real purposes of the first amendment toward the fashioning of unlikely hypothetical examples as a means of escaping punishment by one who should be punished.

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206. 295 F. Supp. 978 (W.D. Wis. 1968).

207. *Id.*, at 990.

208. *Id.*, at 991.

209. *Id.*, at 993.

210. *Id.*, at 990-91.

211. See *Aptheker v. Secretary of State*, 378 U.S. 500, 516-17 (1964).

Further there is a very narrow gap, and a great danger of confusion, between the notion of the statute void for overbreadth and the statute valid on its face, though it might be unconstitutionally applied. Suppose, for example, that a university has a rule making it an offense willfully to continue to participate in a demonstration after a responsible university official has ordered that the demonstration stop, on a finding that it is materially and substantially interfering with the normal activities of the university. Even responsible officials make mistakes of judgment, and an official might think he saw interference in a peaceful—and constitutionally protected—demonstration that did not in fact interfere. Of course the participants in the peaceful demonstration cannot be punished.<sup>212</sup> But should students who refuse to disperse after the dean tells them to stop trying to set fire to the administration building be able to avoid discipline under the rule on the ground that the rule is capable of being applied to the peaceful demonstration, and thus is void for overbreadth? I would hope not, and would hope that the rule would be held valid on its face even though, as the Supreme Court said in a case not dissimilar, “it requires no great feat of imagination to envisage situations in which such an ordinance might be unconstitutionally applied.”<sup>213</sup> The “overbreadth” concept is seemingly firmly established in constitutional jurisprudence, but I think it is not required either by fairness or reasonableness, and I would be hesitant indeed about importing it to the campus.

Another preliminary procedural issue is the extent to which university discipline can be applied at all to “off-campus” activity. Although I use the term “off-campus,” I hasten to say that a rigid on-campus, off-campus dichotomy is hardly workable. The question cannot meaningfully be posed in property terms, and should be put in terms of whether any interest of the university community is involved. Surely there are grounds for university discipline if a student steals the notes of his classmate from a dormitory room, and the university interest is no less if he accomplishes the theft while they are on a bus miles from the campus in search of geology specimens. The student need not even be engaged in a university-sponsored activity for the university to have a legitimate interest in the matter. If students at The University of Texas steal off surreptitiously to capture the Baylor mascot the night before our annual football game, I think that Texas

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212. *Cf. Powe v. Miles*, 407 F.2d 73 (2d Cir. 1968).

213. *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 91 (1965).

has a legitimate interest in the matter and is entitled to impose discipline.<sup>214</sup> But it is now widely recognized by educators that the university has no interest in imposing its own discipline for shoplifting from a downtown store or passing a forged check to a merchant.<sup>215</sup> The *Joint Statement*, endorsed by so many professional groups, says that "institutional authority should never be used merely to duplicate the function of general laws. Only where the institution's interests as an academic community are distinct and clearly involved should the special authority of the institution be asserted."<sup>216</sup> Of course, even conduct wholly divorced from any university connection might show the student's unfitness to be a member of the academic community and the risk of injury to persons or property at the university may require the student to be separated from the university.<sup>217</sup> But even here, as Dean Robert McKay points out:

[I]t is hard to conjure up circumstances in which a student with that risk potential would be left free by the civil authorities. The university should not attempt to second-guess the police and the judicial authorities as to whether a suspected or convicted wrongdoer can be safely returned to the general community.<sup>218</sup>

All of this may be wise educational policy, but is it the law? In terms of the decisions of today, the answer would have to be "No." In the leading *Dixon* case,<sup>219</sup> it will be recalled, the students had been expelled for a sit-in at a downtown lunchroom and for mass marches through the city. The Fifth Circuit insisted that they must have a fair hearing, but it never suggested that this "off-campus" activity might not be a proper basis for university discipline. There are other similar cases,<sup>220</sup> although it may fairly be said that there is no indication in any of them that the point I am here discussing was made to the court, or that the right to discipline was challenged on the ground that the activity did not involve any university interest.

Thus, though the case law presently has not restricted the ambit of university discipline in this fashion, there is no reasoned body of

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214. See Linde, *supra* note 194, at 53-54.

215. Linde, *supra* note 194, at 50-51. See also McKay, *The Student as Private Citizen*, 45 DENVER L.J. 558 (1968); Note, *Reasonable Rules Reasonably Enforced—Guidelines for University Disciplinary Proceedings*, 53 MINN. L. REV. 301, 336-339 (1968).

216. 53 AAUP BULL. 365, 367 (1967).

217. *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1132 (1968).

218. McKay, *supra* note 215, at 563.

219. *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961).

220. *Knight v. State Board of Education*, 200 F. Supp. 174 (M.D. Tenn. 1961); *Due v. Florida A and M University*, 223 F. Supp. 396 (N.D. Fla. 1963); *Corvette v. Aldridge*, 408 S.W. 2d 935 (Tex. Civ. App. 1966).

doctrine on the question. There are straws pointing in the opposite direction. The district court in Colorado has noted "a trend to reject the authority of university officials to regulate 'off-campus' activity of students."<sup>221</sup> The *General Order* in the Western District of Missouri provides that disciplinary standards "may apply to student behavior on and off the campus when relevant to any lawful mission, process, or function of the institution."<sup>222</sup>

On this point I do not think that the last word has been said or that one can predict with much confidence what the last word will be. Arguments can be made that due process prohibits the university from enforcing any regulation that is not related to the legitimate business of the university<sup>223</sup> or that punishment by the university for conduct that does not abuse any privilege extended by the university is so arbitrary as to be a denial of equal protection of the laws.<sup>224</sup> I recognize the force of these arguments—but I am not yet persuaded that the courts will accept them.

One final preliminary point is that the procedural safeguards I will discuss apply only to proceedings against students for misconduct. They do not apply to purely academic decisions by a university. Despite the astonishing suggestion of the *Harvard Law Review* that even the grade given to a student is subject to judicial review if it leads to his expulsion,<sup>225</sup> the courts have considered that the *Dixon* case and its progeny apply only where dismissal is "based upon misconduct, not deficiency in grades."<sup>226</sup> The courts will listen to claims that a dismissal for academic reasons was arbitrary or capricious, but I know of no case in which relief has been given on this ground. And in a bizarre case, the courts refused to interfere with the editorial judgment of the *Rutgers Law Review* in turning down an article submitted by Professor Alfred Avins.<sup>227</sup> These decisions seem to me entirely right. I realize that I lay myself open to a charge of

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221. *Buttny v. Smiley*, 281 F. Supp. 280, 286 (D. Colo. 1968).

