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Luis Kutner

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# HABEAS SCHOLASTICA: AN OMBUDSMAN FOR ACADEMIC DUE PROCESS—A PROPOSAL

LUIS KUTNER\*

*"As life is action and passion, it is required of a man that he should share the passion and action of his time, at the peril of being judged not to have lived."*

Justice Oliver Wendell Holmes

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The mood of the militant segment of world university students can best be described as angry, bewildered, anxiety-ridden, confused, apprehensive and vandalistic. With incredible naiveté concerning world affairs, they vent their frustration and social hostility on the internal affairs of the university. Ego-driven, they strive for momentary applause and lime-light in the word-cloak of deprecatory bombast. Their appeals are instantaneous, and just as rapidly their appeals are relegated to the limbo of clichés mired in intellectual buncombe.

In the main, the restraint of university officials has been remarkable, avoiding engagement in reciprocal demagoguery. However, the Establishment has been insulated in not anticipating the ever-mounting groundswell of student tension, particularly that of the negro and those in empathy. The social scientists have been caught flat-footed and quicksanded in their redundant platitudes of "continued education," "economic security," "the decay of religious faith," "domestic and political discrepancy," etc., *ad nauseum*.

Students, as young men and women who have yet to assume a position of power and authority, are in all ages free to act irresponsibly. They become frustrated because of their inability to make meaningful decisions and seek to find a release for their emotions. Insurrection and quasi-organized chaos are great catalysts for the liberation of the creative strivings of genes and chromosomes. Today this striving is commingled with heightened idealism seeking a vague goal, a yearning for anarchism.

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\* Member, Illinois Bar, Indiana Bar; University of Chicago; former visiting Associate Professor, Yale Law School; Chairman, World Habeas Corpus Committee, World Peace Through Law Center; former Consul, Ecuador; former Consul General, Guatemala; former Special Counsel to the Attorney General of Illinois; author of numerous law journal articles and several books, including *WORLD HABEAS CORPUS* and *I, THE LAWYER*.

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The experience of higher education has now become available to an ever-expanding segment of society. College attendance is now available to the masses, as approximately 6.5 million persons attend colleges in the United States and within a decade this number is expected to increase to 10 million.<sup>1</sup> A similar development has occurred in the other relatively affluent societies of the Western World. The university has, therefore, become a mass phenomenon, a product of the industrial revolution and the more recent cybernetics breakthrough. Men, in ever-increasing numbers, have come to have access to the gratification of their physical wants. The university has come to be a means for this gratification by the admission of people from all socio-economic classes. At the Sorbonne, this phenomenon has resulted in a student upheaval to change an educational structure which has historically been geared to the aristocracy.<sup>2</sup> But the phenomenon of the masses entering the universities leads, in this writer's opinion, to a lowering of standards with even the acquisition of a doctorate becoming a commonplace occurrence. The lowering of standards is perhaps dramatized by the infiltration of members of the underworld into the Sorbonne during the student occupation of that famed institution. The masses, being irrational, seek direction. The mass penetration of the university has resulted in its depersonalization as students are referred to as numbers.

The student unrest and the rise of the New Left are in part protests against this phenomenon. It is a revolt against the affluent materialism and idolatry of contemporary society. The students protest the machine. It should be stressed that this revolt reflects the strivings of only a small minority of the masses who have proliferated in the universities, for the vast majority are content to be directed and to conform. Only the sensitive souls revolt. But these sensitive minds seek to stimulate the masses in protest against the evils remaining in society, such as the fact that segments of society—negroes and other minority groups—have yet not joined the ranks of the relatively affluent and are not part of the Establishment. They further seek to dramatize the immorality of tolerating evil, *viz.*, segregation, violence in Viet Nam, the threat of thermonuclear annihilation.<sup>3</sup>

The protest of the New Left involves a crisis in Western society. The problem, perceived by Ortega in the 1930's, is the inability to cope with the complex problems created by contemporary technology.<sup>4</sup> The complex subtlety of modern problems has not penetrated within the grasp of most men. Contemporary leaders are beset with ignorance of historical

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1. *How Good Is the Megaversity*, NEWSWEEK, Feb. 26, 1968, at 78. See generally A. FORTAS, CONCERNING DISSENT AND CIVIL DISOBEDIENCE (1968). Justice Fortas has done an invaluable service for the entire world, and his cogent thoughts are indeed a mountaintop of legal reasoning.

2. Geraghty, *Ancient Sorbonne Faces Take-Over by Students, University of Paris*, Chicago Sun-Times, June 12, 1960.

3. See generally J. NEWFIELD, A PROPHETIC MINORITY (1966).

4. ORTEGA Y GASSET, REVOLT OF THE MASSES 51 (1952).

perspective and principles. Ortega perceived not only the Russian Revolution but also a repetition of the previous revolution, decrying the "monotonous repetition of revolution."<sup>5</sup> The question before mankind today is whether what is being experienced is indeed revolution or is in reality involution, the retrogression from previous positions of progress. The unrest may lead to a garrison state wherein individual liberties are suppressed and notions of due process are ignored or vitiated. Fear has been expressed that the student campus upheavals may lead to a situation curtailing academic freedom. The basic issue besetting contemporary society is the ability to resolve social conflicts within the context of the rule of law—to reaffirm faith in this rule as alone capable of reconciling the jarring interests of all and of blending into one harmonious union the discordant materials of which society is composed.

Feeling powerless to act, they resort to civil disobedience. The immediate target is the university. The revolt arises spontaneously, as at Berkeley.<sup>6</sup> There is no formal organization, not even the selection of leaders. The mass political action becomes a form of theater, characterized by the demonstration, but as a therapeutic device, aimed not for the receptivity of an audience but for its effect on the participants. The techniques of this action are nonviolent, though they occasionally degenerate into violence. The means for achieving justice is through civil disobedience, which has played a vital role in the growth and establishment of American civil liberties and in the quest for justice.

The problem, however, is to make the expression of this dissent non-violent. If it is to be disruptive, it cannot disregard the rights of others.<sup>7</sup> However, dissent must be encompassed within the rule of law. The legal and institutional processes must devise means for the constructive channeling of diverse outlooks into social adjustment. The student revolt must be permitted, within an institutional setting, to bring forth a new ordering. As William S. Paley, a life-time trustee of Columbia University, observed, "The acceptance of violence as an instrument of progress indicates that something is clearly and radically wrong with our universities . . ." and that universities are "open ended ventures; selective of the past, critical of the present, and oriented to the future," to be looked at afresh.<sup>8</sup>

The young adult, living in contemporary society, has grown up in an absurd situation. He has been instilled with the ideals of a tradition stemming from the Enlightenment and the American and French Revolutions which stressed the importance of the individual, freedom from authority imposed without one's consent, and the ability of man to eradicate social evil. But he grew up in a period which experienced Auschwitz, Eichmann, Hitler, and Hiroshima. He lives in a society where creativity

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5. *Id.* at 49.

6. ROSSMAN, *BREAKTHROUGH AT BERKELEY*.

7. See generally A. FORTAS, *supra* note 1.

8. W. Paley, Commencement of U. of Penn., May 20, 1968, as in Stretch, *The Ordeal of Academic Revolt*, *SATURDAY REVIEW*, June 15, 1968, at 62.

is thwarted by the alienation of the personality as induced by depersonalized automation. From his entrance in school he is pressured to compete as a means for demonstrating his ability. He enters a university which has become a depersonalized bureaucracy to which he must adapt within the context of a constant "rat race." Understandably, he develops an anxiety and seeks a means for releasing the tension between ideals and reality—between being a person and an individual. He seeks to implement the ideals which have been transmitted within him. The university becomes the symbolic vehicle for his frustration. It is the convenient university that is besieged for rage-frustration and ego catharsis.

From Turin to Tokyo, college student demonstrations have erupted to protest and resist academic and governmental authority at the social establishment.<sup>9</sup> Without apparent centralized direction, a spontaneous international movement of student protest has emerged which transcends political, cultural and ideological boundaries. Student unrest has been manifested in Soviet-dominated countries such as Czechoslovakia (where student pressure contributed to the overthrow of the old-line Stalinist regime) and Poland. Students have challenged the authoritarian domination in Spain, while in France a student revolt at the Sorbonne in opposition to archaic educational policies has been the catalyst for a general strike.<sup>10</sup> In the German Federal Republic and in West Berlin, student protests have likewise challenged educational policies and protested the proposed enactment by the Bundestag of legislation to empower the government to suspend constitutional guarantees during emergencies.<sup>11</sup>

The United States has likewise witnessed the eruption of a series of student revolts on college campuses throughout the nation. The first of the student revolts occurred at the University of California in Berkeley in 1964 with the Free Speech movement.<sup>12</sup> The university administration

9. NEWSWEEK, May 6, 1968, at 45; Comments of Joseph C. Harsh, CHRISTIAN SCIENCE MONITOR, May 31, 1968, at 1.

10. New York Times (late city edition), May 17, 1968, at 14, col. 1.

11. NEWSWEEK, *supra* note 9; New York Times, May 17, 1968, at 14, col. 1.

12. T. EMERSON & D. HABER, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES at 1065 (1957). [Hereinafter cited as EMERSON & HABER]; S. LIPSET & S. WOLIN (eds.), THE BERKELEY STUDENT REVOLT (1965); M. MILLER & S. GILMORE (eds.), REVOLUTION AT BERKELEY (1965); H. DRAPER, BERKELEY: THE NEW STUDENT REVOLT (1965).

In judicial review of university expulsions of students and teachers, courts have reversed the prevailing law that a college has the right to dismiss students at any time for any reason without revelation of the reason other than its being for the general good of the institution and that there was no requirement that formal charges be presented or a hearing be held prior to expulsion by school authorities. *Dixon v. Alabama State Board of Education*, 186 F. Supp. 945, 951-52 (M.D. Ala. 1960), *rev'd*, 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961). The intrusion of the expression of due process was inevitable since justice was outraged by the denial to students of the normal safeguards given to a pickpocket. Seavey, *Dismissal of Students: Due Process*, 70 HARV. L. REV. 1406-07 (1957). Since universities have become battlegrounds and blackpower has become the euphemism for black tyranny, articulate fanatics who vocalize thoughts without knowledge have created a gloomy caveat over the province of educational institutions. Due process, rather than being rigid and technical, is in fact a flexible and functional instrument of justice. Pursuant to the fourteenth amendment, procedural safeguards limited solely to governmental action and heretofore not

had banned what had previously been a standing practice of placing tables on the campus to recruit students to participate in civil rights demonstrations. In defiance of the ban, tables were manned to organize political and social action. Eight students were suspended, and four hundred students signed statements claiming to be guilty and asking to be disciplined. At a protest rally, a former student soliciting funds was arrested. Several thousand students surrounded the police car in which the arrested person had been placed and kept the car under siege for more than thirty

applied to private corporations has created a twilight zone that will be continually explored. Educational academies are faced with the redesigning of the environment so as to meet the individual needs and aspirations of their students. Faculty, students and administration constitute a community and should be capable of living by a code that is fair to all of its members and unique to its special requirements. Clark Byse, *University and Due Process: A Somewhat Different View*, 54 AAUP BULL. 143 (1968). Justice Frankfurter, concurring in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 162-63 (1951), declared that:

[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, "due process" cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, 'due process' is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process . . .

[T]he precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment.

As Justice Frankfurter's statement makes clear, the process which the Constitution requires is only that process which is "due" in light of the circumstances and interests of the parties involved. Rather than requiring colleges and universities to wrangle over technicalities, the demand of due process is only that there be fair play. Underscoring Justice Jackson's admonition, dissenting in *Shaugnessy v. United States ex rel. Mezei*, 345 U.S. 206, 224-25 (1953), that due process of law is not for the sole benefit of an accused, it is the best insurance against those blunders which leave lasting stains on a system of justice but which are bound to occur on *ex parte* consideration. Teachers do not relinquish their first amendment rights if they comment on matters of public interest in connection with the operation of public schools in which they work. *Pickering v. Board of Ed.*, 88 S. Ct. 1731 (1968). In *Pickering*, a dismissed teacher was ultimately successful in obtaining reinstatement. His letter to a local newspaper in connection with a proposed tax increase, although critical of the manner in which the Board of Education had handled past proposals to raise due revenue for schools, was not a false statement, knowingly or recklessly made, and therefore did not afford a basis for his dismissal. First amendment rights also apply to high school students. *Robinson v. Sacramento City Unified City School Dist.*, 245 Cal. App. 2d 278, 53 Cal. Rptr. 781 (3d Dist. 1966). Teachers' loyalty oaths have been held to be invalid for vagueness. *Whitehill v. Elkins*, 389 U.S. 54 (1967). The ideas in action permeating colleges and universities throughout the world have produced revolutionary gurus like Che Guevara, Herbert Marcuse, Jules Regis Debray, Frantz Fanon and Mao Tse-tung, and as a consequence the insulated autonomy of academia is no longer accepted. This points up that riots without reason and without compliance with peaceful assembly, do not deprive the university of its expulsion rights. Undisciplined protest, arson, looting, and violence are matters for internal discipline by the university. Amnesty as extorted by students cannot be tolerated, unless due process becomes a three-way road, for the students, the teachers and the university.

hours. Other students staged a sit-in in Sproul Hall, seeking to discuss the suspension of the eight students, and an attempt to liberalize the regulations was followed by imposition of further discipline on the leaders of the Free Speech movement. Subsequently, a mass sit-in by one thousand students was led in Sproul Hall, and the governor ordered the arrest of the demonstrators. Approximately 819 persons were arrested, including 590 students, 89 teaching and research assistants, and 135 wives and husbands of students and other nonstudents who were sympathizers. It took twelve hours to remove the demonstrators, and the protests continued. The University administration was severely criticized. Ultimately the regents promulgated a new code for student activities which provided that "students have the right of free expression and advocacy" and that "the time, place and manner of exercising speech and political activity shall be subject to regulations adopted by the chancellors of the respective campuses" which "shall require orderly conduct, noninterference with university functions or activities, and identification of sponsoring groups or individuals and shall provide for one or more open discussion areas" with only registered student organizations permitted to invite nonuniversity speakers after prior notification of the chancellor who may designate a chairman for the meeting. Individual students and registered organizations may take positions on any public issue. Printed materials may be distributed only by university personnel as directed by the chancellor. The regents further provided that a student "may not be disciplined for off-campus conduct unless such conduct affects his suitability as a student." Political action, as such, was not to be deemed to effect suitability.<sup>13</sup>

The student revolt at the University of California was the first instance of the use, on campus, of the tactic of nonviolent civil disobedience as introduced into the United States by the civil rights movement.<sup>14</sup> Many

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13. EMERSON & HABER, *supra* note 12. See generally Tigar, *Symposium, Student Rights and Campus Rules*, 54 CALIF. L. REV. 1 (1966). *Barker v. Hardway*, 283 F. Supp. 228, 235 (S.D. W. Va. 1968):

Power of president of state college to oversee, to formulate rules and regulations, and to rule is necessary element in order to provide and promote education. . . . [State college] officials have inherent general power to maintain order and to exclude those who are detrimental to student body and institution's well-being, so long as they exercise sound discretion and do not act arbitrarily or capriciously.

14. See generally *Free Speech Movement and the Negro Revolution*, NEWS AND LETTERS PAMPHLET (1965).

The most striking aspect of the contemporary student movement is that it is worldwide—a phenomenon of time rather than of place. In Asia, as in Europe and the Americas, students are voicing their dissent from the established order—often carrying their protests to violent extremes. The nature of their rebellion, however, is partly shaped by the differing social and educational traditions with which they are confronted and by the degree of affluence each area enjoys. In Italy the students challenged the archaic university system. In Germany, the consumer society and the absence of open political contests were the targets. In France, which occupies a middle position, the explosion was long delayed, and, for that reason, was more violent when it came. But each revolt came in response to the massive social and political changes that are reshaping the Western community. Today's students in Europe, Latin America, or Japan are no longer acting as the avant-garde of broadly based movements for modernization and social reform. Students are confronting the main problem of how to pass from cultural and social protest to effective political action. The student

of the participants in the revolt had been active in the civil rights movement in the South and in the San Francisco Bay area.<sup>15</sup> The use of the strike was adapted from the activities of organized labor. Subsequently, the Berkeley experience was to be emulated on other campuses.

