

# Notes

## Equity on the Campus: The Limits of Injunctive Regulation of University Protest

Again, it is urged that the desire born of a chancellor's conscience is 'kinder than the club of the police,' better than 'doubtful results' in a criminal court. Presently, it will be shown that such humility is neither wise nor kind, since it begs the most vulnerable charges against the injunction—that the injunction includes more than the lawless; that it leaves the lawless undefined and thus terrorizes innocent conduct. . . .<sup>1</sup>

As the number and vehemence of campus confrontations have spiraled upward,<sup>2</sup> university administrations have placed increasing reliance on injunctions to quiet the turmoil. In November 1967, the University of Wisconsin secured a temporary injunction—the first of its kind—to restrain students from interfering with job recruitment interviews on the university's Madison campus.<sup>3</sup> During the next year fifty-three injunctions against allegedly disruptive student behavior were granted to universities,<sup>4</sup> and, since then, the pace has continued unabated.<sup>5</sup> As with the fields of labor relations<sup>6</sup> and civil rights,<sup>7</sup> equity, that "gloss written 'round our code,'"<sup>8</sup> has acquired a new look.<sup>9</sup>

This Note explores what limitations should be placed on the emerging technique of campus crisis management by injunction. The enjoining of student protest activities in universities will be viewed from

1. F. FRANKFURTER & N. GREENE, *THE LABOR INJUNCTION* 81 (1950).

2. See generally REPORT OF THE PRESIDENT'S COMM'N ON CAMPUS UNREST 17-49 (1970); Urban Research Corp., *Student Protests, 1969: Summary* (1970); Bayer & Austin, *Violence and Disruption on the U.S. Campus, 1968-69*, 34 EDUC. RECORD 346 (1969); J. SKOLNICK, *THE POLITICS OF PROTEST* 68-76 (Nat'l Comm'n on the Causes and Prevention of Violence Staff Report No. 3, 1969).

3. The injunction named as defendants individual students and the Madison Chapter of Students for a Democratic Society. It remained in force for one year, largely forgotten as the university did not seek a permanent injunction. Interview with George Bunn, past counsel to University of Wisconsin, Aug. 5, 1970, on file with the *Yale Law Journal*.

4. Bayer & Austin, *supra* note 2.

5. See generally URBAN RESEARCH CORP., *ON STRIKE . . . SHUT IT DOWN! A REPORT ON THE FIRST NATIONAL STUDENT STRIKE IN U.S. HISTORY* (1970).

6. See FRANKFURTER & GREENE, *supra* note 1, at 47-53.

7. See, e.g., Avins & Crutchfield, *Prima Facie Tort and Injunctions—New Remedies Against Sitdowns*, 24 GA. B.J. 20 (1961).

8. F.W. MAITLAND, *LECTURES ON EQUITY* 18 (1909).

9. Address by J.P. Holloway, Institute for Continuing Legal Education Conference on Student Protest and the Law II, Ann Arbor, Mich., Aug. 20, 1970.

three perspectives: first, the power of equity to intercede on behalf of a university administration<sup>10</sup> will be evaluated; second, the extent to which the First Amendment protects student protests from restraint by injunction will be described; and, third, the factors which influence the effectiveness of the injunctive remedy in providing temporary relief from student disruptions will be outlined. On the basis of this analysis, a series of guidelines for the deployment of campus injunctions will be delineated.

## I. Equitable Jurisdiction

In practice, most universities seeking injunctions have encountered little or no difficulty obtaining the relief requested,<sup>11</sup> often in a matter

10. The university administration is by no means the only possible plaintiff. Faculty, students, parents, residents adjacent to the troubled campus, and public prosecutors might petition for injunctive relief. Since an injunction is available to restrain interference with contract rights, *e.g.*, *United Kosher Butchers Ass'n v. Assoc. Synagogues*, 349 Mass. 595, 211 N.E.2d 332, 335 (1965), students and faculty might be able to secure injunctive relief by characterizing their relationship to the university as contractual. *Cf. Paynter v. New York Univ.*, 64 Misc. 2d 226, 314 N.Y.S.2d 676 (Civ. Ct. N.Y. City, Small Claims Div. 1970); *Wilson, Suits by Students, Taxpayers, and Others Against Institutions Arising Out of Disruptions in the Educational Processes*, 5 COLLEGE COUNSEL 134 (1970). Under proper conditions an action under 42 U.S.C. § 1983 might be brought, *see Belk v. Chancellor of Washington Univ.*, No. FOC 151(1) (E.D. Mo. Nov. 25, 1970), 3 COLLEGE L. BULL. 36 (1971); *cf. Central Presbyterian Church v. Black Liberation Front*, 303 F. Supp. 894 (E.D. Mo. 1969). *But see Asher v. Harrington*, 318 F. Supp. 82 (E.D. Wis. 1970). Or, all plaintiffs could proceed on a public nuisance theory, *see* 4 POMEROY, EQUITY JURISPRUDENCE § 1349 (5th ed. 1941).

In one case to date students and parents have succeeded in obtaining an injunction restraining other students (at Ohio State University) from creating further disturbances. *Coppeler v. Cohen*, No. 240,650 (Ct. C.P., Franklin County, Ohio, June 8, 1970), 2 COLLEGE L. BULL. 71 (1970). In another, University of Maryland students secured an *ex parte* order forbidding the use of any sound amplifying equipment on campus except by law enforcement officials or for scheduled athletic events. *Edgar v. Elkins*, No. D-4681 (Cir. Ct. Prince-George County, Md. Sept. 11, 1970), *dissolved*, No. D-4681 (Cir. Ct. Prince George County, Md. Sept. 14, 1970), 3 COLLEGE L. BULL. (1970). Public prosecutors are also showing signs of life. A petition by a county prosecuting attorney to close Kent State University was summarily granted. *State of Ohio v. White*, No. 39,346 (Ct. C.P. Portage County, Ohio May 7, 1970), *dissolved*, No. 39,346 (Ct. C.P. Portage County, Ohio June 13, 1970), 2 COLLEGE L. BULL. 71 (1970).

Despite the importance of these trends, attention is focused on the university administration as plaintiff for two reasons. As a practical matter, universities will probably maintain their dominant role as plaintiffs in injunction suits against protesting students; and, as a tactical matter, in view of the need for a sensitive coordinated response to a campus disturbance, the university will almost always be the most suitable plaintiff.

11. A case that reveals the readiness of courts to supply injunctive relief is *George Washington Univ. v. Tizer*, Civil No. 1390-70 (D.D.C. May 6, 1970). Students in Washington, D.C., demanded that their school provide facilities for housing demonstrators arriving in May 1970 to protest the invasion of Cambodia. Despite the fact that classes had previously been canceled for the week, it claimed "irreparable injury in that [it was] unable to gain complete and free ingress to said [student union] building in order to perform [sic] the administrative officials to carry on the educational process." *George Washington Univ. v. Tizer*, Civil No. 1390-70 (D.D.C. May 6, 1970) (Complaint for Temporary Restraining Order and Other Injunctive Relief), at 4. On the basis of these allegations and a reference to threats to "damage, obstruct, and deny the administration the use of" other buildings, *id.*, the court enjoined, *inter alia*:

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of hours.<sup>12</sup> *Ex parte* proceedings for temporary restraining orders [TROs] are prevalent,<sup>13</sup> and generalized allegations of harm to universities are rarely scrutinized.<sup>14</sup>

The apparent ease with which universities have secured court orders contrasts sharply with the courts' historic preference for noninjunctive remedies.<sup>15</sup> Although the exact boundaries of equity jurisdiction are not clearly marked,<sup>16</sup> they are drawn, in part, from the redoubtable maxim that equity will not give specific relief if an adequate remedy at law is available.<sup>17</sup> If this maxim is to be meaningful in defining the role of the judiciary in resolving campus conflicts, then injunctive orders should not be granted except where severe disruption to the educational mission of the university is imminent.