222. 45 F.R.D. at 145.

223. Van Alstyne, *Student Academic Freedom and the Rule-Making Powers of Public Universities: Some Constitutional Considerations*, 2 LAW IN TRANSITION Q. 1, 23 (1965).

224. *Id.* at 31.

225. *Developments in the Law—Academic Freedom*, *supra* note 217, at 1139.

226. *Mustell v. Rose*, 282 Ala. 358, 367, 211 So.2d 489, 498 (1968); *See also* *Wright v. Texas Southern University*, 392 F.2d 728, 729 (5th Cir. 1968); *University of Miami v. Militana*, 184 So.2d 701 (Fla. App. 1966); *Application of Edde*, 8 Misc.2d 795, 168 N.Y.S.2d 643 (1957); *Connelly v. University of Vermont*, 244 F. Supp. 156 (D. Vt. 1965); *Jacobson, The Expulsion of Students and Due Process of Law*, 34 J. OF HIGHER EDUCATION 250, 252 (1963).

227. *Avins v. Rutgers*, 385 F.2d 151 (3d Cir. 1967).

inconsistency and personal bias: if the dean of students and the president are subject to being second-guessed by the court on their administrative decisions, why is the faculty member left undisturbed when he grades bluebooks or makes similar academic judgments. A partial answer is that courts are expert in applying the first amendment and the due process clause, but the persons on campus are the experts in deciding the academic value of a particular piece of work. I recognize that when the courts act they do so "not by authority of our competence but by force of our commissions,"<sup>228</sup> and that when duty calls a court cannot shrink from it because of "modest estimates of our competence in such specialities as public education."<sup>229</sup> But those famous phrases of Justice Jackson were addressed to a situation in which it was claimed that substantive constitutional rights were being denied. I perceive no basis on which a student can claim a constitutional right to a *D* rather than an *F*, so long as the grade given him was the good faith academic judgment of his instructor.

The point was made at the outset of this chapter that the requirements of due process are flexible, and different cases will require different procedural safeguards. Indeed the *Dixon* case itself said that "the nature of the hearing should vary depending upon the circumstances of the particular case."<sup>230</sup> Quite informal procedures, similar to those that usually were followed in all instances prior to *Dixon*, should be quite sufficient if the student, fully aware of his rights, chooses that kind of procedure,<sup>231</sup> or if the possible penalties are mild.<sup>232</sup> I suggest that the rules may distinguish in advance between major offenses and minor offenses and provide different procedures for each. This issue has not reached the courts directly, because students do not go to court to challenge mild sanctions. But the *General Order* in Missouri calls for particular procedures "in severe cases of student discipline for alleged misconduct, such as final expulsion, indefinite or long-term suspension, [or] dismissal with deferred leave to reapply."<sup>233</sup> In the *Soglin* case Judge Doyle specifically left open the question whether the doctrines of vagueness

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228. *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 640 (1943).

229. *Id.*

230. 294 F.2d at 158.

231. *CRISIS AT COLUMBIA*, *supra* note 193, at 197.

232. Van Alstyne, *Procedural Due Process and State University Students*, 10 *UCLA L. REV.* 368, 381-383 (1963); Monypenny, *University Purpose, Discipline and Due Process*, 43 *N.D.L. REV.* 739, 751 (1967); *Joint Statement*, 53 *AAUP BULL.* 365, 368 (1967).

233. 45 F.R.D. at 147.

and overbreadth would apply to proceedings "in which the range of possible sanctions is mild, such as the denial of social privileges or a minor loss of academic credits or perhaps expulsion from a specific course or perhaps a brief suspension."<sup>234</sup> From all of these indications it seems quite clear that a distinction between major offenses, to which severe penalties may attach, and minor offenses, calling only for mild sanctions, is permissible.

One may ask where the cutoff is between a "severe" and a "mild" penalty. To this there is no clear answer. I am sure that at The University of Texas we went farther than the Constitution requires, and indeed farther than I thought wise, in providing that any loss of privileges, no matter how insignificant, can be imposed only after the quite formal procedures we require for "major" offenses.<sup>235</sup> Professor Van Alstyne at one point was prepared to accept even suspension for a semester as a mild sanction that did not require a full hearing.<sup>236</sup> If I read his more recent writings correctly, he now would draw the line at any suspension.<sup>237</sup> My guess is that the courts will draw the boundary about where Judge Doyle does, and will require formal procedures if there is to be expulsion or "suspension for any significant time."<sup>238</sup>

It is possible, as at the University of Oregon,<sup>239</sup> to classify offenses as "major" or "minor" in the rules themselves, much as penal codes commonly divide offenses into felonies and misdemeanors, according to the gravity of the offense. This may well be desirable, since it is informative to students and puts them on notice of the possible consequences of various kinds of misconduct, but it hardly seems necessary. The alternative is to allow the dean of students, or whoever it is that initiates disciplinary proceedings, to label any case he sees fit as a "minor" violation. If he does so, this permits use of informal procedures but it automatically limits the maximum penalty that may be assessed.

There is general agreement that four fundamental safeguards are required in every proceeding that may lead to a serious penalty. The student must be advised of the grounds of the charge, he must be

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234. *Soglin v. Kauffman*, 295 F. Supp. 978, 992 (W.D. Wis. 1968).

235. THE UNIVERSITY OF TEXAS AT AUSTIN, INSTITUTIONAL REGULATIONS ON STUDENT SERVICES AND CONDUCT § 11-303 (c) (1968).

236. Van Alstyne, *supra* note 232, at 386.

237. Van Alstyne, *The Student as University Resident*, 45 DENVER L.J. 582, 593 (1968).

238. *Soglin v. Kauffman*, 295 F. Supp. 978, 994 (W.D. Wis. 1968). See also *Stricklin v. Regents of the University of Wisconsin*, 297 F. Supp. 416 (W.D. Wis. 1969).

239. Linde, *supra* note 194, at 67-72.

informed of the nature of the evidence against him, he must be given an opportunity to be heard in his own defense, and he must not be punished except on the basis of substantial evidence. These requirements are so obvious, and so fundamental, that they require little elaboration.