The students have protested the tendency toward alienation and depersonalization of society. This has been reflected in the "multi-versity" where students are directed by an IBM machine and an impersonal bureaucracy.<sup>16</sup> To the members of the present student generation, the universities have become "factories to produce technicians rather than places to live student lives."<sup>17</sup> The tendency has been to measure education in units: the number of lectures attended, the numbers of pages read or devoted to papers, thus mirroring the quantification of society as a whole. At the same time, the student has become highly sensitive to moral issues. Gunnar Myrdahl had perceived the American dilemma of contradiction between stated generally accepted moral values and actual practice, such as the professed belief in equality as contrasted with prevailing racial inequality.<sup>18</sup> A similar dilemma exists in international relations in the stated values for respect of human life, national self-determination and human brotherhood as contrasted with the war in Viet Nam. Students, viewing society from the vantage point of youth, are most sensitive to these contradictions and have been the vanguard for setting society right.<sup>19</sup>

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revolt signals the birth of new conflicts, the first act in the drama of putting the new computerized industrial state on trial. While they continue to make appeals to the working class, it is not agitation among the workers that triggers the rebellions. The historic events that galvanize the students to action are no longer solely domestic. It is the issue of Viet Nam and the symbolism of Che Guevara that inspire their deepest loyalty. In the main, students remain rebels without alliances, notwithstanding the failure of institutions to recognize that college students represent a new kind of adolescence requiring a special kind of response. The moral dilemma of affluent America over the plight of the negro is, of course, the most decisive force in society. The guilt and grief with which white America mourned the death of Martin Luther King, Jr. is illustrative of the subterranean feeling present before his death. It is no accident that the student protest derived from the civil rights movement. When that movement ceased to welcome white students to the protest activities, this was used to sublimate the guilt of more than three hundred years of injustice. Militant and nonviolent students each can bring an institution of higher learning to a grinding halt. However, they are faced with two imperatives, (1) "what are the principal limits of the student protests," and (2) "which of the students' complaints are legitimate ones that necessitate changes in the processes of higher education and in the power structure of universities." Hence, Habeas Scholastica and the Rule of Law. [Author's comment.]

15. *Id.*

16. *Id.* at 38-40; C. KERR, *THE USES OF THE UNIVERSITY* (1963).

17. *Free Speech Movement and the Negro Revolution*, *supra* note 14, at 19. The University has also been described as the "Marketiversity." BILLINGTON, *THE HUMANITIES HEART-BEAT HAS FAILED LIFE* 32-35 (1968) [hereinafter cited as BILLINGTON].

18. See generally G. MYRDAHL, *THE AMERICAN DILEMMA* (1944).

19. See generally KENISTEN, *THE YOUNG RADICALS* (1968); C. Commager, *The Violent, Idealistic World of Student Revolt*, CONG. REC. S6725 (daily ed. June 3, 1968) [hereinafter cited as Commager].

N. Cousins, *The Crusade for Law and Order*, SATURDAY REV., July 6, 1968, at 16:

[I]t is ironic that a nation born out of protest should be putting such high priority on subduing protest rather than scrutinizing it and seeking to meet it in the only basic way it can be met. Law in a free society is much more than an army of heavily armed policemen wading into a crowd; law is first of all a system of



Students have, therefore, participated in efforts to rectify social evils by engaging in efforts to promote the rights of Negroes and the underprivileged and in opposing the war in Viet Nam. Since the student is most intimately tied with his immediate environment (*i.e.*, the university), he has become especially concerned with rectifying the problems of the campus. The students who are in the forefront of these protests comprise a small minority of the student population. The Students for a Democratic Society, the most vocal student protest group, has a membership of only five thousand; and the protesters on a campus may comprise only 1 to 5% of the student body on the average campus.<sup>20</sup> However, in the writer's opinion, the protesting groups comprise the most intelligent students who are scholastically of the highest rank. They are well organized and capable of attracting support beyond their numbers. Though there have been the predictable charges of Communist Party infiltration,<sup>21</sup> these students do not appear to be concerned with such issues. They are opposed to regimentation and the system as such, manifesting anarchist or decentralist tendencies.<sup>22</sup>

The student at the university feels himself to be powerless in his relationship to an all-powerful administration. Though he may hear preachments about "government by the people" and "democratic rule," he is

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justice, political and social, designed primarily to keep people from being pushed around by other people or by the state itself, and to enable people to live fuller and freer lives.

The best way to make law work is to make justice operational. . . .

[A] distinction must be made between the many students who are demonstrating for increased participation in the decisions that affect their lives, and the few students who are exploiting this underlying situation for their own avowed destructive ends. (It is unfortunate that Columbia University, where relations broke down, should dominate the headlines, while almost no attention is being paid to campuses such as American University, in Washington, D.C., where student protest has been imaginatively and responsibly met and where a pattern of strong student-faculty-administration cooperation is being worked out.)

[T]he attack on violence requires not just superior counter-violence but a spirited and morally imaginative upgrading of our entire way of life.

John Fischer [in an editorial in *HARPER'S MAGAZINE*, August 1968] looses a blast against college faculties which very nearly brings him on the side of the student upheavalists. Marshalling statistics and borrowing from a new study by writer Christopher Jencks and Harvard social scientist David Riesman, Fischer charges that the professors have gone so far down the road toward affluence with their fat salaries and multifarious moonlighting activities that the teaching job is fobbed off onto graduate students just an academic jump ahead of the undergraduates.

Fischer's research has convinced him that the student crowds who sit-in or riot are by no means composed chiefly of hippie hell-raisers. He believes the average crowd would assay a high content of serious, intelligent, but cynical undergraduates voicing their displeasure with a faculty and administration that have let them down miserably.

But a greater irony is the fact that while the scientific and technological revolution has involved the world more and more deeply in cosmic problems threatening to annihilate the race, the academic world is doing less and less to provide the basic human wisdom that must underlie the answers. Perhaps the undergraduate plea for a greater student voice in university affairs has more point than most of us supposed. *What Bugs the Students*, editorial, *Chicago Daily News*, August 19, 1968, at 14, cols. 1 and 2.

20. *NEWSWEEK*, *supra* note 1.

21. Comments by Representative Willis, *CONG. REC.* H2063 (daily ed., March 19, 1968).

22. Comments by Joseph C. Harsh, *Christian Science Monitor*, March 31, 1968, at 1; De Zutter, *SDS: Thunder from the Campus*, *Chicago Daily News*, June 4, 1968, at 3.

confronted with an authority making his decisions and compelling him to obey. He becomes enmeshed in a dehumanized bureaucratized behemoth. To petition or simply express grievances is merely greeted with talk and inaction. The student must, therefore, act through confrontation, which can only be achieved by acts of civil disobedience. Such a course is in accord with the American tradition of disobeying what has been regarded as illegitimate authority. Such disobedience appears, according to this tradition, to be justified when authority condones or promotes what is immoral.<sup>23</sup>

For example, the war in Viet Nam deeply offends the moral sensibilities of these students. Therefore, aware of possible punitive reprisals, it is permissible to disobey the draft laws.<sup>24</sup> Similarly, arbitrary bureaucratized authority by a university administration may be justified by civil disobedience. Where administrative action offends the students' consciences, as in ignoring the rights of negroes or in cooperating with the military-industrial complex in furthering the war in Viet Nam, civil disobedience becomes justified to them. But fundamentally, the issue is the question of student power, the right of the student to participate in the decision-making process, *i.e.*, *participatory democracy*. Among black students, student power has become entwined with black power as these students seek to have a voice to determine policies affecting negroes. Generally, the techniques of civil disobedience employed have been nonviolent, such as student boycotts, the violation of regulations and sit-ins which have, on occasion, resulted in the occupation of student buildings. These tactics may not necessarily be an invitation to lawlessness or the general breakdown of the legal order when undertaken by persons who are committed generally to legal obedience and undertake acts of civil disobedience openly only after careful investigation of one's conscience.<sup>25</sup> However, some student groups appear to have acted only to achieve power for their own sake and do not appear motivated by conscience and principles of nonviolence.<sup>26</sup>

The student protests stem from a lack of administration and faculty dialogue both in and out of the classrooms as the universities have become too compartmentalized. The student feels spiritually starved. As historian James Billington observed in commenting on student mood,

[T]hey protest against the failing of the arid classroom to provide the humanizing education that the college catalogue had promised. In their often clumsy way, they are trying to bridge the rhetoric gap—but they see no hands extended from the other side.

23. See generally Sibley, *Direct Action and the Struggle for Integration*, 16 HASTINGS L.J. 285 (1965).

24. KENISTON, *THE YOUNG RADICALS* (1968).

25. See generally C. Cohen, *Symposium, Civil Disobedience and the Law*, 21 RUTGERS L. REV. 1 (1966).

26. Comments by Carl Rowan in *Washington Evening Star*, May 15, 1968, and May 31, 1968, printed in CONG. REC. S6736 (daily ed., June 3, 1968).

Thus, the turned-out student generation has joined (or merely identified with) the two heavily publicized young peoples' revolts of the mid-sixties: the hippies, with their passionate belief in instant esthetics and salvation-through hallucination; and the New Left, with its equally passionate commitment to instant morality and salvation-through confrontation. Both groups are purer than their detractors contend. They generate an authentic feeling of human community; and they are trying to put esthetic and moral questions back into the machine age.<sup>27</sup>

Student confrontations with university establishments have proliferated throughout the nation. A list of grievances would be submitted to the university officials and the response would be discussion. Sometimes the university would grant some demands and the students would demand more or the university would delay and be unresponsive. The result would be confrontation.<sup>28</sup> At Stanford, a student sit-in resulted in the granting to students of a greater voice in the making of university policy.<sup>29</sup> Black students at Northwestern staged a sit-in at the Administration Building and obtained an agreement from the administration acceding to some student demands involving increased admission of black students, provisions for black student housing and for a place for black students to congregate, and the offering of courses in Negro history.<sup>30</sup> Though opposition was expressed by the Board of Trustees to the tactics the students used, the administration action was ratified.<sup>31</sup> At Roosevelt University student protest arose with regard to a faculty-administration controversy when the President refused to approve the permanent appointment of History Professor Staughton Lynd, who, in 1965, had traveled to North Viet Nam in defiance of a State Department travel ban. The History Department had unanimously recommended his appointment, but the President refused on grounds of personality and *ad hominem*. The students staged sit-ins at the President's office; and when they refused to leave when the offices closed for the day, they were arrested for trespassing and suspended. Approximately seventy students were thus arrested and suspended until the demonstrations were finally terminated.<sup>32</sup>

Issues causing student confrontations with the administration vary. At Wisconsin, students have staged demonstrations to protest the policy of the trustees in investing funds in Chase Manhattan Bank stock because of its dealings with the Union of South Africa.<sup>33</sup> At Duke University,

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27. BILLINGTON, *supra* note 17. Commager, *supra* note 19 states,

At its best student revolt in America is characterized by idealism, at its worst by bad manners and violence and almost everywhere by an exasperating combination of logic and irrationality. This is because it is directed not so much against academic as against public grievances, not against ostentatious injustices and oppression as against authority, traditionalism and complacency.

28. De Zutter, *War on Campus—Who and Why*, Chicago Daily News, May 16, 1968, at 3.

29. Chicago Daily News, May 2, 1968, at 5.

30. Chicago's American, May 10, 1968, at 1.

31. Chicago Daily News, May 15, 1968, at 6.

32. Chicago Sun-Times, May 9, 1968, at 22. Chicago Tribune, May 10, 1968, at 1.

33. The Chicago Maroon, May 21, 1968, at 2.

fifteen hundred students sat in rows for days on the school's main quadrangle in an attempt to force the trustees to pay nonacademic employees more than the going rate of \$1.15 an hour. Other students boycotted classes and cafeterias until finally the divinity school faculty unanimously voted to divert their annual raises into the pay envelopes of campus maids and policemen.<sup>34</sup> Boston University's 125 negro students took over the Administration Building until the President agreed to recruit more black students and start black studies.<sup>35</sup> Five hundred students and faculty sat in the Administration Building at Colgate for almost five days until school officials promised to reform the fraternities' selective and discriminatory "black ball" rushing system.<sup>36</sup> Fifty Temple University students staged an overnight "sleep-in," departing under court order as they demanded greater student power.<sup>37</sup>

The rebellion which has attracted the greatest attention and has erupted into violence is the student revolt at Columbia. Within a five-day period, a group of two hundred students physically seized control of five major university buildings, occupied and vandalized the office of Columbia President Grayson Kirk, held the Dean of the College prisoner for twenty-four hours, and brought classroom instruction to a halt. The students destroyed university property and stole records. The revolt was sparked by a proposal to build a new gym in adjacent Morningside Park, an open-space area abutting a negro neighborhood which the students believed should be used for the recreation of the surrounding residents and accused the administration of ignoring the needs of these residents; by the school's receiving of research grants and cooperation with the Pentagon-affiliated Institute of Defense Analysis; and by the refusal of the school to grant amnesty to students who had been previously engaged in demonstrations. The University's Hamilton Hall was first seized and occupied by a group of negro and white students, but subsequently the black students ejected the white and nonstudents from the black community who had joined their demonstration. The white students then occupied Low Library while a third group seized Avery and Fayerweather Halls. The Low Library group was the most militant, led by Mark Rudd, an advocate of total revolution. For almost a week the revolt was a standoff as the administration sought to negotiate with the rebellious students; however, its refusal to grant total amnesty resulted in stalemate. The students became well organized, communicating with walkie-talkies and setting up medical, food and clean-up committees. The administration, at New York City Mayor Lindsay's prodding, yielded with regard to the gymnasium by stopping construction at least temporarily and indicated it would sever

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34. NEWSWEEK, *supra* note 1. Students at Florida State University held a 10-day sleep-in in front of the administration building to promote changes on campus speaker policies. *New York Times*, May 17, 1968, at 40, col. 2.

35. NEWSWEEK, *supra* note 1.

36. *Id.*

37. *Id.*

its ties with the Institute for Defense Analysis. The faculty emerged as the mediator, particularly the law professors. Finally, however, the administration requested the police to clear the students from the buildings; and instances of brutality ensued as students were clubbed as well as some bystanders, resulting in the arrest of 696 students and 96 injuries. The result was that a large portion of the student body, which had previously been unsympathetic, supported the student position. The administration found it could not return to normal class schedules as a strike developed, and permitted students to have the option of receiving a passing or failing grade on their work based upon academic performance up to the time of the demonstrations or of receiving no credits. The administration also agreed to appoint a fact-finding committee, chaired by former Solicitor General Archibald Cox and comprised of prominent jurists and academicians, to inquire into the demonstrations and the allegations of police brutality.<sup>38</sup> Demonstrations continued as 100 students were arrested when police ended a nine-hour sit-in at a Morningside Heights tenement to protest Columbia's building program. This particular protest was undertaken by community residents with the students assisting. The students have demanded an entire restructuring of the university with greater student-faculty participation in decisions. Approximately one month after the original demonstrations several lawyers, 20 parents and approximately 200 students entered Hamilton Hall to protest the disciplining of students, while several hundred other students milled outside. A thousand policemen entered the campus swinging night sticks, arresting 153 persons and 60 were injured, including 10 policemen.<sup>39</sup>

Student groups differ as to the type of reforms to be sought at Columbia. Mark Rudd and the Students for Democratic Society appeared to assume an extreme position of student sovereignty, while moderate students and possibly the administration are now willing to grant students and faculty a voice in administrative decision-making. The President of the Student Council charged that Columbia President Grayson Kirk had suppressed a report recommending a greater role for faculty members and students in Columbia's disciplinary proceedings.<sup>40</sup> A joint Committee on Disciplinary Affairs comprised of seven teachers, seven faculty members and three administrators recommended that its determinations on discipline of demonstrators be final, that some students be placed on probation, that those committing vandalism or theft be suspended, and that trespassing charges be dropped. President Kirk, however, at first announced he would not be bound by the Committee's recommendations but subsequently indicated his confidence in it and that, if he disagreed, he would be willing to submit the matter to a distinguished alumnus re-

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38. Chicago Daily News, May 22, 1968, at 1, col. 4; New York Post, May 18, 1968, at 1.

39. New York Times, May 6, 1968, at 1, col. 7 (late city ed.). Accounts of the Columbia Revolt are found in *Mutiny at a Great University*, LIFE, May 10, 1968, at 36; *The Siege of Columbia*, RAMPARTS MAG., June 15, 1968, at 27. NEWSWEEK, *supra* note 1.