This limitation on the exercise of equitable jurisdiction follows from the need for the university, as injunction plaintiff, to overcome the availability of two major legal remedies for disruptive student behavior, civil damage suits and criminal proceedings.<sup>18</sup> As for the

Entering or remaining in any building on University premises where entry thereto is unauthorized or has been prohibited to them by the plaintiff . . . , or where the University officials have asked them to leave; . . . interfering with the rights of . . . others in the performance of their duties . . . ; disrupting, impeding lawful activities on University premises; and/or inciting or encouraging others to do any of the aforementioned acts . . . .

12. See, e.g., *Hearings on Riots, Civil and Criminal Disorders Before a Subcommittee of the Senate Committee on Government Operations*, 91st Cong., 1st Sess., pt. 23, at 5271 (1969) (statement of Andrew Cordier, Acting President of Columbia University). Some university counsel have prepackaged complaints into which only the defendants' names and threatened acts need be inserted to activate the request for a temporary restraining order. INSTITUTE FOR CONTINUING LEGAL EDUCATION, *STUDENT PROTEST AND THE LAW* 152 (G. Holmes, ed. 1969).

13. See pp. 1024-25 *infra*.

14. See *STUDENT PROTEST*, *supra* note 12, at 149; Note, *Campus Confrontation: Resolution by Injunction*, 6 COLUM. J.L. & SOCIAL PROBLEMS 1, 3 n.9 (1970).

15. See H. McClintock, *Injunctions Against Sit-Down Strikes*, 23 IOWA L. REV. 149, 151 (1938).

16. As Professor Chafee noted:

'Equity jurisdiction' has no bright line around it. Its boundaries are as wavy and confusing as some of those devised by the various schemes for partitioning Palestine. Z. CHAFEE, *SOME PROBLEMS OF EQUITY* §13 (1950).

17. In holding that a lower federal court erred in enjoining prosecutions under a state law alleged to violate the First Amendment, the Supreme Court recently reiterated the limited character of equity jurisdiction and may have enshrined the maxim as a constitutional requirement. Writing for the majority in *Younger v. Harris*, 91 S. Ct. 746 (1971), Mr. Justice Black emphasized the force, "under our Constitution," of the "basic doctrine of equity jurisprudence that courts of equity should not act . . . when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief."

18. Other remedies may occasionally be proffered. For example, an action for ejectment might be brought against trespassers and campus police used to restore order. These non-injunctive remedies are dealt with in Herman, *Injunctive Control of Disruptive Student Demonstrations*, 56 VA. L. REV. 215, 228 (1970). It should be added to Professor Herman's discussion of self-help that a few courts may require exhaustion of internal remedies, i.e., disciplinary action, before granting permanent injunctions. See Holloway, *supra* note 9; cf. *DeVito v. McMurray*, 311 N.Y.S.2d 617 (Sup. Ct., Queens County, 1970).

first, equitable jurisdiction may nevertheless be proper inasmuch as interference with the university's educational mission is the type of injury not susceptible to compensation by way of money damages.<sup>19</sup> As in cases of interference with a congregation's use of church property, not only is the injury all but impossible to quantify in dollars and cents,<sup>20</sup> but the very use to which the property is dedicated is thwarted.<sup>21</sup> Accordingly, the requirement that recourse be had to the legal remedy of civil damage suits has not precluded equitable jurisdiction over disruptions of religious meetings,<sup>22</sup> and the rationale of irreparable injury to the institutional mission has been explicitly relied upon by state courts in defending the propriety of enjoining college protests.<sup>23</sup>

The second legal remedy, criminal proceedings against disruptive students, should, however, operate as a more substantial impediment to the exercise of equity jurisdiction. Almost all the campus conduct for which an injunction might be secured is traditionally subject to criminal penalty,<sup>24</sup> and in addition, 32 states have enacted penal legislation specifically dealing with student disturbances, in many instances establishing "severe penalties for destruction of school property and interruption of normal class activity."<sup>25</sup> Furthermore, several jurisdictions have resurrected their riot control laws or passed comprehensive riot control legislation.<sup>26</sup>

19. See generally Rosenthal, *Injunctive Relief Against Campus Disorders*, 118 U. PA. L. REV. 746 (1970).

20. Herman, *supra* note 18, at 228.

21. But see note 165 *infra*.

22. E.g., *Gannon v. Action*, 303 F. Supp. 1240 (E.D. Mo. 1969). This line of case law is discussed in more detail in Rosenthal, *supra* note 19, at 748-50.

23. *Lieberman v. Marshall*, 236 So. 2d 120, 126 (Fla. 1970); *Board of Higher Educ. v. SDS, Queensborough Community College Chapter*, 60 Misc. 2d 114, 300 N.Y.S.2d 988, 988 (Sup. Ct. Queens County 1969).

24. Arson, assault, breach of the peace, conspiracy, disorderly conduct, false imprisonment, inciting riot, malicious destruction of property, riot, willful interference with meeting, trespass, and unlawful entry are examples of the wide range of conduct that falls within the traditional ambit of the criminal law. ABA Committee on Campus Government and Student Dissent, Report 29 (1970).

25. *Christian Science Monitor*, July 3, 1970, at 16, col. 1. The recently enacted statutes make it a crime to refuse to leave a building when notified to do so by a designated official; prohibit interference with freedom of movement or use of facilities; punish "willful disturbance" or conduct that "impedes, coerces, or intimidates" university personnel, or "disruptive acts"; make it a felony to enter and destroy records; or prohibit the possession of firearms of "molotov cocktails" on campus. The usual penalties range from \$500-\$1000 fine and 6 months to one year imprisonment. For a state-by-state summary of the new laws, see STATE OF MICHIGAN COMMITTEE TO INVESTIGATE CAMPUS DISORDERS AND STUDENT UNREST, Final Staff Report, pt. 2 (1970); Gonzales, *State Laws Dealing with Student Unrest, 1969* (Mimeo., Report to the Office of Institutional Research, Nat'l Ass'n of State Universities and Land-Grant Colleges).

26. See Legislative Reference Service, Library of Congress, *State and Federal Law on Riot: A Compilation of Pertinent Statutes, 1969* (available from Legislative Reference Service, Library of Congress).