No court since *Dixon* has denied that the student must be given prior notice of the grounds on which the charge is based.<sup>240</sup> Although only a few years ago 53 per cent of state universities surveyed did not give a written statement of the charge,<sup>241</sup> such a statement now appears in the cases that reach court and should be required.<sup>242</sup> Of course it need not be drawn with the precision of a criminal indictment, but should contain "a statement of the specific charges and grounds which, if proven, would justify" discipline.<sup>243</sup> A student cannot be punished on the basis of some ground other than that stated in the written charge.<sup>244</sup>

The Tennessee Supreme Court recognized 27 years ago that a student should be advised of the names of at least the principal witnesses against him and of the nature of their testimony,<sup>245</sup> and it is now a commonplace that this must be done "in some adequate manner."<sup>246</sup> Whether a student is entitled to confront the witnesses against him is a more difficult question. The requirement of *Dixon*, that the student must be given "the names of the witnesses against him and an oral or written report on the facts to which each witness testifies,"<sup>247</sup> seems the bare minimum that will suffice.

It cannot be doubted that the student has a right to be heard and to present evidence in his own defense.<sup>248</sup> In ascertaining the truth, it is

240. *Wasson v. Trowbridge*, 382 F.2d 807, 812 (2d Cir. 1967); *Dixon v. Alabama State Board of Education*, 294 F.2d 150, 158 (5th Cir. 1961); *Esteban v. Central Missouri State College*, 277 F.Supp. 649, 651 (W.D. Mo. 1967); *Schiff v. Hannah*, 282 F.Supp. 381, 383 (W.D. Mich. 1966); *Knight v. State Board of Education*, 200 F. Supp. 174, 180-81 (M.D. Tenn. 1961); *Woody v. Burns*, 188 So.2d 56, 58 (Fla. App. 1966); *State ex rel. Sherman v. Hyman*, 180 Tenn. 99, 109, 171 S.W.2d 822, 826 (1942); *General Order on Judicial Standards*, *supra* note 189, at 147.

241. *Van Alstyne*, *supra* note 232, at 369.

242. *E.g.*, *Esteban v. Central Missouri State College*, 277 F. Supp. 649, 651 (W.D. Mo. 1967).

243. *Dixon v. Alabama State Board of Education*, 294 F.2d 150, 158 (5th Cir. 1961).

244. *Hammond v. South Carolina State College*, 272 F. Supp. 947, 950 (D.S.C. 1967); *Woody v. Burns*, 188 So.2d 56, 57 (Fla. App. 1966).

245. *State ex rel. Sherman v. Hyman*, 180 Tenn. 99, 109, 171 S.W.2d 822, 826 (1942).

246. *Esteban v. Central Missouri State College*, 277 F. Supp. 649, 651 (W.D. Mo. 1967). *See also General Order on Judicial Standards*, *supra* note 189, at 147.

247. *Dixon v. Alabama State Board of Education*, 294 F.2d 150, 159 (5th Cir. 1961). *But cf. Wasson v. Trowbridge*, 382 F.2d 807, 813 (2d Cir. 1967).

248. *See* cases cited in note 240 *supra*.

essential "to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done."<sup>249</sup> One case held that it was not enough that the dean of men gave students a hearing since he was only one of a number of persons on the board that recommended their suspension. The court ordered a new hearing to be conducted before the president of the college.<sup>250</sup> It would ordinarily be inconvenient, and frequently quite impossible, to require that an evidentiary hearing be held before the official or group with the ultimate legal authority to administer discipline. Commonly in our universities that authority is in the president or the board of regents, and these are busy people with other things to do. But if, as is usually true, the disciplinary power is delegated in the first instance to a committee or administrator, with a right of appeal, the results and findings of the hearing should be presented to the higher authorities in a report open to the student's inspection.<sup>251</sup> The right of the student to be heard in his own defense may be lost if the student fails to attend at the appointed time or if he has made it impossible despite diligent effort to give him notice of the hearing.<sup>252</sup>

The cases say that no discipline may be imposed except on the basis of "substantial evidence,"<sup>253</sup> and in one recent case a suspension was set aside because this test had not been met. Students at Lincoln University were unhappy about the food in the cafeteria. The dean of students was aware of this and issued a notice saying that he hoped there would be no demonstration over the issue, but that if there was one, he hoped it would be orderly, and that university property would be respected. What seems to have been planned as a peaceful demonstration soon got out of hand and \$1500 damage was done. The committee that administered discipline apparently proceeded on the assumption that if a student had helped plan any kind of demonstration, he could be disciplined. The court ordered that two suspended students be readmitted, since there was no substantial

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249. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 171 (1951) (concurring opinion).

250. *Esteban v. Central Missouri State College*, 277 F. Supp. 649, 651 (W.D. Mo. 1967).

251. *Dixon v. Alabama State Board of Education*, 294 F.2d 150, 159 (5th Cir. 1961).

252. *Wright v. Texas Southern University*, 392 F.2d 728 (5th Cir. 1968); *Barker v. Hardway*, 283 F. Supp. 228, 233 (S.D. W.Va. 1968), *affirmed*, 399 F.2d 638 (4th Cir. 1968). See also *CRISIS AT COLUMBIA*, *supra* note 193, at 216-222.

253. *Jones v. State Board of Education*, 279 F. Supp. 190, 200 (M.D. Tenn. 1968); *General Order on Judicial Standards*, *supra* note 193, at 147.

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.<sup>254</sup>

Do these four minimal requirements, now so well established in the case law, mean that a university may never take immediate action against those who violate its rules? Is a state university constitutionally barred from adopting the policy of a distinguished private institution that anyone who substitutes force for rational persuasion and who refuses to desist will be suspended after 15 minutes and expelled after another five minutes? My judgment is that this particular procedure, if I understand its full implications, is not available to a state university, but that such a university is not thereby barred from what Judge Friendly has called "prompt and decisive action."<sup>255</sup>

The problem is a difficult one. There is, on the one hand, no "constitutional bar to a prompt and severe disciplinary response to violence and rioting and other constitutionally unprotected conduct."<sup>256</sup> At the same time, if the campus is still in an uproar conditions for holding disciplinary hearings are likely to be far from ideal.<sup>257</sup> Thus I think there must be power in a university, when circumstances compel it, to suspend students summarily pending a later hearing at which they will be given all of the ordinary procedural protections.

Admittedly to act first and hear later is a "drastic procedure" and imposes on administrators "a heavy responsibility to be exercised with disinterestedness and restraint."<sup>258</sup> I draw an analogy to the power of courts to impose summary punishment for contempt, a power to be used only in "those unusual situations . . . where instant action is necessary to protect the . . . institution itself."<sup>259</sup> The *Joint Statement* of a number of professional groups allows interim suspension if necessary for the student's "physical or emotional safety and well-being, or for reasons relating to the safety and well-being of students, faculty, or university property."<sup>260</sup> The cases in point to date

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254. *Scoggin v. Lincoln University*, 291 F. Supp. 161 (W.D. Mo. 1968). See also *Wong v. Hayakawa*, No. 50983 (N.D. Cal., April 24, 1969); *Zanders v. Louisiana State Board of Education*, 281 F. Supp. 747, 769 (W.D. La. 1968).