40. New York Times, May 10, 1968, at 1, col. 4 (late city ed.).

spected by all.<sup>41</sup> The *New York Times* indicated that the University was seeking a way to avoid prosecutions for trespassing.<sup>42</sup>

A majority of the Law School faculty issued a statement declaring "confidence in the orderly processes of change in American universities as well as in the larger society in which universities are a part." The statement recognized that organized protest is allowable and protected by the Constitution against interference by public agencies and is sanctioned within independent universities "by long practice and deep intellectual conviction of its worth;" but there are limits to such organized protests which are overstepped "when protesters seize buildings or physically restrain the freedom of personal movement in order to manifest dissatisfaction." The statement asserts,

We do not assert that every act of "civil disobedience" is reprehensible. One way to challenge the validity of a statute is to ignore its commands, undergo arrest and prosecution, and then argue that the law is unconstitutional.

We recognize, too, that in rare instances persons whose voices might otherwise not be heard at all may engage in concerted violation of an admittedly constitutional law in order to proclaim their disapproval of it. In that situation, the violators are prepared to pay the penalty for their disobedience, hoping thus to dramatize opposition to the operative policies. Having in mind the difficulties sometimes experienced in drawing attention to public issues and to dissenting views, we cannot condemn this form of civil disobedience in every conceivable circumstance.

The Columbia episodes at the outset did not involve civil disobedience, but an effort to impose opinions by force. Without ascertaining whether other students shared their thoughts about academic and social issues, a relatively small group of students sought to immobilize the University until their conceptions of sound policy were adopted. Tactics like these have nothing in common with principled opposition or with democratic processes. They represented attempted intimidation.

The force of reason rather than the force of massed bodies must be the reliance of those who wish to influence a community guided by intelligence, as is Columbia. Disrupting institutional proceedings is an impermissible substitute for rational persuasion. Using muscle instead of minds to express dissent has no place in the academic setting.

We are confident that American students will themselves recognize the un wisdom of attempting to gain goals by illegal force. Violence begets violence. It beclouds rather than illumines issues. No problem that confronts Columbia or other American universities is beyond the capabilities of men who use the tools education has given them.

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41. *Id.*, May 11, 1968, at 1, col. 3.

42. *Id.*

The statement particularly condemned the examination of the President's personnel correspondence files and removing of letters which were publicized as a flouting of the constitutional and legal right to privacy and as "a violation of basic decency." The statement asserts that the University "did not act unreasonably" when it called for police assistance in clearing the campus but deplures acts of police brutality by policemen who ignored their orders and thereby created campus indignation. As to student power, the statement welcomes an inquiry into mechanisms for expressing and considering relevant student views and that student opinion should be made known. Efforts to improve disciplinary procedures are supported with the underlying premise of due process with "*fair procedure and reasoned judgment . . . its operative elements.*" Reinforcement of existing safeguards against mistaken decisions is desirable, though abusiveness was not characteristic of past disciplinary actions despite the absence of elaborate procedures.<sup>43</sup>

Though there were charges that the protests at Columbia were planned in October, ten months in advance, Mark Rudd denied such allegations, while admitting that he had drawn up a proposal which was subsequently scrapped.<sup>44</sup> At this writing, however, the Columbia protest remains unresolved, and the fact-finding committee has yet to hold hearings and issue its report.

A parallel exists between protests in the United States and in other countries. Extremist students leading the protests appear to be guided by the same intellectual heroes: Ché Guevara, Father Torres, Herbert Marcuse, Jules Regis Debray, Frantz Fanon, and Mao Tse-tung. However, the nonviolence of most of the American protests suggests the influence of Gandhi and Martin Luther King, Jr. Students at different universities learn from each other. The students at the Sorbonne who undertake demonstrations in France are familiar with the tactics of the protesters at Columbia.<sup>45</sup>

The developments on the college campuses might be of prime concern to society at large. Educational institutions play a major role in American life. As one writer observes,

It may be that the business of America is no longer business, but education. Nearly 30 per cent of the physical capital of the nation is currently tied up not in industrial plant and equipment but in schools and educational materials. About 55 million persons, one-fourth of our total population, are at present full time students. Teachers are now by far the largest occupational group in the country.

And everybody is in the act. The military branches do more teaching than fighting; the Defense Department is said to spend more on education beyond high school than the 50 state govern-

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43. *Id.*, May 17, 1968, at 41, col. 2.

44. *Id.*, May 13, 1968, at 46, col. 1.

45. NEWSWEEK, *supra* note 1.

ments combined. Firms like General Electric and I.B.M. spend more on training and education than all but the largest universities. America is on its way to becoming a knowledge state. . . .<sup>46</sup>

Clearly, the conditions for the pursuit of knowledge and the health of the academic community is a national problem.<sup>47</sup>

Within this context the campus unrest cannot be lightly ignored. Though it is in part a result of youthful exuberance, a situation which has existed in other historical periods as well,<sup>48</sup> the student protesters have a message to convey. Their demonstrations point to the need for expanding academic freedom, the cornerstone for the functioning of the knowledge state. A legal forum must be substituted for resort to demonstrations. Such a solution is proposed in adopting the institution of an *academic Ombudsman* as a protector of academic due process for both students and faculty. An examination will first be made of the development of the concept of academic freedom in the United States and of its protection under law. A proposal will then be presented suggesting institutional means for the nurturing and protection of academic freedom.

#### I. THE DEVELOPMENT OF ACADEMIC FREEDOM

The roots of academic freedom are to be found in the academies of Socrates and Plato in Ancient Greece and in the autonomous corporate universities of the Middle Ages.<sup>49</sup> Internal matters of universities were in the hands of those immediately connected with learning, with each faculty electing its own head and holding its own assemblies. Medieval students were reported to have been young and riotous, regularly making enemies among the townspeople, who resented their privileges and licentiousness.<sup>50</sup> However, the first truly free university in the modern sense was the University of Leiden, founded in 1575, where the scholar could free himself from the limits of the confessional university.<sup>51</sup>

In the United States the first colleges were congregational institutions, and free inquiry first developed with the toleration of divergent religious views.<sup>52</sup> However, the true impetus for academic freedom came with the growth of Darwinism and scientific skepticism.<sup>53</sup> Of particular influence were the German universities and the concept of *Lernfreiheit* and *Lehrfreiheit*. By *Lernfreiheit* was meant the absence of administrative coercions in the learning situation so that German students were free to move from university to university and to select courses. *Lehrfreiheit*

46. Keller, *Book Review*, Chicago Tribune Book World, May 19, 1968, at 1.

47. Weller, *Student Revolt, How It Grew*, Chicago Daily News, May 25, 1968, at 14.

48. TIME, May 3, 1968, at 24.

49. Commager, *supra* note 19. See generally JENCKS & RISEMAN, *THE ACADEMIC REVOLUTION* (1968).

50. R. HOFSTADER & W. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* 3 (1955) [hereinafter cited as HOFSTADER & METZGER].

51. *Id.* at 71.

52. *Id.* at 236-37.

53. *Id.* at 278.



referred to freedom to engage in learning and research and to be free from administrative regulation within the teaching situation.<sup>54</sup> Americans who studied at German universities brought these concepts of academic freedom to the United States and adapted them to the American context, focusing mostly on *Lehrfreiheit*, the rights of professors, rather than the rights of students as embodied in *Lernfreiheit*. As the graduate schools were established and patterned after the German universities, the principle of academic freedom took root. In contrast to Germany, where the principle of academic freedom was premised on philosophical speculation, in America, academic freedom became identified with the need of scientific investigation and empiricism.<sup>55</sup> Truth was to be derived from scientific investigation, with norms of neutrality and competence. Facts were to be the arbiters between competing notions of truth. The American norms were more permissive than the German in permitting freedom of utterances for professors outside the college community, with the professor having the right to express an opinion outside his competence on extramural subjects. Thus, the concepts of free speech and civil liberties became incorporated into the concept of academic freedom. The principles of academic freedom were first formulated in 1915 by the American Association of University Professors.<sup>56</sup> In 1940, these principles were reformulated by the AAUP in conjunction with the American Association of Universities comprised of college presidents, which asserted that the common good depends upon the free search for truth and its free exposition and that academic freedom is essential to these purposes. "Freedom in research is fundamental to the advancement of truth" and "academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning."<sup>57</sup>

The statement regards academic tenure as essential to academic freedom. With regard to academic freedom, the teacher is entitled to full freedom in research and in the publication of the results; to freedom in the classroom in discussing his subject, but he "should be careful not to introduce into his teaching controversial matter which has no relation to his subject;" and that when he speaks or writes as a citizen he should be free from institutional censorship or discipline, but his special position in the community imposes special obligation in that the public may judge his profession and institution by his utterances so that "he should at all times be accurate, should exercise appropriate restraint, should show respect for the opinion of others, and should make every effort to indicate that he is not an institutional spokesman." Regarding academic tenure, the statement asserts the principles that after the end of a probationary period teachers or investigators would have permanent or continuous tenure, and

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54. *Id.* at 385-89.

55. *Id.*

56. *Id.* at 471.

57. T. EMERSON, D. HABER & N. DORSEN, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 915-17 (1967) [hereinafter cited as EMERSON, HABER & DORSEN].

services should not be terminated except for adequate cause, retirement for age, or under extraordinary circumstances because of financial exigencies. As acceptable academic practice, the statement provides that the precise terms and conditions of every appointment should be stated in writing. The probationary period should not exceed seven years during which a teacher should have the same academic freedom as other faculty members. Termination for cause of a continuous appointment or dismissal for cause of a teacher before the expiration of a term appointment should, if possible, be considered by both a faculty committee and the governing board of the institution and where the facts are in dispute the accused teacher should be informed in writing before the hearing of the charges against him and should have the opportunity to be heard in his own defense with assistance of a counsel or adviser and a full stenographic record should be kept.

The principle of academic freedom was challenged by the charges made by some during the 1950's regarding alleged Communist Party associations of college professors and by the concern of many that a teacher subject to the discipline of the Communist Party was not capable of engaging in free inquiry. The AAUP adopted a statement asserting "that alarming consequences have resulted from the security procedures and the political tensions of the past few years" which present serious dangers to the national welfare and security itself in impairing the supply of qualified scientists, engineers and foreign service officers and by the suffering inflicted through unwarranted and crudely conducted investigations and dismissals, thereby deterring many young people from seeking government careers.<sup>58</sup> The statement further asserted that "when the instances of academic dismissals and the unfortunate policies they exemplify are cast against the stormy background of popular agitation, governmental investigation, and hostile legislation, it is not surprising that scholarship has lost ground and that we are threatened with a shortage of qualified teachers. . . ." The AAUP stated that "the need for academic freedom is greater, far greater, than ever before." The statement recognizes the need for the application of safeguards to colleges and universities against the misuses of specially classified information necessary for military security, to be applied only to the persons having access to the information. The AAUP also recognized the need for vigilance against the subversion of the educational process and stated,

The academic community has a duty to defend society and itself from subversion of the educational process by dishonest tactics, including political conspiracies to deceive students and lead them unwittingly into acceptance of dogmas or false causes. Any member of the academic profession who has given reasonable evidence that he uses such tactics should be proceeded against forthwith, and should be expelled from his position if his

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58. *Id.* at 1009-14.

guilt is established by rational procedure. Instances of the use of such tactics in the past by secret Communist groups in a few institutions seem to have occurred and vigilance against their occurrence in the future is clearly required.<sup>59</sup>

But the statement contends that nothing in the record of college and university teachers as a group justifies the imputation to them of tendencies toward disloyalty. Furthermore, the practice of subjecting them to special tests is deplored and the Association opposes the imposition of disclaimer oaths, the investigations of individuals against whom there is no reasonable suspicion of illegal or unprofessional conduct or of an intent to engage in such conduct and of legislation imposing upon supervisory officials the duty to certify that members of the staff are free of subversive taint. Referring to the 1940 statement, the AAUP asserted,

Implicit in that Statement is the proposition . . . that a faculty member's professional fitness to continue in his position, considered in the light of other relevant factors, is the question to be determined when his status as a teacher is challenged. No rule demanding removal for a specific reason not clearly determinative of professional fitness can validly be implemented by an institution unless the rule is imposed by law or made necessary by the institution's particularly religious coloration. Any rule which bases dismissal upon the mere fact of exercise of constitutional rights violates the principle of both academic freedom and academic tenure. By eliminating a decision by a faculty member's peers, it may also deny due process. This principle governs the question of dismissal for avowed past or present membership in the Communist Party taken by itself. Removal can be justified only on the ground, established by evidence, of unfitness to teach because of incompetence, lack of scholarly objectivity or integrity, serious misuse of the classroom or of academic prestige, gross personal misconduct, or conscious participation in conspiracy against the government. The same principle applies, a fortiori, to alleged involvement in Communist-inspired activities or views, and to refusal to take a trustee imposed disclaimer oath.<sup>60</sup>

Thus, the invocation of the fifth amendment by a faculty member "cannot be in itself a sufficient ground for removing him," as the exercise of the constitutional privilege against self-incrimination does not commonly justify an inference of guilt. Hence, "invocation of the fifth amendment is to be weighted with an individual's other actions in passing judgment on him" and the same may be said regarding refusals to testify on other grounds, such as the fifth amendment right of silence. However, the statement provides that if a faculty member invokes the fifth amendment, the institution should make a preliminary inquiry according with

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59. *Id.* at 1010.

60. *Id.* at 1011.

procedural due process with judgment by his peers. The AAUP took the position that the fact that a faculty member has refused to disclose information to his own institution is relevant regarding his fitness to teach, but not decisive.

If the refusal appears to be based upon evasiveness and a desire to withhold evidence of illegal conduct which would disqualify him as a member of the faculty, the refusal would be a weighty adverse factor. On the other hand, a refusal to answer questions which arises from a sincere belief that a teacher is entitled to withhold even from his own institution his political and social views should be accorded respect and should be weighed with other factors in the determination of his fitness to teach. Nevertheless, members of the teaching profession should recognize that sincerity cannot be judged objectively and that a college or university is entitled to know the facts with which it must deal. This is especially true when a faculty member's activities, whether or not they are blameworthy, have resulted in publicity hurtful to his institution. Accordingly, in any proper inquiry by his institution, it is the duty of a faculty member to disclose facts concerning himself that are of legitimate concern to the institution, namely, those that relate to his fitness as a teacher. . . .<sup>61</sup>

Previously, the Association of American Universities had issued a statement affirming the need for free inquiry and the expression of ideas which may not be curbed so that the scholar is free to challenge orthodox views. However, a line is asserted to exist between "freedom" and "privilege" that "when the speech, writing or other actions of a member of a faculty exceed lawful limits, he is subject to the same penalties as other persons" and "in addition, he may lose his university status."<sup>62</sup> Association with a university implies adherence to standards with endorsement of capability and integrity so that a faculty member "by ill-advised, though not illegal, public acts or utterances . . . may do serious harm to his profession, his university, to education, and to the general welfare" so that "he has a heavy responsibility to weigh the validity of his opinions and the manner in which they are expressed." The statement asserts that the professor owes complete candor and perfect integrity to his colleagues and the general public, "precluding any kind of clandestine or conspiratorial activities."

If he is called upon to answer for his convictions it is his duty as a citizen to speak out. It is even more definitely his duty as a professor. Refusal to do so, on whatever legal grounds, cannot fail to reflect upon a profession that claims for itself the fullest freedom to speak and the maximum protection of that freedom available in our society. In this respect, invocation of the Fifth Amendment places upon a professor a heavy burden of proof of

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61. *Id.*

62. *Id.* at 1003-08.

his fitness to hold a teaching position and lays upon his university an obligation to re-examine his qualification for membership in its society.<sup>63</sup>

Since faculties exercise authority in internal affairs, "they must accept their share of responsibility for the discipline of those who fall short in the discharge of their academic trust." Because universities enjoy public benefits, they carry with them public obligations of direct concern to the faculties and the governing boards. Legislative bodies may scrutinize these benefits and privileges, and "it is clearly the duty of universities and their members to cooperate in official inquiries directed to those ends." "When the powers of legislative inquiry are abused, the remedy does not lie in noncooperation or defiance; it is to be sought through the normal channels of informed public opinion." The statement then condemns Russian Communism, contending that under its principles no scholar could adequately disseminate knowledge or pursue investigations in the effort to make further progress toward truth.