In enjoining conduct that is also the object of criminal statutes, serious disadvantages are worked upon the defendant which are not present when the behavior is merely a civil wrong.<sup>27</sup> Thus, equity has historically professed its inability to enjoin a crime.<sup>28</sup> The rule is, however, replete with exceptions, most notably for national emergencies, widespread public nuisances, and specific statutory grants of power;<sup>29</sup> but even in its weakened form,<sup>30</sup> it continues to induce courts to refrain from equitable action when criminality is present.<sup>31</sup> Ac-

27. Most jurisdictions do not afford the defendant a trial by jury in the action for the injunction. *See generally*, Van Hecke, *Trial By Jury in Equity Cases*, 31 N. CAR. L. REV. 157 (1953). Disobedience to the court order can result in imprisonment for contempt or a substantial monetary penalty unrelated to the harm actually caused to the plaintiff. Note, *Developments In the Law—Injunctions*, 79 HARV. L. REV. 994, 1004 (1965). Although the defendant is entitled to a jury trial if the contempt is a "serious" offense, *see Baldwin v. New York*, 399 U.S. 66 (1970); *Duncan v. Louisiana*, 391 U.S. 145 (1968), the jury does not pass on the facts that gave rise to the underlying civil controversy, for, with limited exceptions, improper issuance of an injunction does not constitute a defense. *Developments, supra*; *see note 256 infra*. It denies the defendant the higher burden of proof imposed on the state in a criminal action, *People v. Lim*, 18 Cal. 2d 872, 880, 118 P.2d 472, 476 (1941); *cf. Kean v. Hurley*, 179 F.2d 888, 891 (8th Cir. 1950), and, finally, it may make possible the imposition of a multiple penalty—one for contempt of the injunction if violated, and another fixed by the criminal law. *People v. Lim, supra*; *People v. Poe*, 236 Cal. App. 2d 928, 47 Cal. Rptr. 670 (Super. Ct. 1965). In the university context yet two more punishments might be exacted as a result of individual campus disciplinary procedures, *Herman, supra note 18*, at 231-32; *cf. Due v. Florida A. & M. Univ.*, 233 F. Supp. 396 (N.D. Fla. 1963); *Knight v. State Bd. of Educ.*, 200 F. Supp. 174 (M.D. Tenn. 1961), and general federal scholarship termination provisions, *see Note, Federal Aid to Education: Campus Unrest Riders*, 22 STAN. L. REV. 1094 (1970); Note, *Campus Confrontation: Resolution by Legislation*, 6 COLUM. J.L. & SOCIAL PROBLEMS 30 (1970).

28. *See generally Mack, The Revival of Criminal Equity*, 16 HARV. L. REV. 389, 391-92 (1903).

29. *See United States v. Jalas*, 409 F.2d 358, 360 (7th Cir. 1969) (holding that outside these three areas equity is without jurisdiction to enjoin criminality). *But see note 32 infra*. At least one state has provided a specific statutory grant of power by enacting legislation under which the head of an institution of higher learning can seek injunctive relief in the event of a campus disorder. *See GEN. STAT. N. CAR.*, 14-288.18 (1969). To the extent that legislation in this realm might be useful, a statute should follow the model proposed by the National Commission on the Causes and Prevention of Violence, "authorizing universities, along with other affected persons, to obtain court injunctions against willful private acts of physical obstruction that prevent other persons from exercising their First Amendment rights of speech, peaceable assembly, and petition for the redress of grievances," NAT'L COMM'N ON THE CAUSES AND PREVENTION OF VIOLENCE, TO ESTABLISH JUSTICE, TO ENSURE DOMESTIC TRANQUILITY 216 (1969).

30. Criminal acts are sometimes said to lie on the "periphery of injunctive power." Brief for the United States as Amicus Curiae, at 18, *Walker v. City of Birmingham*, 338 U.S. 307 (1967).

31. *See, e.g., People v. Lim*, 18 Cal. 2d 872, 118 P.2d 472 (1941); *cf. United States v. Jalas*, 409 F.2d 358 (7th Cir. 1969); *Bass Angler v. U.S. Steel*, 2 ENVIR. REP. 1204 (S.D. Ala. 1971). *But see note 32 infra*.

To avoid the additional burden imposed by the presence of criminal sanctions, the university may argue that the criminal remedies are themselves inadequate, being too trivial to deter the defendant. *See cases cited in Developments, supra note 27*, at 1016 nn. 200-02. However, the expansion and stiffening of the criminal laws pertinent to campus disorders, *see p. 990 supra*, should make it more difficult for the university to secure relief.

Adequacy of the criminal laws may also be attacked if the private party has no control over the initiation of a criminal action or if a jury would refuse to convict out of an aversion to the substance of the criminal law. *Developments supra*, at 1016. However, public prosecutors have shown no reticence in pressing charges against dissident students,

cordingly, to satisfy the criminality doctrine, the disruption must be serious enough to rise to the level of a widespread public nuisance.

Yet, when it comes to issuing an injunction against dissident students, the courts appear to abandon the limiting principles of equity jurisprudence imposed by the availability of civil damage actions and criminal proceedings. For example, one New York court went so far as to maintain "[w]hether or not the act sought to be enjoined is a crime is immaterial."<sup>32</sup> Similarly, almost any potential harm to the university tends to be termed "irreparable," so that another New York court summarily dismissed defendants' suggestion that because the classes usually conducted in the one building being occupied on the campus could easily be scheduled to meet in a nearby building, the allegation of irreparable injury was deficient.<sup>33</sup> Indeed, one court not only refused to acknowledge that criminality might impede the exercise of equity jurisdiction, but also perceived irreparable injury in the prospect of a peaceful and orderly student meeting involving no interference with any scheduled university activities.<sup>34</sup> In contrast to the present practice, the historic preference for civil actions at law and the correlative distaste for enjoining criminally punishable conduct should require that to secure an injunction, the interference with the educational mission of the university be crippling. Isolated incidents and revolutionary rhetoric should not suffice. The crucial inquiry is not even whether *some* disruption is imminent, but rather whether the disruption is of such *magnitude* as to make it impossible for the university to continue its education services. In each case the determination should rest on such factors as the number of students involved,

in some cases proceeding without the request or consent of—and sometimes even against the wishes of—the university administration. See, e.g., STUDENT PROTEST *supra* note 12, at 135 (charges brought against students at Brooklyn College and Cornell University without consent of schools); *Hearings on Riots*, pt. 22, *supra* note 12, at 4820 (Vorhees students arrested over objections of college president).

A few other arguments might be used by a university in an effort to stimulate emission of an injunction when the quantum of disruption is smaller than that described in the text. It could allege that a multiplicity of suits at law would be required to alleviate the effects of a continued trespass or intermittent disruptions. See POMEROY, *supra* note 10, at 1357; cases cited, *Campus Confrontation*, *supra* note 14, at 2 n.7. Also, insolvency of defendants, although not in itself generally sufficient to justify an injunction, may be relevant. See *id.* at 2 n.8. Factors like these, however, relate only to the adequacy of the civil remedy and do not overcome the problems inherent in enjoining criminality.

32. Board of Higher Educ. v. SDS, Queensborough Community College Chapter, 60 Misc. 2d 114, 119, 300 N.Y.S.2d 983, 989 (Sup. Ct. Queens County 1969), quoting *People ex rel. Bennette v. Laman*, 277 N.Y. 368, 376, 14 N.E.2d 439, 442 (1938). See also Note, 28 FORDHAM L. REV. 161, 162 (1959).