255. *Powe v. Miles*, 407 F.2d 73, 78 (2d Cir. 1968).

256. *Soglin v. Kauffman*, 295 F. Supp. 978, 989 (W.D. Wis. 1968).

257. *Scoggin v. Lincoln University*, 291 F. Supp. 161, 172 (W.D. Mo. 1968).

258. *Fahey v. Mallonee*, 332 U.S. 245, 253-254 (1947).

259. *Harris v. United States*, 382 U.S. 162, 167 (1965).

260. 53 AAUP BULL. 365, 368 (1967).

are not numerous, and do not fully articulate the considerations involved, but I think there can be discerned in them a test essentially that of the *Joint Statement*. Indeed one court has accepted in terms the formulation of the *Joint Statement* as the measure of what the fourteenth amendment permits,<sup>261</sup> and other cases permit interim suspension in circumstances consistent with the *Joint Statement*.<sup>262</sup> Interim suspension presupposes a prompt hearing.<sup>263</sup> And it has recently been held that a student on request must be given a preliminary hearing to determine the propriety of his interim suspension.<sup>264</sup>

We turn now to safeguards beyond the bare minimum that students have contended they are entitled to as a part of due process. So far as I can gather, most major universities today permit a student to be assisted by a lawyer at a disciplinary proceeding if he chooses to be. Professor Arthur Sherry has said that "his right to counsel, should the matter appear to him to be of sufficient gravity to make legal assistance desirable, should receive ungrudging recognition."<sup>265</sup> It may be, however, that those universities that allow representation by counsel do so as a matter of grace rather than compulsion. Although there are a few decisions in which a right to counsel has been recognized,<sup>266</sup> most decisions are to the contrary.<sup>267</sup> If "fairness, impartiality and orderliness—in short, the essentials of due process"<sup>268</sup> require, as has recently been held, both the right to counsel and, where it is needed, to appointed counsel in proceedings for determination of juvenile delinquency,<sup>269</sup> I do not see why they do not require recognition of similar rights in major disciplinary proceedings. It is worth noting that a leading case holding that counsel need not be allowed qualifies this by saying that this is true so long as "the

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261. *Stricklin v. Regents*, 297 F. Supp. 416, 420 (W.D. Wis. 1969).

262. *Marzette v. McPhee*, 294 F. Supp. 562, 568-570 (W.D. Wis. 1968); *Scoggin v. Lincoln University*, 291 F. Supp. 161, 172 (W.D. Mo. 1968).

263. *Marzette v. McPhee*, 294 F. Supp. 562, 569 (W.D. Wis. 1968); *Knight v. State Board of Education*, 200 F. Supp. 174, 178 (M.D. Tenn. 1961).

264. *Stricklin v. Regents*, 297 F. Supp. 416 (W.D. Wis. 1969).

265. Sherry, *supra* note 192, at 37.

266. *Esteban v. Central Missouri State College*, 277 F. Supp. 649 (W.D. Mo. 1967). *Goldwyn v. Allen*, 54 Misc.2d 94, 281 N.Y.S.2d 899 (1967).

267. *Wasson v. Trowbridge*, 382 F.2d 807, 812 (2d Cir. 1967); *Barker v. Hardway*, 283 F. Supp. 228, 237 (S.D. W.Va. 1968); *Due v. Florida A and M University*, 233 F. Supp. 396, 403 (N.D. Fla. 1963); *General Order on Judicial Standards*, *supra* note 189, at 147. *Cf. Madera v. Board of Education of City of New York*, 386 F.2d 778 (2d Cir. 1967).

268. *Application of Gault*, 387 U.S. 1, 26 (1967).

269. *Id.* at 34-42.

government does not proceed through counsel.’<sup>270</sup> Another court has said that it is desirable that a disciplinary tribunal ‘have assistance of legal counsel to guide it in regard to the not uncomplicated problems which arise in cases where speech is mixed with conduct.’<sup>271</sup> If universities follow that wise advice, and provide their own lawyer to assist a tribunal, in those cases at least the student can hardly be denied the right to his own counsel, even if, as I doubt, there is no right to counsel generally in disciplinary proceedings.

In a number of cases students have been allowed to confront the witnesses against them, and to cross-examine these witnesses,<sup>272</sup> but this is ordinarily not a matter of right. In *Dixon* itself Judge Rives wrote:

This is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required. Such a hearing, with the attending publicity and disturbance of college activities, might be detrimental to the college’s educational atmosphere and impractical to carry out.<sup>273</sup>

The reason given is not wholly persuasive. The fear of publicity and disturbance of college activities seems to presuppose an open hearing, and that, as will be seen, is in itself a controversial issue. But other courts have agreed that confrontation need not be permitted as a matter of right.<sup>274</sup> Professor Clark Byse has taken a more discriminating view, which I find convincing. This is that there is no right routinely to confrontation, but that confrontation and cross-examination may be required where they are ‘the conditions of enlightened action.’<sup>275</sup> Thus in many cases and with regard to many witnesses the tribunal is free to accept affidavits and to refuse confrontation. But if the case resolves itself into a problem of credibility, and the tribunal must choose to believe either the accused or his accuser, cross-examination is the condition of enlightened action and is therefore required in the interest of fairness and reasonableness.

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270. *Wasson v. Trowbridge*, 382 F.2d 807, 812 (2d Cir. 1967).

271. *Scoggin v. Lincoln University*, 291 F. Supp. 161, 173 (W.D. Mo. 1968).

272. *E.g.*, *Jones v. State Board of Education*, 279 F. Supp. 190, 194 (M.D. Tenn. 1968); *Esteban v. Central Missouri State College*, 277 F. Supp. 649, 651 (W.D. Mo. 1967).

273. 294 F.2d at 159.

274. *Wong v. Hayakawa*, No. 50983 (N.D. Cal., April 24, 1969); *State ex rel. Sherman v. Hyman*, 180 Tenn. 99, 171 S.W.2d 822, 826 (1942); *General Order on Judicial Standards*, *supra* note 189, at 147. See *Legislation, College Disciplinary Proceedings*, 18 VAND. L. REV. 819, 828-830 (1965). But see *Johnson, The Constitutional Rights of College Students*, 42 TEXAS L. REV. 344, 352-353 (1964).