Appointment to a university position and retention after appointment require not only professional competence but involve the affirmative obligation of being diligent and loyal in citizenship. Above all, a scholar must have integrity and independence. This renders impossible adherence to such a regime as that of Russia and its satellites. No person who accepts or advocates such principles and methods has any place in a university. Since present membership in the Communist Party requires the acceptance of these principles and methods, such membership extinguishes the right to a university position. Moreover, if an instructor follows communistic practice by becoming a propagandist for one opinion, adopting a "party line," silencing criticism or impairing freedom of thought and expression in his classroom, he forfeits not only all university support but his right to membership in the university.<sup>64</sup>

The statement further asserts that the universities should cooperate with law enforcement officials whose duty requires them to prosecute those charged with offenses, but their innocence is to be presumed until convicted under due process. However, unless a faculty member violates a law, his discipline or discharge is a university responsibility and should not be assumed by political authorities. "Discipline on the basis of irresponsible accusations or suspicion can never be condoned," and "the university is competent to establish a tribunal to determine the facts and fairly judge the nature and degree of any trespass upon academic integrity. . . ." The professor should not be subject to any special discrimination so that "universities are bound to deprecate special loyalty tests which are applied to their faculties but to which others are not subjected. . . ."

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63. *Id.* at 1007.

64. *Id.* at 1008.

However, the AAUP statement,<sup>65</sup> after citing various cases, was critical of the manner in which academic institutions have been subject to "the irresponsible push and pull of contemporary controversies." It urged that "American colleges and universities return to a full scale acceptance of intellectual controversy based on a catholicity of viewpoint, for the sake of national strength as well as for academic reasons. Noting that "simple membership in the [Communist] Party has not yet been clearly defined as illegal, . . . the influence of the academic community should, we think, be directed against the proscription of membership in a movement which needs to be kept in view rather than driven underground." Referring to the Association of American Universities statement with regard to invocation of the fifth amendment, the AAUP statement contends,

[T]here is a popular prejudice against informers as such, but there is also reason to sympathize with a person who declines to act in the ruin of others who, in his judgment, do not deserve such a fate. The use of the Fifth Amendment as a basis for silence in such situations may not be morally or academically blameworthy, although it might be legally indefensible. . . .

The policy of placing "a heavy burden of proof" on a teacher who has invoked the Fifth Amendment must be considered in relation to the constitutional protection that the Amendment is designed to secure. This report [of the AAUP] has already expressed a belief in the duty of a faculty member to be open and truthful with his associates if he has invoked the Fifth Amendment and is for this reason questioned; but it does not follow that it is wise or right to place his professional survival in jeopardy by demanding that he not only talk freely but also refute unspecified inferences drawn by his accusers from his refusal to testify. The adoption of such a policy tends to substitute economic punishment for the criminal punishment against which the amendment is designed to guard; and it impairs in direct proportion the constitutional guaranty. The variety of reasons which have induced witnesses to invoke the Fifth Amendment, moreover, renders the policy of attaching prima facie blameworthiness to their conduct thoroughly unrealistic. . . .<sup>66</sup>

Clearly, the AAUP statement regarding academic freedom takes the position that mere membership in the Communist Party should not in itself preclude faculty status, while the statement of the American Association of Universities would appear to preclude Party members. While the AAUP position is more tolerant to professors who invoke the fifth amendment, the American Association of Universities would impose a "heavy burden of proof" upon such a professor. These differences indicate that, while there is general acceptance to the principles of academic free-

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65. Note 47, *supra*.

66. HOFSTADER & METZGER, *supra* note 50, at 1014.

dom, disagreement persists as to its application. A debate has raged as to whether Communist Party members should be allowed to teach.<sup>67</sup> Where professors were dismissed for prior Communist Party membership, as at the University of Washington,<sup>68</sup> there appeared to be no consideration of teaching competence. A similar attitude prevailed regarding dismissal for invoking the fifth amendment. Where professors were not dismissed, they were not reappointed.<sup>69</sup> There have also been instances where professors were dismissed or denied reappointment for holding or expressing opinions on public issues which deviated from certain pressure groups, such as opposition to the House Un-American Activities Committee or the film, *Operation Abolition*.<sup>70</sup>

This writer submits that a professor's past or present political associations or philosophy should not in itself be a basis for determining faculty status. The only criteria should be his competence as a teacher or researcher. Mere membership in the Communist Party should not be the deciding factor. If, however, evidence is presented, in accord with due process, which establishes that the faculty member is or has engaged in activities involving the conspiracy or promotion of violent revolution or other acts which constitute a violation of a statute, or if his political commitment has in fact impaired his competency in that he has ceased to adhere to standards of scholarship and objectivity, grounds would be established for terminating his faculty status.

A university, in its quest for truth, must encourage the availability of what the AAUP statement rightly terms, *a catholicity of views*. A university can be truly said to have academic freedom if it adheres to the Socratic principle that only the examined life is worth living, that man is ennobled by understanding. Only then can it be said that its students are being educated and that it has become a fountainhead of knowledge. In such a climate all opinions and political philosophies must be encouraged to flourish. Only when truths are challenged and refuted can they be said to flourish. As John Stuart Mill observed, "Complete liberty of contradicting and disproving our opinion, is the very condition which justifies us in assuming its truth for purposes of action; and on no other terms can a being with human faculties have any rational assurance of being right."<sup>71</sup> Mill further observed that "the whole strength and value of human judgment . . . , depending on the one property, that it can be set right when it is wrong, reliance can be placed on it only when the means of setting it right are kept constantly at hand."<sup>72</sup> From this it follows that a university must encourage the flourishing of all philosophies, no matter how heretical.

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67. *Id.* at 1015-16.

68. *Id.* at 1016-26.

69. *Id.*

70. Joughin, *Academic Due Process*, in *ACADEMIC FREEDOM, THE SCHOLAR'S PLACE IN MODERN SOCIETY* 143-82 (H. BAADÉ & R. EVERETT, eds., 1963) [hereinafter cited as *BAADÉ & EVERETT*].

71. J. S. MILL, *ON LIBERTY* 19 (Crofts ed. 1947).

72. *Id.* at 20.

Clearly, an avowed Communist or Marxist, anarchist, atheist and agnostic should be encouraged to be on a university faculty, provided he is scholastically competent.

As modern men have become emancipated and deprived of the guidance and support of traditional and customary authority, such as the Church, the academic community has become the only source for true knowledge. This company of scholars, scattered throughout the globe, has mastered the criteria for measuring truth and knowledge and is duty bound to hear one another. They comprise the only court as the source for authority and knowledge in the modern world. "Because modern man in his search for truth has turned away from kings, priests, commissars and bureaucrats, he is left, for better or worse, with the professors."<sup>73</sup> As Walter Lippmann stated,

In his relations with the laws of the land, a professor is as subject as any other man to the laws against murder, robbery, cheating on the income tax, driving his automobile recklessly. The laws for him, as for all other men, are what the law-enforcing authorities say they are. The professor has no special privileges and no special immunity.

But in the field of truth and error about the nature of things, and of the history and future of the universe and of man, the state and its officials have no jurisdiction. When the scholar finds that two and two make four, no policeman, no judge, no governor, no legislator, no trustee, no rich alumnus, has any right to ordain that two and two make five. Only other scholars who have gone through a mathematical training equivalent to his, and are in one way or another qualified as his peers, can challenge his findings that two and two make four. Here, it is the community of scholars who are the court of last resort.

It follows that they are the court of last resort in determining the qualifications of admission to the community of scholars—that is to say, the criteria of appointment and the license to teach. No criterion can be recognized which starts somewhere else than in the canons of scholarship and scientific research. No criterion is valid here because it emanates from the chamber of commerce, or the trade union council, of the American Legion, or the clergy, or the newspapers, or the Americans for Democratic Action, or the John Birch Society or any political party. The selection and the tenure of the members of the community of scholars is subject to the criterion that scholars shall be free of any control except a stern duty to bear faithful allegiance to the truth they are appointed to seek.<sup>74</sup>

The university, as a sanctuary for excellence, must maintain a

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73. Lippman, *The University and the Human Condition*, 21 CHICAGO JEWISH FORUM 27 (1966). Similar ideas are expressed in Nisbet, *What is an Intellectual?*, 1965 COMMENTARY at 93.

74. *Id.* at 29.



climate favorable to the pursuit of truth. This means that an academic institution cannot be operated in the manner of a private business corporation because it does not turn out a product to be sold for profit. It must function as an academic community. The concept of employer-employee relationship between the administration and the faculty cannot apply nor may the students be treated as mere objects subject to regulations and to be lectured to. The faculty must have a voice in the making of university policy, and the students must also be given a decision-making role.<sup>75</sup>

Three groups play the most important roles in the government of colleges and universities, faculties, administrators and governing boards. Broad legal powers are conferred on the governing boards. In the case of public institutions, these boards have been delegated with authority by state legislatures and state constitutions, while in private institutions the corporate charter will usually confer authority on such a board. Though the board of regents or governing board of a public institution may be subject to some check through legislative appropriations, the boards of trustees of private universities are responsible to no one. Many of the members of such boards may not necessarily have an academic background. Generally, they review the educational program as a whole in meeting the needs of the community, handle appropriations, and are the final authority as to the hiring and firing of personnel. To handle the routine operations of the university, the board retains administrative officers, particularly presidents and academic deans who comprise the link between the board and the faculty and students. At the same time, the teaching profession creates a scholarly community. The role of faculty decision-making in universities varies with the institution, but the better schools permit the faculty a strong voice in policy-making. The faculty should have the primary responsibility for determining the educational and research policies of the institution as clearly expressed in the charter or as set forth in legislation by the governing board. Educational and research policies include such fundamental matters as the subject matter and methods of instruction, requirements for admitting students, academic performance and granting degrees, major changes in the size of the student body, and the relative emphasis to be given to the various components of the educational and research program. Provision should be made for the active participation and concurrence of the faculty with regard to appointments, promotions and dismissals of faculty members. The faculty should also have some participation in the selection of college presidents and academic deans who should be qualified for faculty membership by training and experience. Heads of academic departments should be appointed after consultation with the members of that department. Provision should be made for faculty consultation regarding the expenditure and allocation of funds for teaching and research. Provision may be made

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75. See generally R. MACIVER, *ACADEMIC FREEDOM IN OUR TIME* (1967).

for the participation of the faculty, as a whole, through an assembly or through elective representation of faculty members on committees and panels at all the administrative levels of the institution. Though the administrative officers have the prime responsibility of communicating to governing boards, there should also be communication through reports by faculty committees.<sup>76</sup>

Universities with strong faculty government are able to attract the best scholars. Where the faculty assumes a strong policy role, the faculty member becomes committed to the particular university and is not likely to leave. The best scholars are committed to principles of academic freedom and are attracted to institutions where they may enjoy this freedom. He should be free to engage in scholarly pursuits with a minimum of intrusions.<sup>77</sup>

Recent campus unrest has dramatized the problem of student participation in university policy-making. Only a small part of the student's university education is derived from the classroom. He must be thought of as the subject rather than the object of education.<sup>78</sup> In the process of free inquiry, the teacher learns as he teaches and the student teaches as he learns, as his questions and difficulties stimulate the teacher to better comprehension of the subject matter through the challenge of clearer exposition and inquiry. The student must be given the freedom to express and defend his beliefs and to question and differ. Students should also have the opportunity to be exposed to all types of ideology and to form diverse groups. After graduation they will be subject to the pressures and coercions of conforming to community standards. It is only during his college days that he has the opportunity to come into contact with the nonconformist and to be a nonconformist himself. Exposure to nonconformity is an essential part of his education, and it is this author's opinion that the ideal student body should even contain groups advocating such diverse beliefs as Communism, Jeffersonian anarchism, atheism, free love and nudism. Furthermore, if the student is to be trained as a responsible citizen, his best training lies in having an active role in the campus decision-making process.

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76. Clark, *Faculty Authority*, 47 AAUP BULL. 293 (1961).

77. *Id.*

78. BILLINGTON, *supra* note 17; Commager, *supra* note 19. In 1947, the President's Commission on Higher Education, *Higher Education for Democracy: Establishing Goals*, stated at p. 14,

[I]ntegration of democratic principles into the active life of a person and a people is not to be achieved merely by studying or discussing democracy. Classroom teaching of American tradition, however excellent, will not weave its spirit into the innermost fiber of students. Experience of the give and take of free men in a free society is equally necessary. Democracy must be lived to be understood. . . .

The statement further asserted:

[T]he very style of life that a university embodies is itself an education in freedom. What could be better training for democracy than the spectacle of agile minds colliding in the free search for knowledge.

Similar views have been expressed by M. MOOS & F. ROURKE, *THE CAMPUS AND THE STATE* 317 (1959); MACIVER, *supra* note 75, Chap. XII; Taylor, *The Student as a Responsible Person*, 19 HARV. EDUC. REV. (1949).

As stated by the AAUP, "As members of the community, students should be encouraged to develop the capacity for critical judgment and to engage in independent search for the truth."<sup>79</sup> The statement further asserts that students should be evaluated solely on the basis of academic performance, not on their opinions or conduct in matters unrelated to academic standards. Though students are responsible for learning thoroughly the content of any course of study, the statement asserts that "they should be free to take reasoned exception to the data or views offered and to reserve judgment about matters of opinion." While students are responsible for maintaining standards of academic performance established by their professors, "they should have protection through orderly precedents against prejudiced or capricious academic evaluation." Information on student views, beliefs and political associations which professors acquire in the course of their work as instructors, advisers and counselors should be considered confidential with protection from improper disclosure. Universities should have a carefully considered policy regarding student records with transcripts stating only academic status with data from disciplinary and counselor files not available to unauthorized personnel. No records should be kept which reflect the political activities or beliefs of students. Provision should be made for the periodic destruction of noncurrent disciplinary records.

The AAUP statement suggests standards for student affairs including freedom from arbitrary discrimination in that all university facilities should be open to all students with equal access and that admission to the university should be open to all students; freedom of association in that students should be free to organize and join associations to promote their common interests with freedom to express opinions and to invite speakers of their own choosing; and freedom to participate in institutional government by having the freedom to individually and collectively express views on institutional policy and on matters of general interest. The student body "should have clearly defined means to participate in the formulation and application of regulations affecting student affairs" and "student governments should be protected from arbitrary interventions." In addition, the student press and student publications should be free of censorship and be permitted to develop their own editorial policies and news coverage enjoying financial autonomy or independence with the editors subscribing to the canons of responsible journalism. The statement further asserts, regarding off-campus activities, that as citizens, "students should enjoy the same freedom of speech, peaceful assembly, and rights of action that other citizens enjoy and should not be inhibited by the university authorities." Where student activities result in violation of laws, university officials should apprise students of their legal rights and may offer other assistance. The statement takes the following position regarding the disciplining of such students:

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79. EMERSON, HABER & DORSEN, *supra* note 57, at 1042-47.

Students who violate the law may incur penalties prescribed by civil authorities, but 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 from those of the general community should the special authority of the institution be asserted. The student who incidentally violates institutional regulations in the course of his off campus activity, such as those relating to class attendance, should be subject to no greater penalty than would normally be imposed. Institutional action should be independent of community pressure.<sup>80</sup>

Regarding disciplinary proceedings, the statement suggests procedural safeguards which include the requirement that standards of conduct and offense be clearly defined and such vague phrases as "undesirable conduct" and "conduct injurious to the best interests of the institution" should be avoided. Except under emergency circumstances, premises occupied by students and their personal possessions should not be subject to search unless appropriate authorization be obtained, and students detected or arrested in the course of violating institutional rules or laws should be informed of their rights and not be subject to harassment to coerce admission of guilt. The status of the student should not be altered pending action on the charges. The formality of the procedure to which a student is entitled in disciplinary cases should be proportionate to the gravity of the offense and the sanctions which may be imposed with minor penalties assessed informally under prescribed procedures. The student should have a right to a hearing before a regularly constituted committee with regard to misconduct which may result in serious penalties. The committee should be comprised of faculty members and, if the accused so requests, student members. The student should be informed in writing of the reasons for the proposed disciplinary hearing and given the opportunity to prepare with the right of assistance by an adviser of his choice. The burden of proof should rest upon those bringing the charge, with the student given the opportunity to testify and present evidence and witnesses. He should have the opportunity to hear and question adverse witnesses, and the committee should not consider adverse statements unless the student has been informed of their content. The decision should be based only upon the evidence presented. In absence of a transcript, there should be both a digest and a verbatim record such as a tape recorder. The decision of the hearing committee should be final subject to appeal to the governing board.