33. Board of Higher Educ. v. Rubain, 62 Misc. 2d 978, 310 N.Y.S.2d 972 (Sup. Ct. Bronx County 1970).

34. Lieberman v. Marshall, 236 So. 2d 120 (Fla. 1970).

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the conduct exhibited or threatened, and its probable duration.<sup>35</sup> For instance, remaining in the student center after closing hours to continue a meeting<sup>36</sup> should not elicit the same response as seizing the computer center<sup>37</sup> or administration building.<sup>38</sup>

In sum, for injunctive relief to be proper, the offensive conduct must be such as to force cessation of at least some teaching or research activity on more than one occasion or severely interfere with other university functions for a prolonged period;<sup>39</sup> however, protest that is only sporadically disruptive or affects only nonessential operations should not be stayed by the hand of equity.<sup>40</sup> Recourse, if any, should be to other remedies.<sup>41</sup>

## II. First Amendment Protections

The trend toward restraining student protest by injunction should be curtailed not only by traditional tests as to when equity may act, but also by a concern for the rights of students to express their ideas and opinions freely and vigorously.<sup>42</sup> To analyze the use of campus

35. *Campus Confrontation*, *supra* note 14, at 28; *cf.* Rosenthal, *supra* note 19, at 751-52. *But see* Herman, *supra* note 18, at 228.

36. *See* Cholmakjian v. Board of Trustees, 315 F. Supp. 1335 (W.D. Mich. 1970).

37. *See* Sill v. Pennsylvania State Univ., 318 F. Supp. 608 (M.D. Pa. 1970).

38. *Cf.* *Campus Confrontations*, *supra* note 14, at 28 n.111. Likewise, occupation of a single classroom building may prove inconvenient but may not involve nearly the injury associated with the conversion of, say, the entire science wing, laboratories and lecture halls alike. Where classes or other activities, like job recruitment interviews, can easily be rescheduled to another building, there can be no irreparable injury to the university, students, or faculty. *But see* Board of Higher Educ. v. Rubain, 62 Misc. 2d 978, 310 N.Y.S.2d 972 (Sup. Ct. Bronx County 1970). But interference with a unique educational facility, such as the political science library or the physics laboratory, is necessarily more serious. On occasion, the non-substitutable nature of the facility may be present only with respect to certain uses. For example, the school auditorium may be essential to accommodate the large audience expected at commencement exercises, but not for a series of poorly attended lectures. *Cf.* Fordham Univ. v. King, 63 Misc. 2d 611, 313 N.Y.S.2d 208 (Sup. Ct. Bronx County 1970).

39. That is, three elements determine the seriousness of the disruption. One is how crucial the facilities being interfered with are to the functioning of the university as an academic institution; the second is how complete the interference is; and the third is how long the interference can be expected to last. *Cf.* Scott v. Alabama State Board of Educ., Civil No. 2865-N (M.D. Ala. May 14, 1969), reprinted in *STUDENT PROTEST*, *supra* note 12, at 315.

40. These guidelines are intended to delineate a threshold below which disruption of university operations does not constitute an enjoined offense. Once it is proved that a disturbance whose proportions bring it above the threshold is imminent, the court should frame its decree to afford adequate relief even if this entails enjoining an act which, taken alone, would not warrant equitable intervention. *But cf.* Lorain Journal Co. v. United States, 342 U.S. 143, 156 (1951).

41. For an outline of the remedies available to the university, *see* O. Williams, *The University's Remedies*, in *Handling Student Demonstrations*, in *THE CAMPUS CRISIS RE-VISITED* 11 (Practising Law Institute 1970).

42. This sentiment is often forcefully espoused in academic and judicial circles. The Supreme Court has repeatedly stated that "[t]he vigilant protection of constitutional

injunctions in First Amendment terms entails determining, first, what forms of protest constitute "expression" cognizable by the First Amendment, and, second, to what extent public universities<sup>43</sup> can regulate activity so classified by injunctive prior restraints<sup>44</sup>—a mode of control "bearing a heavy presumption against its constitutional validity."<sup>45</sup>

freedom is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960), quoted in *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

The general public, however, is less certain, as revealed in a recent Harris poll which found that 52 per cent of the American people believe that students should not have the right to protest—peacefully or otherwise. PRESIDENT'S COMM'N, *supra* note 2, at 219.

43. The extent to which the Fourteenth Amendment constrains the actions of private universities with regard to admissions policies, disciplinary procedures, and control of student expression is not yet settled. See generally O'Neil, *Private Universities and Public Law*, 19 BUFFALO L. REV. 155 (1970). In some cases courts seem to have implicitly assumed the applicability of the First Amendment, though this probably results from mere omission rather than any studied conclusion. See, e.g., *Nat'l Strike Information Center v. Brandeis Univ.*, 315 F. Supp. 928, 930-31 (D. Mass. 1970). Clearly public universities, as instrumentalities of the state, are fully bound by the First Amendment as incorporated into the Fourteenth. On the other hand, although the concept of state action has shown itself to be highly ductile in other contexts, private universities have been able to insulate themselves from the First Amendment. See, e.g., *Post v. Payton*, 39 U.S.L.W. 2437 (E.D.N.Y. Jan. 20, 1971). Accordingly, the First Amendment analysis which is developed in the text can be said to apply with certainty only to public institutions. Nevertheless, at least six theories are available to read state action into the operation of private universities. Cf. Note, *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1056-61 (1968). First, they may be identified with the state by the receipt of government funds. This government financing theory has, however, not fared well when offered with respect to disciplinary proceedings in private universities. See, e.g., *Brown v. Mitchell*, 409 F.2d 593 (10th Cir. 1969); *Powe v. Miles*, 407 F.2d 73 (2d Cir. 1968); Note, *An Overview: The Private University and Due Process*, 1970 DUKE L. REV. 765. Second, private universities may be linked with the state through increased legislative control exerted in response to campus unrest. See *Coleman v. Wagner College*, 429 F.2d 1120 (2d Cir. 1970); O'Neil, *supra*, at 180-81, 184-86. But see *McLoed v. College of Artesia*, 312 F. Supp. 498 (D.N.M. 1970). Third, if, as is often true, campus police possess the power of arrest, their warnings to demonstrators may establish state action. Cf. *Tanner v. Lloyd Corp.*, 308 F. Supp. 128, 131 (D. Ore. 1970); *Sutherland v. Southcenter Shopping Center*, 478 P.2d 792, 794 (Wash. Ct. App. 1970). Fourth, the state's imprimatur in the form of an injunction may, ipso facto, constitute state action. This theory is, of course, supported by the problematical case of *Shelley v. Kraemer*, 334 U.S. 1 (1948), but it is also implicit in the Supreme Court's decision in *Amalgamated Food Employees v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1967) that "the State may not delegate the power, through the use of its trespass laws, wholly to exclude members of the public wishing to exercise their First Amendment rights . . ." *Id.* at 319. But cf. *Evans v. Abney*, 396 U.S. 435 (1970); Note, *Restricted Scholarships, State Universities and the Fourteenth Amendment*, 56 VA. L. REV. 1454, 1463 n.51 (1970). Fifth, if the line of cases similar to *Logan Valley* are read to stand, instead, for the rather metaphysical proposition that private property owners engage in "state action" by allowing their property to become "functionally equivalent" to municipal property, then the private university, like the company owned town in *Marsh v. Alabama*, 326 U.S. 501 (1945), should discover its rights as a private property owner "circumscribed by the . . . constitutional rights of those who use it." *Id.* at 506. Cf. note 115 *supra*. Sixth, from an analogous perspective, education itself may be perceived as a public function, and the action of the educational institution equivalent to that of the state. See *Belk v. Chancellor of Washington Univ., Civil No. 70-C-151(1)* (E.D. Mo. Nov. 25, 1970), 3 COLLEGE L. BULL. 86 (1971); O'Neil, *supra*, at 176-79.