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

There are scattered and inconclusive decisions holding that the privilege against self-incrimination is<sup>276</sup> or is not<sup>277</sup> available in disciplinary proceedings. General statements on this are singularly unhelpful because they fail to take into account an important distinction. Some violations of university rules, such as taking over a campus building, are also violations of criminal statutes. Other violations of rules, such as cheating, are not. To compel a student to testify against himself on a charge of the former kind would be to use the power of the state to extract from him evidence that could be used against him in a subsequent trial of the criminal charge. Since there is no other state proceeding in which persons can be compelled to confess their guilt of a crime,<sup>278</sup> there is no reason to think that the university disciplinary proceeding can be an exception. The privilege must be recognized in these circumstances.<sup>279</sup> But the cheating violation is quite different. The disciplinary proceeding is not itself a "criminal case" within the meaning of the fifth amendment, and since cheating is not a crime, there is no other "criminal case" in which the student's testimony can be used against him. Thus the university may compel the student's testimony in the cheating case<sup>280</sup> if it thinks it is worth the effort to do so. Since in fact an inference will be drawn against the student if he chooses not to testify,<sup>281</sup> no matter what protestations are made to the contrary,<sup>282</sup> to allow the privilege generally as a prudential matter has little practical effect and makes it unnecessary for the tribunal to decide whether particular testimony might be a link in a chain tending to prove a crime, and thus be within the constitutional protection. It hardly needs adding that there is no tenable theory on which the Miranda warnings can be required to be given by a college administrator to a student not in custody.<sup>283</sup>

When a student's conduct leads both to a criminal charge and to disciplinary proceedings within the university—and it was argued

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276. *State ex rel. Sherman v. Hyman*, 180 Tenn. 99, 109, 171 S.W.2d 822, 826 (1942); *Goldwyn v. Allen*, 54 Misc. 2d 94, 99, 281 N.Y.S.2d 899, 906 (1967).

277. *Goldberg v. Regents of the University of California*, 248 Cal. App. 2d 867, 883, 57 Cal. Rptr. 463, 475 (1967); *General Order on Judicial Standards*, *supra* note 189, at 147.

278. *Garrity v. New Jersey*, 385 U.S. 493 (1967); *Uniformed Sanitation Men Ass'n, Inc. v. Commissioner of Sanitation*, 392 U.S. 280 (1968).

279. *Grossner v. Trustees of Columbia University*, 287 F. Supp. 535, 550 (S.D.N.Y. 1968). *See also Furutani v. Ewigleben*, 297 F. Supp. 1163 (N.D. Cal. 1969).

280. *Johnson*, *supra* note 274, at 357.

281. *Heyman, Some Thoughts on University Disciplinary Proceedings*, 54 CALIF. L. REV. 73, 82-85 (1966).

282. *See Wasson v. Trowbridge*, 285 F. Supp. 936, 942 (E.D.N.Y. 1968).

283. *Buttny v. Smiley*, 281 F. Supp. 280, 287 (D. Colo. 1968).

earlier in this section that it may properly do so only if some genuine university interest has been harmed by the criminal act—claims of “double jeopardy” are not uncommon, but are utterly without merit.<sup>284</sup> Nor can the university be required to postpone its disciplinary proceeding until the criminal charge is disposed of.<sup>285</sup> The only circumstance in which a double jeopardy argument might have merit on the campus scene would be if a disciplinary tribunal has absolved a student on a charge and the university, finding new and stronger evidence, should bring the same charge again. This would raise very serious questions of fairness and reasonableness, but fortunately the problem seems never to have arisen.

A number of commentators have thought that the rules about search and seizure limit university discipline, even with regard to a dormitory room.<sup>286</sup> The decision to the contrary by Judge Johnson in *Moore v. Student Affairs Committee of Troy State University*,<sup>287</sup> has been criticized as relegating students to “second-class citizenship.”<sup>288</sup> I have taken a different view, and have written elsewhere of *Moore* that “the result, if unappealing, is sound.”<sup>289</sup>

*Moore* was suspended from Troy State, after a proper hearing, for having marijuana in his room. The dean of men had been called to the office of the chief of police and given a list of names of students whose rooms narcotics agents, on the basis of information from unnamed but reliable informers, wished to search. Some of the suspected students were packing to leave the campus for vacation, and it was decided to search the rooms immediately. The agents, accompanied by the dean, searched *Moore*’s room, without a warrant. *Moore* was present but did not consent to the search. I note first that the *Moore* decision, holding that the marijuana found in the room was properly admitted at the disciplinary hearing, does not allow random fishing expeditions into student’s rooms and belongings. Although Judge Johnson did not require that the “probable cause”

284. McKay, *supra* note 215, at 564; *General Order on Judicial Standards*, *supra* note 189, at 147-148.

285. *Furutani v. Ewingleben*, 297 F. Supp. 1163 (N.D. Cal. 1969); *Grossner v. Trustees of Columbia University*, 287 F. Supp. 535, 550 (S.D.N.Y. 1968), *Goldberg v. Regents of the University of California*, 248 Cal. App. 2d 867, 885, 57 Cal. Rptr. 463, 476 (1967).

REV. 223, 231-233 (1969); 54 IOWA L. REV. 618 (1969).

286. Van Alstyne, *supra* note 237, at 588-589; Johnson, *supra* note 274, at 353-356.

287. 284 F. Supp. 725 (M.D. Ala. 1968).

288. Note, *Reasonable Rules Reasonably Enforced*, *supra* note 215, at 324-325; 3 GA. L. REV. 223, 231-233 (1969).

289. 3 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 36 (1969).

test of the fourth amendment be met, he did say that a search is proper only if there is "a reasonable belief on the part of the college authorities that a student is using a dormitory room for a purpose which is illegal or which would otherwise seriously interfere with campus discipline."<sup>290</sup> Second, the college involved in *Moore* had a rule clearly reserving the right to enter rooms for inspection purposes and to search student belongings. Thus the student could not have regarded his room as a place "in which there was a reasonable expectation of freedom from governmental intrusion,"<sup>291</sup> and this, soundly in my judgment, has been regarded by the Supreme Court in recent cases as the measure of fourth amendment protection.