The American Civil Liberties Union has issued a statement regarding student rights which provides that students who are arrested or convicted for violation of laws in the course of engaging in first amendment activities or civil rights should be given particular assistance, and the

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80. *Id.* at 1045.

records of such convictions should be separated from other student records.<sup>81</sup>

Clearly, academic freedom means the right to engage freely in the pursuit of knowledge. It encompasses the right of a professor to be free from the threat of arbitrary suspension and of the student to develop his intellectual faculties in a setting free from arbitrary disciplinary action where he may be given the maximum freedom to express himself. Academic freedom requires the maintenance of a viable academic community where faculty members participate in the governing of the university and the students are also given a voice in the decision-making of this community. There is no sovereign in such a community.

## II. JUDICIAL PROTECTION OF ACADEMIC FREEDOM

Academic freedom as a legal and constitutional right has yet to be established.<sup>82</sup> The courts have, however, upheld the rights of teachers, professors and students in a number of decisions and dicta in a number of Supreme Court decisions, thereby indicating a disposition toward establishing this right. Academic freedom may be regarded as an emerging constitutional right.<sup>83</sup>

### A. *The Rights of Professors*

The courts in the older cases refused to recognize a right to academic freedom as such. This was reflected in the Tennessee Supreme Court's decision in *Scopes v. State*,<sup>84</sup> involving the challenge to the constitutionality of the Tennessee statute forbidding the teaching of evolution which was upheld as a valid legislative regulation. The courts have never emerged as an instrument for defining the scope of freedom of curriculum inquiry and expression.<sup>85</sup> However, in *Meyer v. Nebraska*,<sup>86</sup> the United States Supreme Court declared a statute which forbade the teaching of any subject in a public, private or parochial school in any language other

81. *Id.* at 1047.

82. *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1050 (1968) [hereinafter cited as *Developments in the Law*]. The argument has, however, been made that academic freedom is a recognized legal right. Cowan, *Interference with Academic Freedom: The Pre-Natal History of a Tort*, 4 WAYNE L. REV. 205 (1958).

83. Murphy, *Academic Freedom—An Emerging Constitutional Right*, in BAADE AND EVERETT, *supra* note 70, at 17 [hereinafter cited as Murphy].

84. *Scopes v. State*, 154 Tenn. 105, 289 S.W. 363 (1927). In *Kay v. Board of Higher Educ.*, 173 Misc. 943, 18 N.Y.S.2d 821 (Sup. Ct., 1940), *aff'd*, 259 App. Div. 879, 20 N.Y.S.2d 1016, *aff'd*, 260 App. Div. 9, 20 N.Y.S.2d 898, *motion to appeal denied*, 284 N.Y. 578, 284 N.Y. 819 (Sup. Ct. 1950), affirmed without opinion, a taxpayer's suit successfully enjoined Bertrand Rullell from teaching at the City College of New York because of his writings on marriage and morals.

85. *Developments in the Law*, *supra* note 8, at 1053. A challenge to an Arkansas statute making the teaching of evolution a misdemeanor was dismissed in *Epperson v. State*, 242 Ark. 922, 416 S.W.2d 322 (1967), appeal filed, 36 U.S.L.W. 3180 (U.S. Oct. 20, 1967) (No. 749).

86. 262 U.S. 390 (1923).

than English or in teaching any language other than the English language until the pupil had completed the eighth grade as an unreasonable infringement upon liberty without due process as guaranteed by the fourteenth amendment. Similar statutes in Hawaii have also been invalidated.<sup>87</sup>

The rights of teachers have been recognized by the courts in cases involving extra-mural associations within the context of state-imposed loyalty and security programs proscribing membership and activities in certain organizations and in imposing loyalty oaths. The Supreme Court has apparently taken the position that, though specific acts may be made the basis for exclusion or dismissal, associational activities which could not be penalized criminally do not justify denial of public employment.<sup>88</sup> In *Wieman v. Updegraff*, the court invalidated an Oklahoma statute which required all state employees to state on oath that they were not and had not been for the past five years members of organizations listed by the United States Attorney General as Communist front or subversive because of indiscriminate classification of innocent with knowing membership. The action had been brought by college faculty members, and this prompted Mr. Justice Frankfurter to write a concurring opinion in which he was joined by Mr. Justice Douglas stressing the importance of protecting first amendment rights for teachers, the need for "habits of open mindedness," and further stressing that teachers are "the exemplars of open mindedness" who "must have the freedom of responsible inquiry . . . to sift evanescent doctrine, qualified by time and circumstance, from the restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms of thought, of speech, of inquiry, of worship are guaranteed by the Constitution . . ." and that "the functions of educational institutions in our national life and the conditions under which alone they can adequately perform them are at the basis of these limitations upon state and national power."<sup>89</sup>

The Court, in *Sweezy v. New Hampshire*<sup>90</sup> reversed a contempt conviction of a professor who had refused to answer questions posed by the state Attorney General authorized to function as a one-man legislative committee to ferret out subversive activity as to membership in the Progressive Party in 1948, holding that the authorizing statute for investigation of "subversive persons" and "subversive organizations" was too broadly drawn. Mr. Chief Justice Warren, writing the opinion of the Court, stated,

We believe that there unquestionably was an invasion of petitioner's liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread.

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87. *Farrington v. Tokushige*, 273 U.S. 284 (1927); *Mo Hock Ke Lok Po v. Stainback*, 74 F. Supp. 852 (D. Hawaii, 1947).

88. *Developments in the Law*, *supra* note 82, at 1066.

89. 344 U.S. 183, 196-97 (1952).

90. 354 U.S. 234 (1967).

The essentiality of freedom in the community of American universities is almost self evident. No one should underestimate the vital role in a democracy played by those who guide and train our youth. To impose any straight jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is this true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.<sup>91</sup>

Mr. Justice Frankfurter, in a concurring opinion, stated,

According to the [New Hampshire Supreme] court, the facts that made reasonable the Committee's belief that petitioner had taught violent overthrow in his lecture were that he was a Socialist with a record of affiliation with groups cited by the Attorney General of the United States or the House Un-American Activities Committee and that he was co-editor of an article stating that, although the authors hated violence, it was less to be deplored when used by the Soviet Union than by capitalist countries.

When weighed against the grave harm resulting from governmental intrusion into the intellectual life of a university, such justification for compelling a witness to discuss the contents of his lecture appears grossly inadequate. Particularly is this so where the witness has sworn that neither in the lecture nor at any other time did he ever advocate overthrowing the Government by force and violence.

Progress in the natural sciences is not remotely confined to findings made in the laboratory. Insights into the mysteries of nature are born of hypothesis and speculation. The more so is this true in the pursuit of understanding in the groping endeavors of what are called the social sciences, the concern of which is man and society. . . . For society's good—if understanding be an essential need of society—inquiry into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well being, except for reasons that are exigent and obviously compelling.

These pages need not be burdened with proof, based on the testimony of a cloud of impressive witnesses, of the dependence of a free society on free universities. This means the exclusion of governmental intervention in the intellectual life of a university. It matters little whether such intervention occurs

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91. *Id.* at 250.

avowedly or through action that inevitably tends to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor. . . .<sup>92</sup>

Frankfurter's opinion balanced the interests of the legislature in making inquiries regarding subversive activities with the overriding interests of the first amendment and academic freedom and found that the interests of the state were not compelling in this particular case. The decision did not indicate that first amendment rights and academic freedom would override state interests under all circumstances.

This limited approach was reflected in *Barenblatt v. United States*,<sup>93</sup> where the Court upheld the contempt conviction of a defendant who had invoked the first amendment in refusing to answer questions elicited from a House Un-American Activities subcommittee. Though the defendant had been a teacher when summoned to appear before the subcommittee, his contract had expired when he did actually appear and his contract was not renewed. He refused to answer questions as to whether he had been a Communist Party member while at another university. Though Mr. Justice Harlan reaffirmed the right of a teacher to be free from government encroachment, the *Sweezy* case was distinguished in that he had not been questioned about his academic activities and that the investigation was more limited.

In *Shelton v. Tucker*,<sup>94</sup> the Supreme Court in a class action struck down an Arkansas statute, aimed at the National Association for the Advancement of Colored People, which required that every teacher, as a condition for employment in the state school system, execute an affidavit disclosing every organization with which he had been associated over a five-year period. Though the Court acknowledged that the state may make relevant inquiries as to a teacher's competence and that the statute was relevant, the inquiry was so unlimited and indiscriminate as to constitute a prior restraint on the exercise of constitutionality recognized first amendment freedoms as incorporated into the fourteenth. The opinion relied upon *Sweezy*, ignoring *Barenblatt*.

The fifth amendment privilege against self-incrimination may also limit the penalizing of teachers for refusal to answer questions. In *Slcohower v. Board of Higher Education*,<sup>95</sup> the Court held that the dismissal of a Brooklyn College professor for invoking the privilege before a congressional committee inquiring into national security was unconstitutional. But in *Beilan v. Board of Public Education*,<sup>96</sup> the Court upheld the dismissal of a teacher for refusing to answer questions posed by his superintendent about his allegedly subversive past activities by holding that the dismissal was not predicated on an impermissible inference of

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92. *Id.* at 261-62.

93. 360 U.S. 109 (1959).

94. 364 U.S. 479 (1960).

95. 350 U.S. 551 (1956).

96. 357 U.S. 399 (1958).



guilt drawn from a refusal to answer, but on a finding of insubordination derived from the very fact of refusal to answer. *Slochower* was distinguished in that *Beilan* was a specific, relevant inquiry into the fitness of the teacher by his superior and a specific finding of incompetency based on permissible inferences. A similar approach was taken in *Nelson v. County of Los Angeles*,<sup>97</sup> involving public employees. However, the current authority of these cases may be questioned by the Court's decision in *Spevak v. Kelin*,<sup>98</sup> which reversed the disbarment of a lawyer who invoked the privilege against self-incrimination when asked to produce certain evidence in a judicial inquiry of unethical practices in the legal profession. A plurality of justices held that the fifth amendment "should not be watered down by imposing the dishonor of disbarment and the deprivation of a livelihood as a price for asserting it." If applied broadly, this decision could protect teachers and all public employees. However, the case of a teacher is distinguishable from that of a lawyer, as in *Spevak*; for to require the state to produce evidence procured wholly through its own investigative efforts to prove the unsuitability of every applicant or public employee would impose a heavy burden on the state, while bar associations have their own ethics committees to aid the state in such functions. Since the state is responsible for the ethical acts of its agents, but not of its licensees, it has a greater interest in assuring their fitness. Disbarment, bearing the official imprimatur of the courts, has more of the elements of the stigma of a criminal proceeding than has the loss of employment.<sup>99</sup>

The Supreme Court has generally looked with disfavor upon the imposition of loyalty oaths requiring teachers to deny membership of association in certain organizations. This was reflected in the case of *Wieman v. Updegraff*,<sup>100</sup> which has already been discussed. In *Speiser v. Randall*,<sup>101</sup> the Court struck down a California statute which required a loyalty oath for obtaining certain tax exemptions as, in effect, imposing the burden of proof on the taxpayers to show that they were entitled to the exemptions which was not satisfied until they had executed the oath. The Court held that, where the transcendent value of free speech is involved, the state bears the burden of persuasion to show the state taxpayers engaged in criminal speech. The procedure was found to place an unconstitutional burden on speech. A Florida oath, requiring a school teacher to swear, as a condition of employment, that he had never lent his "aid, support, advice, counsel or influence to the Communist Party" was invalidated as too vague.<sup>102</sup>

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97. 362 U.S. 1 (1960).

98. 385 U.S. 511, 516 (1967).

99. *Developments in the Law*, *supra* note 82, at 1076-77.

100. *See* note 89, *supra*.

101. 357 U.S. 513 (1958). The problem of loyalty oaths is discussed generally in *Morris, Academic Freedom and Loyalty Oaths*, in BAADE & EVERETT, *supra* note 70, at 57.

102. *Cramp v. Board of Pub. Instruction*, 368 U.S. 278 (1961).

In *Bagget v. Bullitt*,<sup>103</sup> the Court struck down a Washington oath which was challenged by sixty-four members of the faculty, staff and student body of the University of Washington. Teachers were required to swear that they will by "precept and example promote respect for the flag and the institutions of the United States of America and the State of Washington, reverence for law and order and undivided allegiance to the government of the United States." These oath requirements were incorporated in a 1955 statute which prohibited "subversive persons" from state employment. *Subversive person* was defined to mean any person "who commits, attempts to commit, or aids in the commission of any act intended to overthrow, destroy or alter, or assist in the overthrow, destruction or alteration of the constitutional form of the government of the United States, or of the State of Washington. . . ." The act similarly defined *subversive organization* and *foreign subversive organization* and declared the Communist Party a subversive organization and membership therein a subversive activity. The Court found the oath requirements and statutory provisions unduly vague, uncertain and broad. Under the 1955 statute, the teacher had to swear that he was not a subversive person. The court found that oaths do not provide an "ascertainable standard of conduct or that it does not require more than a State may command under the guarantee of the First and Fourteenth Amendments." There is the hazard of prosecution for knowing but guiltless behavior.

In *Elfbrandt v. Russell*,<sup>104</sup> the Court invalidated the Arizona oath which required the teacher to swear support and allegiance to the Constitutions of the United States and Arizona. The legislature had placed a gloss on the oath by subjecting to prosecution for perjury and discharge for any person who "knowingly and wilfully becomes and remains a member of the Communist Party of the United States or its successors or any of its subordinate organizations" or "any other organization" having for "one of its purposes" the overthrow of the government of Arizona or any of its political subdivisions. The Court found that the oath and the accompanying gloss do not exclude association by one who does not subscribe to the organization's unlawful ends and, therefore, threatens freedom of association protected by the first amendment. Similarly, in *Keyishian v. Board of Regents*,<sup>105</sup> the Court struck down a New York loyalty scheme

103. 377 U.S. 360 (1964).

104. 384 U.S. 11 (1966).

105. 385 U.S. 589 (1967). The case in effect overrules the Court's earlier decision in *Adler v. Board of Educ.*, 342 U.S. 485 (1952). The Court found the terms *treason* and *sedition* as set forth in the statute to be vague. Mr. Justice Brennan, in writing the opinion for the Court reaffirmed the principle of academic freedom:

Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools . . ."

The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which

seeking to exclude teachers who were affiliated with organizations determined by the State Board of Regents to be subversive as based upon notice and hearings with an annual inquiry to be made to determine whether the teacher was qualified. The Court held that mere membership in a subversive organization was insufficient as a basis for disqualification from employment; the teacher must, in addition, have a specific intent to bring about the illegal objectives of the association. In so holding, the Court equated the requirement for criminal prosecution with the requirements for exclusion from public employment, apparently on the assumption that mere membership is no more relevant to a teacher's suitability to teach than it is to his danger to society generally. Mr. Chief Justice Warren's opinion for the Court quotes approvingly from his opinion in *Sweezy* with regard to academic freedom. The words *treasonable or seditious acts* in the disclaimer oath were found to be too broad.

Recently, in *Whitehall v. Elkins*,<sup>106</sup> the Court invalidated a Maryland oath requiring teachers to swear they were not "engaged in one way or another in the attempt to overthrow the Government . . . by force or violence." The oath was construed to be read in conjunction with a Maryland statute which defines a *subversive* as

any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of the constitutional form of the Government of the United States, or of the State of Maryland . . . by revolution, force or violence; or who is a member of a subversive organization. . . .

*Subversive organization* was defined, *inter alia*, as a group that would alter the form of government by revolution, force or violence. The Court held that "the oath required must not be so vague and broad as to make men of common intelligence speculate at their peril on its meaning." The words *in one way or another* might suggest that a person who was a member of a group seeking to overthrow the government by force or violence might have perjured himself even if he was ignorant of the real aims of the group and innocent of any illicit purpose. The line between permissible and impermissible conduct is indistinct. The Court stressed that first amendment rights were involved in relation to teachers, holding that "the continuing surveillance which this type of law places on teachers is hostile to academic freedom" in that aside from possible perjury reasonable grounds for belief a person is a subversive person was cause for discharge.