44. A contempt citation is a subsequent punishment only in the sense as is any penalty exacted for disobedience of a prior restraint.

45. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). See also *C.O.R.E. v. Burt*,



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### A. *The Limits of Expression*

In this section, campus protest will be examined in terms of the action/expression dichotomy as a prerequisite to ascertaining when First Amendment protections are operative.<sup>46</sup> While campus demonstrations are complex phenomena composed of many individual acts, some of which will be shown to be "expression," and other, "action," injunctions whose scope is restricted to controlling the elements that are determined to be "action" are governed primarily by the constraints of equitable jurisdiction.<sup>47</sup>

In classifying the forms of campus protest, a general investigation of the problem of "symbolic speech"<sup>48</sup> will not be undertaken. Instead, following the cases in which college protests have attracted the attention (and frequently the ire) of the courts, it will be assumed that even in circumstances where conduct which would otherwise be "action" is undeniably "symbolic" and charged with meaning, it is not thereby transformed into "expression."<sup>49</sup>

The courts have unhesitatingly declared that whenever demonstrators damage persons or property or physically obstruct normal university operations, they forfeit any First Amendment protections which might otherwise be afforded to them.<sup>50</sup> Condemnation of acts of violence, even those undertaken as an integral part of the protest, is unanimous.<sup>51</sup> Indeed, the barest minimum of violence on the part of

318 F.2d, 95, 102 (5th Cir. 1963). *But see* P. FREUND, *THE SUPREME COURT OF THE UNITED STATES* 69-74 (6th ed. 1967).

46. For a comprehensive effort to classify conduct about which First Amendment litigation has centered, see T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970).

47. See pp. 988-93 *supra*. The First Amendment does require that even injunctions against protest classified as "action" be obtained, with limited exceptions, through an adversary proceeding. See pp. 1024-25 *infra*.

48. See generally Note, *Symbolic Conduct*, 60 COLUM. L. REV. 1091 (1968).

49. Cf. Kaufman, *The Medium, the Message, and the First Amendment*, 45 N.Y.U. L. REV. 761 (1970).

50. Since this Note deals only with how traditional First Amendment protections should apply on campuses, no inquiry will be made into whether acts of "civil disobedience"—violent or otherwise—deserve legal protection.

51. Fairly representative of the judicial attitude, a federal district court in Ohio declared in the most *obiter* of *dicta*:

While the constitution guarantees a right of peaceful assembly and the right to petition, it does not condone violence or the destruction of public or private property. . . . Those individuals who violate the law by burning, bombing, and destroying are, and should be, subjected to prosecution for their acts. . . . While those students who disagree with the policies of others have a constitutional right to advance their positions, they have no right to bomb, burn, and interfere with the rights of the vast majority who attend our universities in the pursuit of an education.

*King v. Jones*, 319 F. Supp. 653, 662 (N.D. Ohio 1970).

The following actions have been judged "conduct by students . . . obviously constitutionally subject to severe sanctions . . .," *Marzette v. McPhee*, 294 F. Supp. 562, 569 (W.D. Wis. 1968): breaking windows, see, e.g., *Locke v. Vance*, 307 F. Supp. 439 (S.D. Tex. 1969); slashing fire hoses and stealing food and typewriters, *Board of Higher Educ. v. Marcus*, 63 Misc. 2d 268, 311 N.Y.S.2d 579 (Sup. Ct. Kings County 1970); damaging furniture, see *Mar-*

the demonstrators suffices to transport their dissent beyond the protective aegis of the First Amendment.<sup>52</sup>

Similarly, acts of physical obstruction have been treated as "action" subject to injunction or punishment rather than "expression" potentially protected by the First Amendment. The obstructive behavior can take many forms<sup>53</sup> but always involves conduct by the demonstrators that physically interferes with normal university operations.<sup>54</sup> In particular, most of the physically obstructive campus demonstrations have centered around interference with the movement of persons,<sup>55</sup> but many have also included forcibly taking control of campus facilities.<sup>56</sup>

zette v. McPhee, 294 F. Supp. 562 (W.D. Wis. 1968); banging on doors with "large objects," Board of Higher Educ. v. Rubain, 62 Misc. 2d 978, 310 N.Y.S.2d 972 (Sup. Ct. Bronx County 1970); burning buildings, *see, e.g.*, Cholmakjian v. Board of Trustees, 315 F. Supp. 1335 (W.D. Mich. 1970); breaking into locked offices, Sill v. Pennsylvania State Univ. 318 F. Supp. 608, 612 (M.D. Pa. 1970); dumping and rifling through files, and burning faculty research, *see* Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535 (S.D.N.Y. 1968); and forcing school officials out of their offices, Sill v. Pennsylvania State Univ., *supra*, or holding them captive, *see* Marzette v. McPhee, *supra*, Grossner v. Trustees of Columbia Univ., *supra*. *See also* Barker v. Hardway 283 F. Supp. 228, 238 (S.D.W.Va.), *aff'd*, 599 F.2d 638 (4th Cir. 1968) (per curiam), *cert. denied*, 394 U.S. 905 (1969).

52. The incidents of violence in Esteban v. Central Missouri State College, 290 F. Supp. 622 (W.D. Mo. 1968), *aff'd*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970), led the district court to declare without reservation that an educational institution can protect itself against "conduct that would damage or destroy it or its property in toto or in part." 290 F. Supp. at 629. This broad rule that violent tactics are outside the First Amendment and, therefore are amenable to injunction is consistent with the cautious, if not timid, dicta of the Supreme Court in the symbolic speech cases, *see* Street v. New York, 394 U.S. 579 (1969); Tinker v. Des Moines Independent School Dist., 393 U.S. 503 (1969); United States v. O'Brien, 391 U.S. 367 (1968), and with an earlier decision upholding an injunction against labor picketing where a background of violence "tainted" the record, Milk Wagon Drivers v. Meadowmoor Dairies, 312 U.S. 287 (1941).

53. Perhaps the most imaginative obstructive demonstration occurred entirely outside the college context. In United States v. Aarons, 310 F.2d 34 (2d Cir. 1962), protestors in a rowboat blocked a submarine launching.

54. In this sense it is to be distinguished from peaceful conduct that may also impede normal university functioning. Noise, the waving of placards, the presence of large numbers of people, and other inevitable accoutrements of any mass demonstration do not constitute "obstruction" as that term is used here. Even in situations where these factors do disrupt classes, school meetings, etc., they do not displace a demonstration outside the "expression" category, *see* pp. 997-98 *infra*, though protest that is nonviolent and nonobstructive but is nevertheless disruptive does require special treatment. *See* pp. 1000-19 *infra*.