You will recall that I described the result in *Moore* as "unappealing" even though I thought it sound. This is an appropriate place to say again that the Constitution provides minimal protections and that prudential judgment may suggest that a university go far beyond what the Constitution requires. The committee drafting rules for The University of Texas had concluded, on an analysis similar to that I have made here, that the university did have a power of search. For several days the committee struggled for appropriate language with which to codify this power. Then a member of the committee happened to ask the dean of students under what circumstances the university had exercised this power. The dean replied that so far as he knew it never had. Since the university had not felt the need to resort to searches in the past, we saw no reason to allow it to search in the future, and a rule was adopted that denies it any such power.<sup>292</sup>

The issue of an open hearing is an interesting one. One of the grievances at Columbia in the spring of 1968 was the refusal to have open hearings in disciplinary proceedings, and the Cox Commission was critical of the institution for refusing "a public hearing altogether for an offense alleged to have been committed in public, where no one's privacy or reputation can be affected."<sup>293</sup> At the University of Oregon, on the other hand, the rulemakers specifically rejected student suggestions that hearings should be closed unless the accused student requested otherwise, and provided that proceedings are always open unless otherwise ordered.<sup>294</sup> It seems quite clear that fairness and

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290. 284 F.Supp. at 730.

291. *Mancusi v. DeForte*, 392 U.S. 364, 368 (1968).

292. THE UNIVERSITY OF TEXAS AT AUSTIN, INSTITUTIONAL REGULATIONS ON STUDENT SERVICES AND CONDUCT § 11-301(f) (1968).

293. CRISIS AT COLUMBIA, *supra* note 193, at 97.

294. Linde, *supra* note 194, at 57.

reasonableness do not require that a disciplinary proceeding be open, and the cases so hold.<sup>295</sup> Indeed one of the cases not only rejects a constitutional right to an open hearing, but says that it is "more fitting" to have a private hearing.<sup>296</sup> Another judge suggested that it may be desirable to allow the press to be present.<sup>297</sup> It might also be wise to allow the accused student to have a few relatives or friends, or to permit responsible faculty members and student leaders to be present to guard against any later claim that the student was not fairly treated.<sup>298</sup> A truly open hearing does have the danger that concerned Judge Rives in the *Dixon* case, that it may lead to "publicity and disturbance of college activities" and thus "be detrimental to the college's educational atmosphere."<sup>299</sup> It is hard to imagine many students accused of cheating or breaking parietal rules who would wish an open hearing. The demand for this kind of hearing is likely to come from those who want the hearing to "supply a forum for the politicalization of cases."<sup>300</sup> Nothing in the Constitution of the United States requires a university to allow its disciplinary procedures to be utilized for such a purpose.

No one doubts that a student charged with misconduct has a right to an impartial tribunal.<sup>301</sup> There is doubt as to what this means. It would be wholly impractical in many educational institutions to provide that no one who has prior knowledge of or contact with the case may sit on the tribunal. We do not ask this much even of jurors in a criminal case and thus it is not demanded of a university.<sup>302</sup> There is weighty authority for the proposition that members of the tribunal may also be witnesses against the accused student, since the "limited combination by a school administrative body of prosecutorial and adjudicatory functions is not fundamentally unfair in the absence of a

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295. *Moore v. Student Affairs Committee of Troy State University*, 284 F. Supp. 725, 731 (M.D. Ala. 1968); *Zanders v. Louisiana State Board of Education*, 281 F. Supp. 747, 768 (W.D. La. 1968); *General Order on Judicial Standards*, *supra* note 189, at 147.

296. *Zanders v. Louisiana State Board of Education*, 281 F. Supp. 747, 768 (W.D. La. 1968).

297. *Moore v. Student Affairs Committee of Troy State University*, 284 F. Supp. 725, 731 (M.D. Ala. 1968).

298. THE UNIVERSITY OF TEXAS AT AUSTIN, INSTITUTIONAL REGULATIONS ON STUDENT SERVICES AND CONDUCT § 11-406(a) (1968).

299. 294 F.2d at 159.

300. Hall, *Movement Legal Services Aids Unpopular Defendants*, TEXAS LAW FORUM, March 6, 1969, p.3, col.2.

301. *Wasson v. Trowbridge*, 382 F.2d 807, 813 (2d Cir. 1967); *Esteban v. Central Missouri State College*, 277 F. Supp. 649, 651 (W.D. Mo. 1967).

302. *Wasson v. Trowbridge*, 382 F.2d 807 (2d Cir. 1967).

showing of other circumstances, such as malice or personal interest in the outcome of a case.’<sup>303</sup> I agree that this procedure may not be fundamentally unfair, but I wonder if it does not fall by the other test of reasonableness? When other alternatives are so easy, it seems quite unreasonable for the judge also to be a witness, a role “manifestly inconsistent with the attitude of impartiality which he is sworn to maintain.”<sup>304</sup> At Oshkosh State University, for example, the president ordinarily considers appeals and makes recommendations to the regents. But when the president was personally involved, since the charges grew out of an incident in which students broke into his office, threatened him, and held him prisoner, the regents excused the president from participation and engaged a respected former justice of the state supreme court to conduct the hearings and make recommendations.<sup>305</sup> I do not doubt that the president of that institution could and would have put his personal feelings aside and acted without malice or personal interest, but it was far more reasonable to excuse him and to provide a procedure that not only ensures that justice is done but also that it will seem to have been done.

Professor Van Alstyne has suggested the possibility of an equal protection issue if punishment indiscriminately threatened by a rule properly forbidding certain conduct is unduly harsh and not essential to the university’s interest.<sup>306</sup> This view has attracted no judicial following. The usual rule, and, I think, the constitutionally proper rule, is that if the student has been found guilty of violation of a valid rule after a hearing that meets the tests of fairness and reasonableness, the punishment given him is a matter that should be left to the discretion of the university.<sup>307</sup> Nor is there any requirement that all those guilty of similar violations must be treated alike. Leaders of a disruptive movement may be dealt with more severely than their followers,<sup>308</sup> and freshmen may be dealt with more gently than graduate students.<sup>309</sup>

I have now examined the most prominent issues of procedural due process that have come to the surface in the wake of *Dixon*.

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303. *Jones v. State Board of Education*, 279 F. Supp. 190, 200 (M.D. Tenn. 1968).

304. MCCORMICK, EVIDENCE 147 (1954).

305. *Marzette v. McPhee*, 294 F. Supp. 562, 566 (W.D. Wis. 1968).

306. Van Alstyne, *supra* note 223, at 32.

307. *Corvette v. Aldridge*, 408 S.W. 2d 935 (Tex. Civ. App. (1966).

308. *Zanders v. Louisiana State Board of Education*, 281 F. Supp. 747, 766 (W.D. La. 1968).