The due process clause has been increasingly invoked to protect

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discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection. . . ."

*Id.* at 603.

106. 88 S. Ct. 184 (1967).

teachers from being arbitrarily dismissed.<sup>107</sup> The privilege doctrine, that a position of employment is not a constitutional right, has declined in significance in that the teacher is entitled to be protected from summary dismissal. The courts have held that though no one has the right to a particular government job, the state has no license to embark on a discriminatory hiring policy or any other arbitrary or capricious course of action.<sup>108</sup> Specific constitutional safeguards were not recognized. The Court's rationale presumes the existence of a substantive constitutional liberty which has been denied without due process. It has avoided the requirement that there be "life, liberty or property" to invoke the protection of the fourteenth amendment. A hearing of some sort must be provided.

In many instances, particularly regarding professors, rights are protected by tenure which provide for a hearing. Dismissal may occur only for specific cause. Absent tenure, the teacher may have contractual rights under his contract of employment. These rights may be subject to judicial enforcement. However, a tenure system creates what is in substance private grievance machinery operating under privately developed standards. Failure to comply may subject the institution to an action for damages. But, if the formal procedures are followed, a court may decline to consider even an indefensible result in a contract action, unless a specific contract term has been violated.

Despite the Supreme Court precedents, the exercise of academic freedom has not been established as a substantive legal right. Exemplifying this attitude is *Koch v. Board of Trustees of the University of Illinois*,<sup>109</sup> in which the Illinois Supreme Court found no constitutional issues involved in the dismissal of a biology professor, employed under a two-year contract, who was dismissed during his first year after writing a letter to the student newspaper stating, *inter alia*, that "premarital intercourse among college students is not, in and of itself, improper." The President found his views "offensive, repugnant and contrary to commonly accepted standards of morality and his espousal of these views could be interpreted as an encouragement of immoral behavior and that for these reasons he should be relieved of his university duties" and so relieved him. Though a faculty committee, after a hearing, recommended reprimand rather than a discharge, the Board of Trustees ordered his discharge after the first academic year. Koch then brought an action for breach of contract which was dismissed by the trial court, and an appeal was taken to the Illinois Supreme Court alleging a constitutional issue. The appeal was denied. The case was then transferred to the Appellate Court which affirmed the dismissal of the case.

The Florida Supreme Court rejected the concept of academic free-

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107. *Developments in the Law, supra* note 82, at 1077.

108. *Greene v. McElroy*, 360 U.S. 474 (1959).

109. 39 Ill. App. 2d 51, 187 N.E.2d 340 (1962), discussed in *Murphy, supra* note 83.

dom in *Jones v. Board of Control*,<sup>110</sup> a case involving the dismissal of a University of Florida law professor prior to the expiration of his one-year contract for violation of a rule prohibiting an employee of the university from engaging in political activities. The professor sought election to the post of circuit judge. The court upheld the dismissal on grounds of reasonable regulation of public employment, though rejecting the concept of academic freedom.

However, in a case involving the dismissal of a high school teacher, the Supreme Court has held that a teacher may not be dismissed for writing a letter to a newspaper expressing criticism of a school administration with regard to educational policies or the allocating of public funds.<sup>111</sup>

### B. *The Rights of Students*

In the older cases the courts manifested unconcern as to the rights of students. Universities were conceived as acting *in loco parentis* combining the responsibilities of the church, the civil and criminal law, and the home in the rearing of the young.<sup>112</sup> They were surrogate parents endowed with vast discretion. Accordingly, courts were unconcerned if a student was dismissed without a hearing or inquiry into the cause. A student, suspended "for the general good and reputation of the institution," was without judicial recourse, even when that determination was made without written charges, confrontation, or cross-examination of witnesses.<sup>113</sup> In some of these cases constitutional protection could be sought, such as where a student was dismissed for nonattendance at chapel in a state institution, but even in such cases the typical action was for mandamus based on the discretion of state courts and premised upon common law notions of property or contract.

Courts have traditionally based their approach on contract, on the assumption that the provisions of the student-university contract are to be found in all of the statements contained in the admissions application, the registration form, the school's rules and the catalogue.<sup>114</sup> Included in the catalogue or registration form may be a statement that the school reserves the power to cancel a student's registration, to refuse to award academic credits, or to deny a certificate or degree without having to state a reason for its action. The enforcement of such a clause was upheld in *Anthony v. Syracuse University*<sup>115</sup> involving a coed who was dismissed for not being "a typical Syracuse girl." Many other cases have followed

110. 131 So.2d 713 (Fla. 1961).

111. *Pickering v. Board of Educ.*, 88 S. Ct. 1731 (1968).

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

113. *State ex rel. Ingersoll v. Clapp*, 81 Mont. 200, 263 P. 433 (1928), *cert. denied*, 277 U.S. 591 (1928), *appeal dismissed*, 278 U.S. 661 (1928).

114. Goldman, *The University and the Liberty of Students—A Fiduciary Theory*, 54 KY. L.J. 643 (1966) [hereinafter cited as Goldman].

115. 224 App. Div. 487, 231 N.Y. Supp. 435 (1928).

this precedent. However, the contract approach is inappropriate to student-university relations in that contract law is based upon the hard bargaining of self-interested persons in the market place. It is unreasonable to bind him to terms set forth in a lengthy catalogue. The restrictions in selecting a school place the student in an unfair bargaining position. Moreover, the student is in no position to renegotiate the contract as stated by the provisions of the registration forms. The contract may well be regarded as a *contract of adhesion*.<sup>116</sup>

Though the courts have followed a policy of judicial restraint, the case of *Dixon v. Alabama State Board of Education*<sup>117</sup> represents a significant departure. Action was brought by students of Alabama State College who were expelled after participating in a courthouse lunch counter sit-in and in several other civil rights demonstrations. The President of the college had warned some of the students to cease demonstrating, though one of those who were warned and some other students participated in subsequent demonstrations. Otherwise, there was no formal notice that the students were being charged with conduct which might lead to expulsion. There was no hearing, and the notice of their expulsion did not state specifically the conduct for which they were being expelled. The Fifth Circuit Court of Appeals, in reversing the district court's dismissal of an action to enjoin the State Board and others from obstructing the plaintiff's right to attend college, held that due process requires notice and some opportunity for hearing before students, at a tax-supported college, are expelled for misconduct. The court held that it is not enough to say that the students did not have a constitutional right to attend college, as it is necessary to consider both the nature of the private interest which is being impaired and the governmental power which has been exercised. The students could not be said to have waived a right to notice and a hearing, as the state cannot condition the granting of even a privilege upon the renunciation of the constitutional right of procedural due process. Only private associations have the right to obtain a waiver of notice and hearing, and even in those instances the waiver must be clear and explicit. The Court recognized that the students' right to an education was basic and vital and expulsion would impair the students' ability to complete their education and enter their careers. The Board, in dismissing the students, must exercise fundamental principles of fairness. The interest in national security is not so overwhelming as to preclude this exercise. The court cited prior authority<sup>118</sup> indicating that notice and a hearing must be held where students are expelled. As guidance to the parties the Court set forth the following standards as proper for such a hearing:

The notice should contain a statement of the specific charges and grounds which, if proven, would justify expulsion under the reg-

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116. Goldman, *supra* note 114.

117. 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961).

118. 58 A.L.R.2d 903-20.

ulations of the Board of Education. The nature of the hearing should vary depending upon the circumstances of the particular case. The case before us requires something more than an informal interview with an administrative authority of the college. By its nature, a charge of misconduct, as opposed to a failure to meet the scholastic standards of the college, depends upon a collection of the facts concerning the charged misconduct, easily colored by the point of view of the witnesses. In such circumstances, a hearing which gives the Board or the administrative authorities of the college an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved. This is not to imply 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. Nevertheless, the rudiments of an adversary proceeding may be preserved without encroaching upon the interests of the college. In the instant case, the student should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies. He should also be given the opportunity to present to the Board, or at least to an administrative official of the college, his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf. If the hearing is not before the Board directly, the results and findings of the hearing should be presented in a report open to the student's inspection. If these rudimentary elements of fair play are followed in a case of misconduct of this particular type, we feel that the requirements of due process of law will have been fulfilled.<sup>119</sup>

The question unanswered by *Dixon* is whether the courts extend this precedent to require trial-type hearings with the right to cross-examine witnesses and to present rebuttal evidence, though short of a full-dress judicial hearing. Generally, courts have found that any type of hearing is adequate.<sup>120</sup> If the courts were to follow the analogy of other types of cases, such as in the deportation of aliens,<sup>121</sup> trial-type hearings should be provided. The *Dixon* precedent may be expanded. Four months after the decision, a federal district court in Tennessee followed this precedent in enjoining the suspension of students who had engaged in demonstrations and had been arrested for breach of the peace.<sup>122</sup> The decision was later followed by a federal district court in Florida<sup>123</sup> and has clearly become part of the law of the land.<sup>124</sup>

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119. 294 F.2d 150, 158-59 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961).

120. *Wright v. Texas Southern University*, 392 F.2d 728 (5th Cir. 1968).

121. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953).

122. *Knight v. State Bd. of Educ.*, 200 F. Supp. 174 (M.D. Tenn. 1961).

123. *Due v. Florida A & M Univ.* 233 F. Supp. 396 (N.D. Fla. 1963).

124. Note, *Procedural Limitations on the Expulsion of College and University Students*, 10 *St. Louis L.J.* 542, 549 (1966).

The courts, however, have not accepted the principle of a trial-type hearing. The standard is that of "fair play."<sup>125</sup> The requirements include notice of the charge and the grounds for the sanction if the charges are proven; the names of the witnesses against him and an oral or written report of the facts on which each would testify; and if the hearing is not before the governing board, the findings of the determinative body should be presented open to the student's inspection. The standard requires that, in determining whether a student has been guilty of improper conduct, there need not be a formal trial but that the students be given a fair opportunity to demonstrate his innocence. Opposition to an adversary or trial-type approach is based upon concern for demoralizing the university because of the hesitancy of fellow students, and possibly professors, in testifying against the student or the school.<sup>126</sup> However, school authorities were urged by one court to formulate standards for disciplinary proceedings.<sup>127</sup>

The application of *Dixon* is well illustrated by *Zanders v. Louisiana State Board of Education*,<sup>128</sup> where students at a negro college were dismissed following engagement by the student body in demonstrations protesting educational policies and involving a student blockade of the administration building and a sit-in at the auditorium with demonstrations and marches. Following the clearing of the campus by the National Guard and sheriff's police, the students were dismissed by an interdepartmental council without notification of the disciplinary charges against them, nor given a chance to present individual defenses. An action was brought under the Civil Rights Act,<sup>129</sup> and the federal district court issued a temporary restraining order reinstating the students but reserving the right for the college to take further disciplinary action. The college then scheduled a second hearing notifying the students in writing of the charges against them and informing them of the right to counsel of their choice, to cross-examine witnesses, and to present evidence in their own behalf. At the hearing, the chairman of the disciplinary committee announced that the college did not intend to present evidence but would listen to evidence presented by the student alone. After two and one-half hours of testimony, the students were again expelled. The Court then enlarged the temporary restraining order to provide that the students could not be expelled until afforded a right of appeal to the Louisiana State Board of Education. The Board then conducted a hearing de novo at which all parties were heard. Each student's case was treated individually with direct and cross-examination. With one exception, the students chose

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125. *Zanders v. Louisiana St. Bd. of Educ.*, 281 F. Supp. 747 (W.D. La. 1968). See note 120, *supra*; Note, *The College Student and Due Process in Disciplinary Proceedings*, 1962 U. ILL. L.F. 438.

126. Heyman, *Some thoughts on University Proceedings*, 54 CALIF. L. REV. 73 (1966), who takes the position that a trial type hearing would impose a heavy expense on colleges. *State ex rel. Sherman v. Hyman*, 180 Tenn. 99, 171 S.W.2d 822 (1942).

127. *Zanders v. Louisiana St. Bd. of Educ.*, 281 F. Supp. 747 (W.D. La. 1968).

128. *Id.*

129. 42 U.S.C. 1983 (1959).



not to present evidence in their own behalf. At the conclusion of the hearings, the students were again expelled. The students then filed a complaint alleging that the expulsions were discriminatory in that these particular students were chosen for expulsion while other students who participated in the demonstrations were unpunished, that the disciplinary committee and the Board were biased, and that no evidence was presented regarding the expulsion of certain students.

The court upheld the dismissals, finding that the demonstrations by blocking buildings disrupted campus life and, therefore, engaged in activities not protected by the first amendment. The students' action in taking over the administration building was compared to the situation in *National Labor Relations Board v. Fansteel Metallurgical Corporation*,<sup>130</sup> where the Supreme Court upheld the discharge of employees engaged in a sit-down strike which involved the take-over of company buildings, and the situation in *Adderley v. Florida*,<sup>131</sup> where demonstrators had demonstrated on property on which there was a jail. The court found that it was the students' participation in the illegal activities which constituted the grounds for dismissal. The college president had testified that the students were expelled for their conduct and not for their criticism of the administration. The Court found no evidence of bias and held that the hearing was fair. As to the singling out of these particular students, the Court noted that college administrations are endowed with discretionary authority and that these students were not discriminated as a class. College officials are not relegated to dismiss the entire student body to stop illegal activity but, as in wild-cat strikes, may expel the leaders. The Court stated that "the hearing before the State Board more than satisfied the 'rudiments of fair play' set forth in *Dixon v. Alabama State Board of Education*."<sup>132</sup>

Further judicial clarification of disciplinary proceedings is found in *Buttney v. Smiley*,<sup>133</sup> where the court upheld the dismissal of students from the University of Colorado for blocking admission to the University Placement Service by standing in doorways to the offices in protesting CIA recruitment. The students were granted a hearing in conformity with established procedures and appeal was made to the Board of Regents. The court found the rules were not vague. The students were charged with violating rules against hazing, "interfering with the personal liberty of other students," and the requirement to obey national, state and local laws, to respect the rights and privileges of other people and conduct themselves in "a manner that reflects credit on the university." Though the rules were not in the form of specific prohibitions, "they do set standards for acceptable conduct which are readily determinable and should be easily understood." Though the court recognized that the doctrine of "*in loco parentis*" is no longer tenable in a university community and

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130. 306 U.S. 240 (1939).

131. 385 U.S. 39 (1966).

132. 281 F. Supp. 747, 767-68.

133. 281 F. Supp. 280 (D. Colo. 1968).

that there is a trend to reject the authority of university officials to regulate off-campus activity of students, "that is not to say that conduct disruptive of good order on the campus should not properly lead to disciplinary action." The court found that the students' activity does not encompass the exercise of free speech as guaranteed by the first amendment. The students could be tried as a group because they had acted in this manner. The court further found it was not arbitrary to impose a more severe punishment upon graduate students. The court found that "the test of whether or not one has been afforded procedural due process is one of fundamental fairness in the light of the total circumstances."

Whether students in disciplinary proceedings have a right to counsel is questionable. In *Madera v. Board of Education of the City of New York*<sup>134</sup> the Second Circuit Court of Appeals reversed a district court decision in holding that counsel may be excluded from a guidance conference with parents following suspension of a child from school which determines how the child should be handled. The court characterized the proceedings as non-criminal and that the District Superintendent had no lawyer present. The court stressed that the proceedings were not adversary in nature. The case may be applicable to the rights of college students in that the court cited *Dixon* and noted there was no mention in that case of representation by retained counsel. The court in *Buttney v. Smiley* held that "we know of no legal authority that requires university officials to advise a student involved in disciplinary proceedings of his right to remain silent and to be provided with counsel."<sup>135</sup> However, the right of counsel was accorded the students in *Zanders*. It is suggested that although a university disciplinary proceeding cannot be equated to a criminal proceeding, where a student is indeed faced with the sanction of suspension, the right to counsel should be granted. Such a right is concomitant to the exercise of the right to cross-examine and refute witnesses, an essential element of a fair proceeding.