55. Examples are plentiful and include: blocking the entrance to the student center at Fordham University to prevent attendance at an ROTC luncheon, Fordham Univ. v. King, 63 Misc. 2d 611, 313 N.Y.S.2d 208 (Sup. Ct. Bronx County 1970), linking arms to prevent attendance at placement interviews at Colorado, Buttney v. Smiley, 281 F. Supp. 280 (D. Colo. 1968), "crowding" in front of the Marine Corps booth at Michigan State's Career Carnival, People v. Harrison, 383 Mich. 585, 178 N.W.2d 650 (Mich. 1970), and chaining and barricading (with "metal art objects") the entrances to buildings at the City University of New York, Board of Higher Educ. v. Rubain, 62 Misc. 2d 978, (Sup. Ct. Bronx County 1970) (violence also present).

56. *See, e.g.*, Sill v. Pennsylvania State Univ., 318 F. Supp. 608, 612 (M.D. Pa. 1970); Seymour v. Virginia Polytechnic Inst., 313 F. Supp. 554 (W.D. Va. 1970). Building "seizures" should not be confused with the more traditional "sit-ins." While both entail remaining within a building against the wishes of the proprietor, the sit-in does not necessarily

Inclusion of physical obstruction, along with violence, in the "action" category is justifiable,<sup>57</sup> for these activities always entail immediate harm which cannot be alleviated except through direct control of the offending conduct.<sup>58</sup> However, in concluding that acts of violence and physical obstruction are always "action" rather than "expression," it must be emphasized that an outbreak of such conduct should not suffice to condemn a demonstration in toto. The temptation to label an entire demonstration "violent," or worse, "aggressive,"<sup>59</sup> and, for that reason, beyond the protection of the First Amendment should be staunchly resisted. For instance, the rule announced by the district court in *Esteban v. Central Missouri State College*<sup>60</sup> should allow steps to be taken against the egg-throwing, car-rocking demonstrators who were penalized, not for being part of an entity known as a "violent demonstration," but simply for resorting to specific acts of violence. Precision in this matter is especially important in view of the nature of equitable remedy. The problem of speech "brigaded with action"<sup>61</sup> is actually less severe in connection with restraint by injunction than in other contexts, for a court order, unlike a cloud of tear gas, can be confined to counter "action" without impinging on protected "expression."<sup>62</sup>

While violence and physical obstruction are "action," most other forms of campus protest are "expression," the regulation of which is governed by the First Amendment.<sup>63</sup> For example, in *Brown v. Louisi-*

deny continued use of the building to the usual occupants. A "seizure," "takeover," "occupation," or "liberation," on the other hand, always does. As a result, while seizures are generally regarded as "action," see EMERSON, *supra* note 46, at 293, sit-ins are more appropriately classified as "expression," see pp. 997-98 *infra*.

57. Lower courts frequently rely on *United States v. O'Brien*, 391 U.S. 367 (1968), the draft card burning case, in rejecting attempts to characterize campus occupations as symbolic speech. *E.g.*, *Scott v. Alabama Board of Higher Educ.*, Civil No. 2865-N (M.D. Ala. May 14, 1969), reprinted in *STUDENT PROTEST*, *supra* note 12, at 315; *Hutt v. Brooklyn College*, No. 68-C-691 (E.D.N.Y. Dec. 28, 1968). *O'Brien*, however, assumed, *arguendo*, that the burning was expression, 391 U.S. at 376, and proceeded to introduce a weighted balancing test to justify penalizing the conduct, *id.* at 377. *Cf. Cox v. Louisiana*, 379 U.S. 536, 577 (1965).

58. See T. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 61 (1966). Furthermore, the rule that physical obstruction is "action" no matter how essential it may be to the protest is in keeping with the Supreme Court's per curiam dismissal of certiorari as improvidently granted in the obstructive picketing case of *Taggart v. Weinacker's, Inc.*, 397 U.S. 223 (1970) as well as its ready acceptance of the Mississippi anti-picketing law challenged in *Cameron v. Johnson*, 380 U.S. 611 (1967).

59. See *Barker v. Hardway*, 394 U.S. 905 (1969) (denying cert.).

60. See note 52 *supra*.

61. *Brandenburg v. Ohio*, 395 U.S. 444, 456 (1969) (Douglas, J. concurring).

62. It will be shown that as a consequence, an injunction cannot be used as a prior restraint against the occurrence of a demonstration for fear that the protest will consist of expression interlaced with action. See pp. 1001-03 *infra*.

63. Of course, in the absence of a full protection test for expression, this does not mean that all nonviolent and nonobstructive protest is actually protected by the First

ana,<sup>64</sup> the Court overturned the conviction of a group of Blacks who had remained in the segregated reading room of a public library over the librarian's objections. After reiterating the language of the First Amendment, the opinion subscribed to by the largest number of majority Justices stated:

[T]hese rights are not confined to verbal expression. They embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest by silent and reproachful presence . . . .<sup>65</sup>

As the opinion emphasized, marching, carrying signs, leafleting, making speeches, sitting-in, and the like, if done nonviolently and non-obstructively, are historic First Amendment activities.<sup>66</sup> Furthermore, they remain expression rather than action even if executed in the midst of a hostile audience<sup>67</sup> or in a place not suitable for demonstrations.<sup>68</sup>

### B. *The Limits of Injunctive Regulation*

Exclusion of violent and physically obstructive forms of protest from the definition of "expression," although consistent with the case law, represents a relatively conservative theory of the scope of the First Amendment.<sup>69</sup> If this theory is to be effective in protecting and en-

Amendment. Three types of speech which the courts have been reluctant to protect are advocacy of criminal acts where there is a likelihood the act will occur, *see, e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969), "fighting words," *see, e.g.*, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), and obscenity, *see, e.g.*, *Roth v. U.S.*, 354 U.S. 476 (1957). Such speech, it has been argued, should be considered "action" rather than "expression." *See* EMERSON, note 46 *supra*.

64. 383 U.S. 131 (1966).

65. 383 U.S. at 141-42. There was no majority opinion in the case. Mr. Justice Fortas, joined by Mr. Chief Justice Warren and Mr. Justice Douglas took the position that there was no evidence to support a conviction of breach of the peace. Mr. Justice Brennan concurred, on the grounds that the statute was overbroad, and Mr. Justice White concurred, for the reason that the protestors "were making only a normal and authorized use of the library." *Id.* at 151.

66. 383 U.S. at 142 n.6. *But cf.* *Cogwill v. California*, 396 U.S. 371 (1971) (dismissing appeal); *Street v. New York*, 394 U.S. 579 (1969); *United States v. O'Brien*, 391 U.S. 367 (1968).

Within this category, however, the Court, in talking of "speech pure," "speech plus," and conduct "akin to 'pure speech,'" has spawned a confusing set of subdivisions. *See generally* Note, *Regulation of Demonstrations*, 80 HARV. L. REV. 1773 (1967).

67. *See* *Gregory v. City of Chicago*, 394 U.S. 111 (1969), stating in dictum, "Petitioners' march, if peaceful and orderly, falls within the sphere of conduct protected by the First Amendment."

68. In *Sword v. Fox*, 317 F. Supp. 1055 (W.D. Va. 1970), the district court was confronted with a peaceful sit-in in violation of a rule against political demonstrations in campus buildings, and after emphasizing the nonviolent and nonobstructive aspects of the demonstration, concluded that "the conduct of the students sought to be punished amounted only to protected expression." *Id.* at 1067.