309. *Buttney v. Smiley*, 281 F. Supp. 280, 287 (D. Colo. 1968).

Doubtless the future will uncover more. Is there any right to discovery in disciplinary proceedings? Do students charged with participation in a common violation have a right to be tried jointly? Or a right to be tried separately? Can administrative officials increase the penalty assessed by the tribunal? These, and many others, can be imagined. I am hopeful that the analysis I have suggested here will provide a method of approach to new questions. I have no doubt that the courts will reach right results if they do not allow themselves to be distracted by analogies from criminal law or administrative law or elsewhere and keep their gaze fastened on the twin requirements of fairness and reasonableness as these apply in that unique institution, the academic community.

#### IV. CAN THE CAMPUS AFFORD THE CONSTITUTION?

The three preceding sections have been descriptive in nature, an examination of the process by which the Constitution came to the campus and the meaning it has in this new setting. I cannot conclude without a brief evaluation of this development, an attempt to weigh the benefits of the new dispensation against its costs, for costs it surely has.

In 1967 President James A. Perkins of Cornell University, addressing the New England Association of Colleges and Secondary Schools, took as his topic "The University and Due Process."<sup>310</sup> President Perkins voiced a generally gloomy view of the notion that "judicial processes can be substituted for academic processes,"<sup>311</sup> and expressed fear that the result might be "interference with the capacity of the university to function as a self-contained community."<sup>312</sup> Professor Clark Byse, of the Harvard Law School, in his presidential address to the American Association of University Professors, undertook a detailed answer to President Perkins.<sup>313</sup>

I do not propose to retrace the ground covered by President Perkins and Professor Byse, and refer to their exchange of views only as indicating that it is not a self-evident proposition that the developments of the last eight years have been desirable ones.

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310. Perkins, *The University and Due Process*, 62 AMER. LIBRARY ASSN. BULL. 977 (1968).

311. *Id.*

312. *Id.* at 979.

313. Byse, *The University and Due Process: A Somewhat Different View*, 54 AAUP BULL. 143 (1968).

Professor Hans Linde has observed that "the legalism of student rights in the public-service model of the state university has its costs. It accelerates, just as it reflects, the erosion of traditional and valued forms of the academic community. . . . But legalism is an inevitable price of mass operation."<sup>314</sup>

One obvious cost is in the time and money required to administer a discipline system that meets constitutional standards. If the full panoply of due process were to be invoked on behalf of every student charged with drinking beer on the intramural field, the institution itself would be brought to a halt. Students, faculty, and administrators would all be so busy at disciplinary hearings that we should have to suspend classes and abandon research. President Perkins is surely right when he tells us that "there are human rights involved in the time and cost of adjudication."<sup>315</sup> Fortunately such a situation is an imaginary horrible. The distinction suggested in section III between major offenses and minor offenses provides much of the answer. At even the largest institution, the cases of alleged misconduct in which an administrator would think that suspension or expulsion was a conceivable penalty must be very few indeed. Even in those few cases most students are going to be content with administrative disposition of the charge. There are statistics indicating that fewer than 10% of students charged with misconduct deny the facts or take exception to the discipline administratively imposed.<sup>316</sup> At my own institution, The University of Texas, where more than 30,000 students are enrolled, there were 544 cases from September 1968 through March 1969 in which the dean of students, as a result of preliminary investigation, brought disciplinary charges. Of these 531 were "minor offenses," even under the very restrictive definition of this category that we have at Texas, and only thirteen were "major offenses," in which the dean considered that some withdrawal of privileges might conceivably be justified. In eight of the thirteen cases of major offenses, the student waived hearing and consented to administrative disposition of the case. Thus there were only five cases out of 544, or fewer than one per cent, in which a hearing before a disciplinary tribunal was held.

The procedures constitutionally required are likely to be demanded in only two kinds of cases: charges of cheating or similar

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314. Linde, *Campus Law: Berkeley Viewed From Eugene*, 54 CALIF. L. REV. 40, 65 (1966).

315. Perkins, *supra* note 310, at 981.

316. Van Alstyne, *Procedural Due Process and State University Students*, 10 UCLA L. REV. 368, 371 (1963).

serious misconduct in which the facts are disputed, and charges arising out of demonstrations or other activity of a political nature. It will cost time and money to do what due process demands in these classes of cases, but it will be time and money well spent. In the first kind of case the university ought gladly incur any cost to be sure that it is not committing a serious injustice, likely to damage the student for life, by finding him guilty of an offense he did not in fact commit. In the second kind of case the time and money are well spent in providing assurance both to the persons charged and to the remainder of the academic community that sanctions have been imposed fairly and responsibly.

A different kind of cost comes from loss of support for the university. One would have to be wholly blind to what is happening in America today not to know that the taxpayers, and their representatives in the legislatures, are outraged by events on campus and think that universities have been far too permissive. It is politically popular to refuse to allow Mark Rudd to speak on campus or to deny recognition to the SDS or to expel on the spot militant demonstrators. And yet here is the Constitution, which says that none of these things can be done. Thus the university is barred from doing what those who provide its financial support insist that it must do. The loss of legislative support for the state university is a very frightening prospect—and a very real one. I have no doubt that many public institutions are going to have to tighten their belts for the next few years and operate on budgets that will not provide for their needs or permit them to exploit their opportunities. It is a very grim prospect. But there is no law of nature that says that faculty members must have salary increases every year and though it would be nice to have a third-generation computer immediately, we can make do for a time with what we have.

This kind of crisis in relations between the university and the legislature is not unprecedented. Much of the same kind of tension developed during the days of McCarthyism in the early 50's. Most universities behaved quite courageously in the face of great public pressure and refused to sacrifice academic freedom for the sake of the next appropriation bill. Those universities paid a price for their courage, but they managed to survive. Passions cool off, and reasonable legislators come to see that when they short-change the university because of some development on campus they do not like, the ultimate harm is to the young men and women of the state, and to the state itself. I would hope that great universities would insist on the

principles of freedom of speech and fairness in procedure on their campuses whatever the cost in financial support. The fact that the Constitution is now directly applicable to them, and that the courts are not going to permit them any choice in the matter, merely insures that what ought to be done will be done.

There are those who think that the student was better off when he had no procedural protections, and the dean was "a friend to the student"<sup>317</sup> rather than his prosecutor.