The question of student demonstrations will increasingly come within judicial ambit. A federal district court has held that prior administration approval of all campus demonstrations was an unconstitutional restraint.<sup>136</sup> It would follow that a flat ban on all campus demonstrations would be unconstitutional.<sup>137</sup> Students have the right to petition universities for a redress of their grievances. But the university may place reasonable restrictions on demonstrations to protect safety and property, maintain normal operation and facilitate campus transportation. Furthermore, the university has power to preserve an atmosphere conducive to educational pursuits. This is illustrated by *Goldberg v. Regents of University of California*<sup>138</sup> in which a California state court upheld the dis-

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134. *Madera v. Bd. of Educ. of City of N.Y.*, 386 F.2d 778 (2d Cir. 1967).

135. 281 F. Supp. 280, at 287.

136. *Hammond v. South Carolina St. College*, 272 F. Supp. 947 (D.S.C. 1967).

137. *Developments in the Law*, *supra* note 82, at 1131.

138. 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (Dist. Ct. App. 1967).

missal of students who participated in a "filthy speech" rally during the Berkeley protests finding the discipline necessary for maintaining order. Courts have also refused to extend first amendment protection to acts of students barring access to campus buildings.<sup>139</sup>

However, the reasons for invoking school discipline to prevent excessively disruptive demonstrations on the campus do not justify the imposition of penalties upon off-campus demonstrations, even those entailing violations of criminal law. The student's conduct off campus should justify suspension or expulsion only if it would constitute a manifestation of his unfitness to be a member of the academic community.<sup>140</sup>

An issue involving student academic freedom which has come to the fore is the problem of bans, as imposed by state statutes and school rules, prohibiting certain speakers from using school facilities to address members of the student body. Normally directed against subversives, such rules have been successfully challenged on the ground that the denial of school facilities constitutes a discrimination against advocates of minority viewpoints in violation of first amendment rights. Facilities for speech and assemblage may not be withheld or restricted in such a way as to confer monopolistic use or impede equal access. This applies to both the popular and the unpopular cause. No restriction, prohibition or censorship of the content of speech or advocacy should be imposed unless there are extraordinarily compelling reasons involving a "clear and present" danger to the interests of the university.<sup>141</sup> However, such dangers will rarely arise, except, perhaps, in instances where a speaker may make libelous utterances, incite violence, or advocate and disseminate ethnic or religious hatred and the promotion of genocide.

Student groups have initiated suits in Illinois and North Carolina district courts<sup>142</sup> to enjoin the denial of use of university facilities to hear addresses by controversial speakers. An Illinois statute prohibits campus speaking invitations to any "subversive, seditious, and un-American organization, or to its representatives. . . ."<sup>143</sup> A North Carolina statute charges university officials to adopt regulations governing use of school facilities by "known" members of the Communist Party, those who advocate the overthrow of the federal or state constitution, or those who have

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139. *Zanders v. Louisiana St. Bd. of Educ.*, 281 F. Supp. 747 (W.D. La. 1968); *Buttney v. Smiley*, 281 F. Supp. 280 (D. Colo. 1968).

140. Developments in the Law, *supra* note 82, at 1132. A related question involves student attire and long hair. In *Ferrell v. Dallas Independent School Dist.*, 392 F.2d 697 (5th Cir. 1968), the court upheld the dismissal of high school students, members of a musical group, who wore long hair despite a school rule to the contrary, and the administration had established that the wearing of long hair was conducive to student disorder and disruption. The court, however, indicated that arbitrary regulations based merely on the personal likes of the administrator could not be imposed.

141. *Id.* at 1132.

142. *Snyder v. Board of Trustees*, Civil No. 66-C-847 (N.D. Ill., filed May 12, 1966); *Dickson v. Siterson*, Civil No. 3-59-C-66 (M.D.N.C., filed March 31, 1966).

143. Ill. REV. STAT. ch. 144 § 48.8 (1967).

pleaded the fifth amendment before any tribunal in answer to questions about subversive activities.<sup>144</sup>

The student's problem of standing may be met by dicta in a recent Supreme Court case allowing the addressee of mail to challenge Post Office seizure and indicating that it would be an anomaly if a principal beneficiary of the first amendment, the audience, were precluded from seeking relief because of illegal censorship.<sup>145</sup> The denial of university facilities to a speaker who has been extended and has accepted a specific invitation to speak, represents a ripe issue, narrowly defined, susceptible to judicial resolution.<sup>146</sup>

Another basis for standing is the dicta of the Supreme Court in the cases involving the rights of faculty members which assert that academic freedom is essential for seeking knowledge in a free society.<sup>147</sup> It is submitted that a speaker ban hinders the search for truth. The student attends college to obtain an education and a restriction imposed upon whom he may hear deprives him of his right to receive an education. The speaker is invited to speak, not primarily for his own benefit, not merely to accord him an opportunity to propagate his ideas, but to provide the student with an educational experience in hearing what he has to say. As one judge stated in dismissing a taxpayer's suit to enjoin the University of Buffalo from permitting Communist Party theoretician Herbert Aptheker from speaking,

Petitioner contends that allowing avowed communists to preach their ideology at a tax-supported university cloaks their activities with a mantle of academic and intellectual integrity which makes their subversive propaganda more susceptible to impressionable young people, but we believe that the tradition of our great society has been to allow our universities in the name of academic freedom to explore and expose their students to controversial issues without governmental interference. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die . . . .<sup>148</sup>

A speaker ban is a prior restraint on speech. Though the state might justify a uniform prohibition on use of facilities to prevent a diversion of student time and use of campus space and require students to bear any

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144. N.C. GEN. STAT. §§ 116-199, 116-200 (1966). The rights of speakers on state university campuses is discussed in Van Alstyne, *Political Speakers at State Universities: Some Constitutional Considerations*, 111 U. PA. L. REV. 328 (1963); Note, *Freedom of Speech on College Campus*, 24 OHIO ST. L.J. 549 (1963); Pollitt, *Campus Censorship: State Barring Speakers from State Educational Institutions*, 42 N.C.L. REV. 179 (1963).

145. *Lamont v. Postmaster Gen.*, 381 U.S. 301, 307-10 (1965) (Brennan & Goldberg, JJ. concurring) allowing addressee of mail to challenge seizure.

146. *Developments in the Law*, *supra* note 82, at 1133.

147. *Sweezy v. New Hampshire*, 254 U.S. 234 (1967); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

148. *Egan v. Moore*, 20 App. Div. 2d 150, 245 N.Y.S.2d 622, 14 N.Y.2d 775, 250 N.Y.S.2d 609, 199 N.E.2d 842 (1964).

marginal costs incurred by the university, existing bans are not addressed to these problems but are selective, denying facilities to a particular class of speakers defined by past actions or previously expressed views. A prohibition resting solely on the credentials of the speaker is unjustifiable.

An argument could be made that the university must be free to deny the use of campus facilities to speakers whose subject is not amenable to scholarly or intellectual inquiry, so that a speech adding nothing to the students' educational experience would be inconsistent with the lawfully dedicated use of university property. However, to sanction even a narrowly drawn ban directed at the speaker's subject matter could be subject to abuse as almost any controversial speaker could be excluded as "noneducational." If the courts confer subject matter censorship on universities, a broad conception of the uses to which universities are dedicated should be adopted. If the university makes its facilities available for discussion of a particular issue or subject, it should not be permitted to exclude representatives of particular positions.<sup>149</sup>

The right of student newspapers to freely criticize the university administration, even when supported by state funds, has been judicially recognized by a court which found unconstitutional as an infringement of first amendment rights the dismissal of a student editor who criticized the Alabama Legislature in an editorial in violation of a school rule prohibiting such criticism.<sup>150</sup> However, the court indicated that the expulsion might have been upheld if a reasonable relation could be found to the maintenance of order and discipline. It remains to be seen if the principle can be extended to prevent the firing of student editors or the preventing of distribution of student publications. Though restraints on the student press might justly be imposed which the state could not impose on the press generally, students should have the opportunity to freely express themselves. A rule banning criticism not based on demonstrable fact would be justifiable to encourage responsible editorial comment.<sup>151</sup>

### C. *Rights in Private Universities*

The fourteenth amendment and the Civil Rights statutes require state action or action under color of law as a basis for jurisdiction. An element of state action must be found if constitutional rights are to be invoked to

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149. *Developments in the Law, supra* note 82, at 1132-33.

150. *Dickey v. Alabama St. Bd. of Educ.*, 273 F. Supp. 613 (M.D. Ala. 1967). An action in the United States District Court, Case No. 68 C 717, *Scoville v. Bd. of Educ.* challenged the suspension of two 17-year-old high school students following the distribution of an unauthorized publication. Judge Alexander J. Napoli heard on July 19, 1968, that under the state statutes the School Board had sufficient delegated authority to make a finding of gross misconduct and that no federal ground existed that would apply to a state-supported high school. Judge Napoli followed the precedent of the California case wherein the district court of appeal applied the first amendment differently to high school students than college students. *Robinson v. Sacramento City Unified School Dist.*, 245 A.C.A. 311, 53 Cal. Rptr. 781 (1966), noted 55 CALIF. L. REV. 911 (1967).

151. *Developments in the Law, supra* note 82, at 1130.

protect students or faculty members.<sup>152</sup> There has been an expansion of the concept of state action so as to encompass private schools, casting doubt on those cases which had held that private schools had no fourteenth amendment obligation. State action may be found where sufficient state involvement exists, such as a free library receiving appropriations from a city.<sup>153</sup> In *Griffin v. State Board of Education*,<sup>154</sup> state action was found in that state aid was determinative to perpetuate segregation where tuition grants were made to students to attend private schools. The Court found the aid necessary to the school's existence even though no state effort was made to make the schools discriminate. However, the courts have not extended this approach beyond cases where the school's entire budget emanates from the state.<sup>155</sup> In the absence of direct financial control, the role of state agents in administering a school may give them control.

Even when the institution is not an instrumentality of the state nor controlled by it, specific acts or policies may be permeated with state control to such a degree as to call for constitutional protection.<sup>156</sup> When the state does not finance or closely regulate the institution or the questioned activity, courts have found that certain combinations of factors relating the state to the private sector may provide a sufficient nexus to justify a finding of state action. In *Burton v. Wilmington Parking Authority*,<sup>157</sup> the Court found state action in segregation by a private restaurant leased in a public building. In *Evans v. Newton*, state action was found as to a private park situation adjacent to a public park.<sup>158</sup>

With this approach, state action may often be found in that private schools use state and federal funds, participate in governmental programs, receive tax immunities, or enjoy special protection afforded charitable institutions. Moreover, many private universities are chartered by the state and must comply with state educational requirements. These indicia were found in the most updated Girard College case.<sup>159</sup> In *Simkins v. Moses H. Cone Memorial Hospital*,<sup>160</sup> state action was found with regard to a private hospital in that it received federal and state aid and the state had

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152. *Id.* at 1056.

153. *Kerr v. Enoch Pratt Free Library*, 149 F.2d 212 (4th Cir.), *cert. denied*, 326 U.S. 721 (1945).

154. 239 F. Supp. 560 (E.D. Va. 1965).

155. *Developments in the Law*, *supra* note 82, at 1057.

156. *Id.*; *Public Util. Comm. v. Pollock*, 343 U.S. 451 (1952).

157. 365 U.S. 715 (1961).

158. 382 U.S. 296 (1966).

159. *Pennsylvania v. Brown*, 270 F. Supp. 782 (E.D. Pa. 1967). In *Guillory v. Administrators of Tulane Univ.*, 203 F. Supp. 855 (E.D. La. 1962), *judgment vacated and new trial ordered*, 207 F. Supp. 554, *aff'd per curiam*, 306 F.2d 489 (5th Cir.), *rev'd on retrial*, 212 F. Supp. 674 (E.D. La. 1962). Judge Skelley Wright examined the connections between Tulane University and the State of Louisiana and found state action in that it had been a state institution, enjoyed a special franchise and charter with tax exemption and state officials had served on its board of trustees. The case was reversed at a new trial, 212 F. Supp. 674 (E.D. La. 1967).

160. 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964).

picked it as part of a federal aid plan. Another approach might be to find the university engaged in state action because it assumes a public function, a rationale which has been applied to company towns and party primaries.<sup>161</sup> However, these cases involved the issue of race, and the courts might not be inclined to find state action in other areas. A sound approach might be to find state action under either a control, indicia or public function approach and then recognize that the demands of equal protection and due process vary with the institution and issue involved. The objectives of the college, such as where it is a religious institution, might be taken into account.<sup>162</sup>

In the case of private schools the courts still follow the contract approach in determining whether the student's discipline comports with due process. In *Carr v. St. John's University*,<sup>163</sup> the appellate division reversed a lower court decision ordering the reinstatement of students who were expelled after a hearing before a faculty committee for participating in a civil wedding ceremony in violation of the tenets of the Catholic religion. The college catalogue had provided that "in conformity with the ideals of Christian education and conduct, the University reserves the right to dismiss a student at any time on whatever ground the University judges advisable." The trial court found this language too vague. In reversing, the appellate division reasoned that the customary use of the terms gave the students sufficient clarity as to their meaning. The court of appeals affirmed without an opinion, but two judges dissented, arguing that no distinction should be made between private and public institutions of learning because of the nexus with the state.<sup>164</sup> The distinction between public and private, though still accepted, is highly technical.<sup>165</sup>

One suggested approach which may increase legal protection for students in both public and private universities is to regard the student-university relationship as fiduciary in nature. This places confidence and trust in the university to receive an education, reposing confidence in its skill and abilities. As a fiduciary, the university cannot exercise any action

161. *Marsh v. Alabama*, 326 U.S. 501 (1946); *Terry v. Adams*, 345 U.S. 461 (1953).

162. *Developments in the Law*, *supra* note 82, at 1061.

163. 17 App. Div. 2d 632, 231 N.Y.S.2d 410 (1962).

164. 12 N.Y.2d 802, 235 N.Y.S.2d 834, 187 N.E.2d 18 (1962).

165. Note, *Procedural Limitations on the Expulsion of College and University Students*, 10 St. Louis U.L.J. 542 (1966). One writer has observed:

Many persuasive reasons can be asserted for applying the Fourteenth Amendment to private as well as state supported schools. When private property is used in a manner which substantially affects the community at large, it is clothed with a public interest and comes within the scope of the Fourteenth Amendment. Private universities require state license or charter, generally receiving special tax treatment and unquestionably perform an essential public service. It requires no great expansion of accepted concepts to constitutional law to find that the guarantees secured by the Fourteenth Amendment are applicable in measuring the legality of the conduct of a private university. Thus, one judge recently observed that: "[A]dministrators of a private college . . . do the work of the state, often in place of the state. Does it not follow that they stand in the state's shoes? And, if so, are they not then agents of the state, subject to the constitutional restraints on government action to the same extent as private persons who govern a company town?"

*Guillory v. Tulane Univ.*, 203 F. Supp. 858 (E.D. La. 1962). *Goldman*, *supra* note 114, at 650.

which has the taint of unreasonableness, unfairness or arbitrariness. Given this fiduciary relationship, the courts would have the duty to examine the university's conduct. The university would then have the fiduciary burden of proving the integrity of its educational trust and of establishing that it acted in a just and reasonable manner. As a fiduciary the university would then have a duty to the general community, the student, and the parents.<sup>166</sup>

### III. THE OMBUDSMAN—A PROPOSAL FOR PROTECTING ACADEMIC FREEDOM

The judiciary is an imperfect means for the protection of academic freedom, regardless of whether the rights of students or of faculty members are involved. Litigation is expensive and may be protracted. Moreover, the courts may be invoked in only the most extreme cases, and its concept of academic freedom and *academic due process* may be more limited than what is commonly recognized in the academic community.<sup>167</sup> Furthermore, courts are not well equipped to develop educational policies.