69. *See* Savoy, *Toward a New Politics of Legal Education*, 79 YALE L.J. 444, 451 (1969).

couraging protest, regulation of that conduct which is "expression"—the nonviolent and nonobstructive modes of protest—must be carefully circumscribed.

1. *Contemporaneous Orientation: Enjoining Action*

For analytic purposes, campus injunctions can be separated into two parts: those portions that seek to terminate contemporaneous activity and those that restrict future conduct.<sup>70</sup> The First Amendment consequences of the orders depend strongly on which of these two orientations is utilized. While it is theoretically possible that a university might attempt to enjoin a perfectly peaceful demonstration after its inception,<sup>71</sup> this does not appear to be a practical problem.<sup>72</sup> In virtually every case in which a university has secured an injunction to terminate an ongoing student demonstration, the conduct of the protestors could be characterized as violent or physically obstructive.<sup>73</sup> Typical of decrees of this genre are the provision of a TRO "order[ing] and direct[ing] [defendants] to vacate the [old Student Union building] forthwith . . ."<sup>74</sup> and the segment of a temporary injunction prohibiting "[o]bstructing the entrance and exit of any persons to or from Parkhurst Hall . . ."<sup>75</sup> Inasmuch as these orders usually control "action" rather than "expression,"<sup>76</sup> they are subject to no obvious constitutional challenge.<sup>77</sup>

70. The compartmentalization of injunctions into "contemporaneous" and "prospective" elements is not watertight. When the disturbance takes the form of the intermittent harassment, such as periodic mill-ins in randomly selected offices, or when acts of violence are sporadic but persistent, whether an order enjoining the tactic proscribes present or future conduct is not altogether clear. Nevertheless, in the vast majority of cases, the division is a useful one.

71. It might, for instance, allege that a hostile audience had gathered about a speaker, creating an imminent danger to the continued operation of the university. *Cf. Trustees of Dartmouth College v. John Doe*, No. 10795 (Super. Ct. Grafton County, N.H. May 6, 1969) (Petition for Injunction).

72. Nor, given the logistics of obtaining injunctive relief, is it likely to become one. For example, if a university objects to the presence of an outside speaker on campus, it might attempt to ban him in advance of his arrival, *see* cases cited note 82 *infra*, but the probability that it will rush to court to obtain a TRO to serve upon him after he has begun speaking is negligible.

73. *See, e.g.*, cases cited, notes 55-56 *supra*.

74. *George Washington Univ. v. Tizer*, Civil No. 1390-70 (D.D.C. May 6, 1970).

75. *Trustees of Dartmouth College v. John Doe*, No. 10795 (Super. Ct. Grafton County, N.H. May 6, 1969).

76. Unfortunately, as a result of imprecise terminology, the orders are often not confined to "action." For example, a state court in Pennsylvania granted an *ex parte* temporary injunction restraining ten named students and forty John Does from "[o]bstructing, hindering or attempting to obstruct or hinder, in any manner, whether or not overt force or violence is committed or threatened to be committed, any person or persons from free ingress and egress to said Shields building or any other premises or property of the University." *See Sill v. Pennsylvania State Univ.*, 318 F. Supp. 608, 611-12 (M.D. Pa. 1970). Whether this order is, by its terms, restricted to physically obstructive and violent behavior is far from apparent.

77. The fundamental problem posed by these orders lies in deciding at what point

## 2. *Prospective Orientation: Enjoining Expression*

Unfortunately, campus injunctions are rarely limited to contemporaneous conduct. Understandably, they are also concerned with future student protest, and those portions of injunctions which are fashioned to operate prospectively are, more often than not, gravely afflicted with constitutional infirmities. In Colorado, for instance, students were enjoined from so much as "entering any academic or administrative building . . . for the purpose of conducting any demonstration, protest or remonstrance,"<sup>78</sup> while in New York, Queens College students discovered they could not assemble in the vicinity of any campus building without prior approval from the president or a dean.<sup>79</sup> These decrees are not isolated aberrations; rather, they are representative of the manner in which protest conduct not yet underway at the time of issuance of the order is enjoined. As they reveal, the prospectively oriented portions of campus injunctions tend to ban conduct well within the First Amendment sphere as well as violent or obstructive activities beyond its effective radius. As a consequence, problems of prior restraint, vagueness and overbreadth are ubiquitous in the prospectively oriented relief.

a. *Prior Restraints.* The prior restraint doctrine<sup>80</sup> substantively circumscribes the issuance of injunctions<sup>81</sup> in that it precludes the

"expression" becomes "action." Under almost any definition of these terms, numerous borderline situations will inevitably arise. Beyond the effort to characterize the conduct prohibited as "expression," the substance of the orders might be impeached, if at all, on the basis of their chilling effect on other, protected, conduct. See *Dombrowski v. Pfister*, 380 U.S. 479 (1965). But see *Cholmakjian v. Board of Trustees*, 315 F. Supp. 1335, 1344-46 (W.D. Mich. 1970); *November Action Coalition v. Johnson*, Civil No. 69-1154-G (D. Mass. Nov. 4, 1969); *Locke v. Vance*, 307 F. Supp. 439 (S.D. Tex. 1969).

78. *Regents of the Univ. of Colorado v. Fulks*, Civil No. 26035 (Dist. Ct. Boulder County, Colo. Apr. 20, 1970). Injunctions like this one, regulating protest as to place, are discussed in detail at pp. 1008-16 *infra*.

79. *Board of Higher Educ. v. Anderson*, 162 N.Y.L.J. No. 68 (Oct. 6, 1969) at 17, col. 4 (Sup. Ct. N.Y. County). The constitutional defect of such injunctions subjecting the rights of students to assemble to the unrestricted discretion of administrative officials is discussed at note 188 *infra*.

80. The modern prior restraint doctrine has reached its fullest development in the field of obscene literature. See *Near v. Minnesota*, 283 U.S. 697 (1931). There have been occasions on which the Court has sustained prior restraints on publications, see, e.g., *Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961), but in these cases, the expression already existed on the record, in the form of a book or a film, and could be analyzed on its face in constitutional terms because the substantive obscenity standards do not relate to particular reactions or specific audiences.

As regards prospective control of demonstrations, however, the law of prior restraints is still at a comparatively primitive stage. For example, even the constitutionality of a requirement that protestors notify officials of an impending demonstration remains unclear. Compare *Leflore v. Robinson*, 434 F.2d 933, 948 (5th Cir. 1970) with *Bayless v. Martine*, 430 F.2d 873, 878 (5th Cir. 1970). See generally Note, *The Constitutionality of a Requirement to Give Notice Before Marching*, 118 U. Pa. L. Rev. 270 (1969).

81. The prior restraint doctrine also has a procedural aspect which limits the manner in which the injunctions should be issued. See pp. 1019-27 *infra*.

consideration of certain criteria—the most obvious being antipathy to the protestors' opinions—in the decision to ban a demonstration.<sup>82</sup> Campus injunctions are seldom overtly content-oriented, however, for three criteria, ostensibly independent of content, are usually relied upon to justify suppression of student expression. Sometimes it is suggested that demonstrators will exceed First Amendment bounds by partaking in militant forms of protest. At other times, it is feared that a demonstration will excite or provoke the campus community, leading ultimately to a disruption of university operations. And, finally, it is often argued that the campus or parts of it are not suitable forums for protest activities. Analysis of these standards will reveal that only a form of the third, namely "traffic control" as to place, is constitutionally tolerable.