The administrators of student affairs, who have the immediate responsibility for the operation of formal and informal controls on student conduct do not readily separate their functions of advice, guidance, and assistance, on the one hand and formal discipline, or punishment on the other. They tend to see formal punishment, where imposed, as only a continuation of the guidance and counseling function, as Clausewitz saw war as a continuation of diplomacy. . . . To persons with this orientation toward the control of student conduct, the formalities of due process are not only irrelevant, they are destructive of the mutuality on which counseling rests.<sup>318</sup>

I do not want to seem to disparage this view. In the course of drafting rules on student services and conduct for my university, I had constant and close contact with those persons at Texas who work in the area of student life. I was impressed by the dedication, sensitivity, and compassion that every one of them brought to his work. There is every reason to suppose that this is true around the country, and that these administrators do "exercise their authority benignly."<sup>319</sup> For these reasons I agree with the Cox Commission that "the older paternalistic procedures probably gave much greater protection to most student offenders,"<sup>320</sup> and that "in most cases, the student offender may fare much better under quasi-parental forms of correction than under a quasi-judicial procedure."<sup>321</sup>

But mark well, the Cox Commission speaks of "most student offenders" and "most cases." A quiet interview with a kindly dean is doubtless much better than a formal adversary proceeding for the freshman girl, unversed in the niceties of attribution of sources, who is technically guilty of plagiarism on a term paper. It seems to me

317. Johnson, *The Constitutional Rights of College Students*, 42 TEXAS L. REV. 344, 352 (1964).

318. Monypenny, *University Purpose, Discipline and Due Process*, 43 N.D.L. REV. 739, 748 (1967).

319. Heyman, *Some Thoughts on University Disciplinary Proceedings*, 54 CALIF. L. REV. 73, 74 (1966).

320. CRISIS AT COLUMBIA: REPORT OF THE FACT-FINDING COMMISSION APPOINTED TO INVESTIGATE THE DISTURBANCES AT COLUMBIA UNIVERSITY IN APRIL AND MAY, 1968 at 192 (1968).

321. *Id.* at 97.

unlikely that counseling and understanding will be productive with the student who has publicly threatened to "eliminate" the president and "tear this joint down."<sup>322</sup> The older paternalistic procedures are ill-adapted to deal with those whose complaint is that the university is too paternalistic.

Even on the simpler and traditional kinds of misconduct, the quasi-paternal procedures were best only in "most cases." Well-meaning and devoted administrators did make mistakes. President Perkins tells us that "arbitrariness is not unknown in the most elite intellectual circles. Administrators are not uniformly capable of distinguishing between what they consider desirable and what is acceptable to a consensus of the community. Operating under pressure, as administrators do much of the time, they can be insensitive to the most rudimentary forms of justice and fair play."<sup>323</sup> It is because I agree with the Cox Commission that the older procedures were better for the students in "most cases," and because I think also that there was some cases for which they were ill-adapted or in which they did not work properly, that I have proposed in section III that the student should have a choice, and in serious cases should be able to have his case disposed of administratively, rather than by a full hearing, if he prefers to do so.

It is my judgment, on balance, that the application of constitutional principles to universities has its costs, but these are tolerable costs if they are viewed without exaggeration. The costs are considerably outweighed by the benefits. Constitution or no, it is hardly thinkable that we could deny to today's generation of students freedom of expression or procedural fairness. The dramatic reversal of doctrine that I described in section I shows "that the courts . . . are ready to vindicate claims for justice rooted in constitutional principle"<sup>324</sup> and blunts the argument of those who defend the use of coercive power on the ground that it is often the only effective means of bringing about institutional change.<sup>325</sup>

It is a pleasant exercise in nostalgia to reminisce about how simple life was in the good old days, but we exist in the present. The distinguished president of the American Council on Education, Dr. Logan Wilson, has said:

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322. See *Jones v. State Board of Education*, 279 F. Supp. 190, 201 (M.D. Tenn. 1968), *affirmed*, 407 F.2d 834 (6th Cir. 1969).

323. Perkins, *supra* note 310, at 980.

324. Tigar, Book Review, 67 MICH. L. REV. 612, 613 (1969).

325. *Id.* at 616.

An Ivy League president noted some years ago that the fewer rules and regulations a college or university has for its students, the better. This observation may have been valid for most places then, and for some places now, but I suspect that many of our institutions must face up to the need for more formalization than they once required. This implies a codification of roles, with more specification of behavior norms, and set procedures for their enforcement.<sup>326</sup>

Some persons welcome this development, as I do. Others do not. But it is here, it is a fact of life, and our educational institutions had better accustom themselves to it.

It is far preferable that institutions accept the Constitution on their own initiative rather than wait until it is forced upon them by a court. Clark Byse is surely right in arguing that the values important to an academic community will be "realized more effectively and fully in an institution peopled by administrators, faculty, and students of honor and rectitude than in a lesser institution in which those values are grudgingly accepted because of a judicial decree."<sup>327</sup> Needed changes to meet constitutional criteria can, of course, be made by administrative or regential fiat, but to do so is to overlook the obvious opportunity that this task presents to deepen the sense that there is an academic community, of which students, faculty, administrators, and regents are all part, by permitting all of the elements in the community to participate in the process. I think that the courts have not entered this field willingly or cheerfully. They have been forced to do so, and to draft rules on an ad hoc, case by case, basis, because many universities have failed to put their own houses in order and have left the matter by default to the courts.<sup>328</sup>

A court decision that a university rule or procedure is unconstitutional is an unhappy event, which can only deepen distrust within the academic community. Voluntary acceptance of wise rules, going in many instances beyond the minimal requirements of the Constitution, is a constructive act, "calculated to ensure the confidence of all concerned with student discipline."<sup>329</sup>

These are unhappy times for those persons who are charged with the governance of great universities.<sup>330</sup> They are required to make

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326. Wilson, *Campus Freedom and Order*, 45 DENVER L.J. 502, 507 (1968).

327. Byse, *supra* note 313, at 144.

328. *Zanders v. Louisiana State Board of Education*, 281 F. Supp. 747, 760 (W.D. La. 1968).

329. *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, 148 (W.D. Mo. 1968).

330. *See Presidents Cite Strains of Job As Many Quit*, CHRONICLE OF HIGHER EDUCATION, April 21, 1969, p. 1, col.3.

agonizingly hard decisions on matters that may involve even the survival of the university as a free institution dedicated to a high purpose. In making these decisions, the administrator will not long preserve his sanity if he must constantly look over his right shoulder to see what the legislature will think, and then over his left shoulder to determine how the militant students will react. The long-term interests of the university require that it do what is right, regardless of what immediate consequences may be feared. In forming that judgment, the administrator now has a valuable guide in the Constitution of the United States.