Academic due process and academic freedom can best be promoted and protected by the establishment of an academic *Ombudsman*. The *Ombudsman* idea, originating in the Scandinavian countries, envisions the establishment of an institution to rectify arbitrary governmental action and mistakes with authority to lodge complaints, initiate judicial action and propose legislative reform.<sup>168</sup> The institution has been adopted throughout the world and proposals have been made for its establishment, in varied form, at the national, state and local levels of American government.<sup>169</sup> As an institutional device, the *Ombudsman* is peculiarly adapted to secure *academic due process* by examining complaints of infringement upon faculty or student rights and in suggesting changes in university administrative policies. Conceivably, such an institution could function as an adjunct of the university administration itself, acting as an independent entity. But where, as has happened at a number of universities such as Columbia, the university administration has been beset with distrust and complete loss of confidence by a substantial portion of the academic community, the *Ombudsman* would function most effectively if it were wholly independent of the university administration. The institution might be set up through legislative action at the state or federal level, but the general distrust in this country for uniform government regulation of education, particularly as affecting private education, suggests that the better approach would be to establish the academic *Ombudsman* as a non-

166. Goldman, *supra* note 114.

167. Murphy, *supra* note 83, at 54.

168. See generally W. GELLHORN, OMBUDSMAN AND OTHERS (1967); *The Ombudsman or Citizen's Defender: A Modern Institution*, 377 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. (May 1968); OMBUDSMAN FOR AMERICAN GOVERNMENT? (Anderson, ed., 1968) [hereinafter cited as ANDERSON].

169. ANDERSON, *supra* note 168.



governmental entity. It would best function as an adjunct to college and university accrediting agencies with the threat of withholding or denying accreditation as a means for enforcement of its recommendations.

A precedent for an academic *Ombudsman* exists in the American Association of University Professors which delegates committees to undertake independent investigations of cases involving the denial of *academic due process* to college professors. It examines each case and if a denial of *academic due process* is found, it seeks redress and an adoption by the university of a change in policies.<sup>170</sup> Each case is considered in the light of advancing the principles of academic freedom, with the interest of the individual faculty member submerged to this overriding goal. The Association renders advisory opinions interpreting its broad statement on academic freedom which was formulated in 1940 and from time to time issues supplementary statements. Reports are also issued of investigations of particular cases with decisions enforceable by pressures, such as threatened boycotts of the institutions which are involved, *i.e.*, professors are informed not to seek employment at these universities. However, reports of prior investigations are not treated as precedents as each report purports to be a *de novo* application of the basic principles of the 1940 statement. But an increasing tendency has been manifested for the codification of decisions.

In many academic freedom disputes the AAUP also plays a role as mediator. When a satisfactory settlement of the dispute cannot be achieved through mediation, an *ad hoc* investigation is conducted by a committee composed of professors from outside the particular university involved which then renders a decision and issues a report. The committees consider the parties' opposing claims and the general conditions affecting academic freedom in a wide ranging inquiry. A preliminary report is first issued, which is commented upon by the parties, and then a final report is published in the *AAUP Bulletin*. This approach, though assuring thoroughness and accuracy, has the disadvantage of causing a two-year delay between the filing of the original complaint and the publication of the final report. Where a serious situation exists, the institution is censured and boycotted. In an extreme case, the AAUP may recommend that the regional accreditation association reconsider the institution's status. Most censured schools come in contact with the AAUP to bring about reforms. The AAUP, in bargaining with the censured institution, may not necessarily seek redress of the professor's rights, if a change in academic policies is achieved, thus subordinating the individual's interest to that of the academic community. The AAUP functions as a restraining influence upon the administration and the Board of Trustees. The professor feels his own rights and intellectual autonomy will be protected as an increasing number of complaints has been filed.

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170. Joughin in BAADE & EVERETT, *supra* note 70; *Developments in the Law, supra*, 1105-12.

The AAUP as a protector of *academic due process* is limited in its effectiveness in that it does not necessarily secure the rights of the individual professor in a particular grievance. Moreover, it merely seeks to protect the rights of professors and other faculty members with little regard for the rights of students.

Another precedent for an academic *Ombudsman* is to be found in the accrediting institutions. Absent a single, authoritative body to establish uniform national standards, private accrediting agencies were created to formulate standards of proficiency to qualitatively evaluate educational institutions.<sup>171</sup> The activities of these institutions are coordinated by the National Commission on Accreditation, created in 1950 to "accredit" accrediting agencies. Presently, six regional and approximately thirty professional accrediting agencies have met the National Commission's standards for acceptance. Generally, regional agencies accredit public and private universities and colleges within its jurisdiction, evaluating each institution's over-all program with focus on the undergraduate level while professional agencies are national in scope, approving specific programs of study. The National Commission has sought to promote coordination and uniformity. The accrediting association establishes certain minimum standards which each educational institution must meet to receive accreditation. Representatives of the association visit the campus and the information obtained, along with data submitted by the institution, is presented to a review committee which determines whether to grant or deny accreditation. Each decision is then appealable to an internal body. The associations recognize the autonomy of the university, being concerned with the general policies of the school and refraining from interfering with the institution's exercise of discretion in individual matters. The accrediting associations have functioned as protectors of academic freedom by refusing to recognize any institution not professing "integrity of operation," freedom from political and governmental interference. The Southern Association of Colleges and Schools threatened disaccreditation of all state colleges and universities in Mississippi when the governor of that state became involved in the racial problems of the schools of Mississippi.<sup>172</sup> The Southern Association also threatened disaccreditation of North Carolina University after the state legislature enacted a statute forbidding any subversive or communist-affiliated individual, or anyone, pleading the fifth amendment in governmental investigations into subversive activities, from speaking on state campuses. This threat induced the legislature, in special session, to amend the statute.<sup>173</sup> The Middle States Association of Colleges and Secondary Schools conducted an investigation at St. Johns University to determine the status of academic

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171. See generally Kaplin & Hunter, *The Legal Status of the Educational Accrediting Agency: Problems in Judicial Supervision and Governmental Regulation*, 52 CORNELL L.Q. 104 (1966).

172. *Id.* at 107.

173. *Id.*

freedom in the environment of a church-related school.<sup>174</sup> This Association also refused to accredit a private preparatory school and a junior college because of its profit motive.<sup>175</sup>

Educational accrediting associations are incorporated and subject to the common law of private associations. The accredited schools may be regarded as members and must exhaust all available remedies within the framework of the association before seeking judicial relief. Procedures for internal appeal are generally provided. After exhaustion of remedies the school, if excluded or expelled, may seek equitable relief.<sup>176</sup> For judicial relief to be obtained the university must have been expelled in accordance with the rules of the association; the proceedings must have been undertaken in good faith and in accordance with "natural justice." Where a university is excluded from an association, generally the law would not grant relief. However, when the association enjoys a monopoly position, because of public reliance on it, which is great enough to make membership a necessity for successful operation in that area, courts may intervene. An accrediting association is not truly a voluntary association since accreditation is a prerequisite for the operation of the university, and, because it fulfills a public function, it may be regarded as a quasi-public agency. However, courts are generally reluctant to intervene because of the expertise involved in accreditation. The accrediting association may be regarded as coming within the purview of the fourteenth amendment in that their function is quasi-public and accreditation is relied upon for distributing government funds to universities. Moreover, many state institutions are members of these associations.<sup>177</sup> However, in *Parsons College v. North Central Association of Colleges & Secondary Schools*<sup>178</sup> Judge Julius Hoffman of the Northern District of Illinois refused to intervene in an action involving the expulsion of a school, holding that constitutional protections do not apply to private associations and that the procedures for disaccreditation were in accordance with the rules of the Association. This decision, however, is highly questionable in that it ignores the true nature of the function of an accrediting association, which is, in fact, *quasi-public*.

The accrediting associations may be utilized in establishing an academic *Ombudsman*. A basic requirement for an education is the maintenance of standards of academic freedom which can only function within the context of *academic due process*. Therefore, a university must adhere to the principles of academic freedom to receive accreditation. Clearly, accrediting associations could properly establish means for investigating disputes involving the application of principles of academic freedom as

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174. *Id.*

175. *Id.* at 108; *Marjorie Webster Jr. College Inc. v. Middle States Ass'n of Colleges and Secondary Schools*, Civil No. 1515-66, U.S. Dist. Ct. D.C. (Complaint filed June 10, 1966).

176. Kaplin & Hunter, *supra* note 171, at 108-20.

177. Kaplin & Hunter, *supra* note 171.

178. 271 F. Supp. 65 (N.D. Ill. 1967).

applied both to faculty members and to students. The National Commission, working in cooperation with regional and professional accrediting associations, the United States Office of Education, the AAUP and the American Association of Universities, should formulate standards for *academic due process*. Where disputes arise, complaints could be filed with an *Ombudsman* attached to an appropriate regional association or professional association which would investigate, mediate, render findings and suggest means for compliance. The threat of disaccreditation would secure compliance or the *Ombudsman* could initiate judicial relief on behalf of the aggrieved party. The university administration would also be accorded rights of appeal to review the findings of the *Ombudsman* within the association and could also have ultimate judicial recourse.

The Writ of Habeas Scholastica, like the Writ of Habeas Corpus, would be readily invoked by any member or group within the academic community whose rights are adversely affected by administrative action. The form of the Writ would be simple and could be asserted without assistance of counsel, much like prisoners are capable of filing habeas corpus writs *pro se*. The Writ would be a petition requesting the academic *Ombudsman* to investigate the matter and take appropriate action.

Such an *Ombudsman* would be an effective bulwark for helping universities, beset with outside pressures, to adhere to principles of *academic due process*. The threat of disaccreditation would strengthen the position of universities confronted with legislative and other political pressure to dismiss faculty or students who espouse unpopular political views or engage in controversial political activities. The position of private universities would also be bolstered in its relation with alumni and certain contributors.

With reference to students, the *Ombudsman* would help reduce tensions and eliminate frustrations. As an institution, it would function as a confessor, having a father image in advising students as to their rights and in guiding them. Being independent of the administration, it would have a cathartic effect by listening and evaluating students' complaints and in exerting power to achieve what are found to be goals which accord with principles of academic freedom. Though some students, adhering to the ideas of Herbert Marcuse,<sup>179</sup> may reject any solution within the context of the present social system, many students will find the *Ombudsman* an effective legal and democratic means for redress of grievances. The *Ombudsman* may properly urge effective student participation in university affairs as an application of principles of academic freedom and may also demand the establishment of fair procedures regarding student discipline. In many universities throughout the country, student disciplinary procedures have not been clearly formulated.<sup>180</sup> This would be an area where an academic *Ombudsman* could assume an effective role.

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179. H. MARCUSE, *ONE DIMENSIONAL MAN* (1962).

180. A survey by Van Alstyne in *Procedural Due Process and State University Students*,

Student participation in university decision-making is an effective means for the protection of student rights. But such participation does not mean student control of the university. Rather, it means student influence. A number of universities have granted students the right to exercise authority in certain matters and in making policy for the university.<sup>181</sup>

The *Ombudsman* would also protect the rights of faculty members.

10 U.C.L.A.L. Rev. 368, 369 (1963), involving 72 universities revealed that 43% do not provide students with a reasonably clear and specific list which describes misconduct subject to discipline; 53% do not provide students with a written statement specifying the nature of the misconduct charged and only 17% provide such a statement at least ten days before the determination of guilt or imposition of punishment; 16% do not even provide for a hearing where students take exception to the charge of misconduct; 47% allow students or administrators who appear as witnesses or who bring the charge to sit on the hearing board if they are otherwise a member; 30% do not allow the student charges to be accompanied by an advisory of his choice during the hearing; 26% do not permit students to question witnesses; 47% permit the hearing board to consider evidence which was improperly acquired, e.g., removed by a university employee from a student's room absent an emergency justifying such a procedure; but 90% provide for appeal, normally to a dean.

181. *Developments in the Law*, supra note 82 at 1157-59; Sherry, *Governance of the University: Rules, Rights and Responsibilities*, 54 CALIF. L. REV. 23 (1966).

182. *The Siege of Columbia*, RAMPARTS at 27 (June 1968). In *Ombudsmen Urged All Over Country*, New York Times, August 11, 1968, at 6 (late city ed.), it is reported:

Complaint officers whose job is to cut through bureaucratic red tape for ordinary citizens would be established by all levels of government, if recommendations by a conference co-sponsored by the University of California are followed.

The office of ombudsman, so named in Sweden, where it was first established, is needed to "amplify the voice of the citizen in the halls of government," according to the conference report by the Western American Assembly on the ombudsman, held in Berkeley for 66 officials and political scientists.

The consensus report adopted by the conference urges that the ombudsman be introduced at the Federal level "to humanize the remoteness and occasional harshness of this large bureaucracy."

Others should be chosen by the states, the report said, to cover branches of their governments except the governor, legislature and judiciary. The ombudsman's power, as defined in the report, is exerted through investigation, persuasion and publicity. He would not be able to reverse decisions.

A symptom of the student revolts is the establishment of the Anti-University of London. Established by left-wing intellectuals, the Anti-University has a range of student permissiveness that would shock the most informal don at Oxford.

Its founders and lecturers (or anti-lecturers) are largely American left-wing activists and leaders of the British "underground" movement. Poets, painters, sculptors, publishers, writers, psycho-analysts, sociologists and historians meet here in a strange atmosphere of "free thought" and "revolutionary ideas."

The anti-university was founded as the "answer to the intellectual bankruptcy and spiritual emptiness of the educational establishment in England and the rest of the Western world." The list of lectures exhibits a definite political leaning. All ambivalence ends when the visitor sees posters of the new martyr Che Guevara on the walls, and press clippings about Vietnam war conscientious objectors on the tables.

Robin Alp, *Now the Anti-University*, ATLAS (September 1968) at 30-32. See generally *Anatomy of a Riot: An Analytical Symposium of the Causes and Effects of Riots*, 45 J. URBAN L. Nos. 3-4 (Spring-Summer 1968); Greenberg, *The Supreme Court, Civil Riots and Civil Dissonance*, 77 YALE L.J. 1520-44 (1968); Comment, *Judicial Control of the Riot Curfew*, 77 YALE L.J. 1560-73 (1968); B. W. Heineman, *Tyranny of the Majority—Tyranny of the Minority*, 49 CHICAGO BAR RECORD, SPECIAL SUPPLEMENT 434-441 (Summer 1968); Comment, *Black Power Advocacy: Criminal Anarchy or Free Speech*, 56 CALIF. L. REV. No. 3 (May 1968); Comment, *Kill or Be Killed?: Use of Deadly Force in the Riot Situation*, 56 CALIF. L. REV. No. 3 (May 1968); A. Schlesinger, Jr., *What is Behind the Student Revolts*, SATURDAY EVENING POST, Sept. 21, 1968, at 24, et seq.; M. Rudd, *We Want Revolution*, SATURDAY EVENING POST, Sept. 21, 1968, at 26, et seq.; and B. McGuire, *It Wasn't Worth It*, SATURDAY EVENING POST, Sept. 21, 1968, at 27, et seq.

In this role it would function in conjunction with the AAUP. A professor could appeal to either the *Ombudsman* or the AAUP for assistance, and in some cases the two could combine their efforts.

The assistance of the *Ombudsman* would be invoked by filing a *Writ of Habeas Scholastica* which would allege the grievance and the relief sought. Agents of the *Ombudsman*, stationed in communities having colleges or universities, would be readily available to process the complaints and would proceed promptly. The confidence of the academic community would have to be obtained through prompt and effective action.

The *Ombudsman* would also consider such controversies as university involvement with the Pentagon and the defense establishment. It would determine whether such involvement compromises the university's integrity, and independence as an educational institution. If this involvement means that the school would have to exclude certain professors as security risks because of adherence to certain political outlooks or pursue certain academic policies, a finding could be made whether academic freedom has been infringed. Moreover, the *Ombudsman* should also consider the sentiment of the campus community. If the manifested opinion of the student body and the faculty is opposed to such involvement because of reasons of conscience, the *Ombudsman* could properly find a situation which is not conducive to adherence to a climate of academic freedom and a sense of community.

Similarly, the *Ombudsman* could consider such other university policies as involvement with the surrounding community, such as the real estate acquisitions by Columbia University in Harlem which has resulted in community disruption.<sup>182</sup> Where this results in an environment of discord, a finding of nonadherence to academic due process might properly be found.

#### IV. CONCLUSION

The world student unrest, a release of emotional frustrations resulting from a feeling of impotency in a highly depersonalized society, has focused upon the university as an immediate target. The result is a questioning of established authority which can well result in an extension of academic freedom by recognizing the rights of students to participate in campus decision-making. The proposal for an academic *Ombudsman* suggests a means for sublimating student unrest into a legal form. The *Ombudsman* is a means for securing the rights of professors as well as students in a manner which supplements judicial recourse and is more efficient. The *Ombudsman*, unlike a court, is in a position to make wide ranging inquiries and would have the expertise to suggest educational reforms. It could well emerge as the tool for reforming and reorganizing the multiversity and function as a buckler and shield for *academic due process*.