*The Participants' Future Behavior.* Typically, materials introduced in support of a university's petition for relief from an anticipated demonstration include a lengthy recitation of the past acts of violence, intimidation, vandalism, and obstruction which have plagued the campus.<sup>83</sup> Although administrators have rarely, if ever, tried to enjoin an outdoor demonstration on the ground that the protestors planned "action" in addition to "expression,"<sup>84</sup> some colleges have sought the power to ban an indoor demonstration in order to foreclose the prospect of a building occupation. For example, the TRO used at George Washington last May not only "restrained [defendants] from occupying and/or possessing in whole or in part the old Student Union building . . .,"<sup>85</sup> but also clothed the university with the authority to forbid or terminate at will any other indoor demonstration—peaceful or obstructive.<sup>86</sup>

82. Thus, the fundamental principle underlying the sequence of cases on university speaker bans, *see, e.g.*, *Picking v. Bruce*, 430 F.2d 595 (8th Cir. 1969); *Brooks v. Auburn Univ.*, 412 F.2d 1171 (5th Cir. 1969), control of student newspapers, *see, e.g.*, *Korn v. Elkins*, 317 F. Supp. 138 (D. Md. 1970); *Channing Club v. Board of Regents*, 317 F. Supp. 688 (N.D. Tex. 1970), and recognition of student organizations, *see A.C.L.U. of Virginia v. Radford College*, 315 F. Supp. 893 (W.D. Va. 1970), is that expression cannot be regulated according to its content. *But see Kaufman, supra* note 49; Blasi, *Prior Restraints on Demonstrations*, 68 MICH. L. REV. 1482, 1504-05 (1970).

83. *See, e.g.*, Affidavit of Ralph S. Halford, Vice President for Special Projects of Columbia University, submitted in *Trustees of Columbia Univ. v. December 4 Movement*, No. 4340/1970 (Sup. Ct. N.Y. County, N.Y. Mar. 29, 1970). *See also M.I.T. v. Hahnel*, No. 30407 (Super. Ct. Middlesex County, Mass. Nov. 3, 1969) (Petition); *State of Wisconsin ex rel. LaFollette v. Cohen*, No. 124008 (Cir. Ct. Dane County, Wis. Nov. 7, 1967) (Complaint), reprinted in *STUDENT PROTEST supra* note 12, at 281.

84. They have, in some cases, adopted internal procedures which would permit school officials to ban an outdoor demonstration for this reason. *See, e.g.*, *Hammond v. South Carolina State College*, 272 F. Supp. 947 (D.S.C. 1967) (invalidating regulation as overbroad prior restraint).

85. *George Washington Univ. v. Tizer*, Civil No. 1390-70 (D.D.C. May 6, 1970).

86. *See* note 11 *supra*.

Regulating action through curtailing expression cannot constitutionally form the foundation for a prior restraint by injunction. However convincing the evidence that the demonstrators contemplate violence or other forms of "action,"<sup>87</sup> and however likely it may seem that their "expression" will be burgeoning with "action," the possibility that protestors will emerge from the umbrella of First Amendment coverage cannot warrant enjoining the demonstration as such.<sup>88</sup>

As with efforts to regulate membership in organizations, such control is simply too clumsy.<sup>89</sup> The Supreme Court, in curtailing the use of *ex parte* TROs in First Amendment cases, dispelled any doubts in this regard that may have been produced by the earlier labor picketing injunction cases.<sup>90</sup> In *Carroll v. President and Commissioners of Princess Anne*,<sup>91</sup> the Court emphasized:

An order issued in the area of the First Amendment must be couched in the narrowest terms that will accomplish the pinpointed objective permitted by constitutional mandate and the essential needs of the public order . . . . [T]he order must be tailored as precisely as possible to the exact needs of the case.<sup>92</sup>

Accordingly, since the injunction is an instrument capable of delicacy and precision,<sup>93</sup> flatly enjoining a demonstration—whether it is to be held indoors or outdoors—for fear that the proposed expression will be interlaced with action should be impermissible.<sup>94</sup> Instead, the de-

87. Professor Blasi refers to "concrete evidence" of "a specific intent to cause violence, directed to the specific demonstration and manifested by specific plans," obtained from the open testimony of informers as well as "documented plans by the demonstrators to bring equipment such as helmets, baseball bats, and medics." Blasi, *supra* note 82, at 1509-10. The probative value of some of this evidence—whatever its specificity—is highly questionable.

88. Professor Blasi has reached the opposite conclusion, at least as regards "planned violence." See Blasi, *supra* note 82, at 1509-10. Yet, he would not allow a demonstration to be banned to preclude obscenity, libel, "fighting words," and invasion of privacy. *Id.* 1503-09. This difference in treatment, under his system of "controlled balancing," results from the practical impossibility of adequately identifying the latter elements at the permit application stage, *id.* at 1505-06; consequently, he recommends that the unprotected speech, rather than the entire demonstration, be enjoined. *Id.* at 1506.

89. See, e.g., *United States v. Robel*, 389 U.S. 258 (1967); Comment, *Judicial Rewriting of Overbroad Statutes: Protecting the Freedom of Association from Scales to Robel*, 57 CALIF. L. REV. 240 (1969).

90. See 1 T. EMERSON, D. HABER & N. DORSEN, *POLITICAL & CIVIL RIGHTS IN THE UNITED STATES* 567-69 (3d ed. 1967).

91. 393 U.S. 175 (1968).

92. 393 U.S. at 183-84.

93. See p. 1018 *infra*.

94. Such a rule is the analogue in the area of prior restraints of the specific intent requirement, see, e.g., *Scales v. United States*, 367 U.S. 203 (1961); *Yates v. United States*, 354 U.S. 298 (1957); *United States v. Spock*, 416 F.2d 165, 176-79 (1st Cir. 1969); Z. CHAFFEE, *FREE SPEECH IN THE UNITED STATES* 128-35 (2d ed. 1948), for subsequent punishment. See also note 89 *supra*.



cree must prohibit only the threatened unprotected conduct.<sup>95</sup> Individuals who transgressed the bounds of protected speech may then be punished for contempt without jeopardizing the rights of those who wished to engage in lawful assembly and expression.<sup>96</sup>

*Audience Reaction.* Administrators sometimes seek to justify injunctive relief against peaceful protest on the basis of their belief that even if the demonstrators were themselves well-mannered, conditions would be too volatile to allow dissidents to voice their discontent. Although such regulation may be said to be free of content censorship to the extent it applies to all protest regardless of the issues espoused and the individuals involved,<sup>97</sup> the very consideration of possible audience reactions in imposing an injunction intended to reach prospective expression is impermissible.

The case of *Lieberman v. Marshall*<sup>98</sup> illustrates what may occur when the audience reaction factor is introduced into the decision-making process at the prior restraint stage. In *Lieberman* the acting president of Florida State University denied the campus SDS chapter the use of all school facilities.<sup>99</sup> Upon learning that the group planned to hold a meeting in the student union, he obtained an *ex parte* temporary injunction forbidding the students to use any campus building for any meetings.<sup>100</sup> The state's highest court affirmed the denial of a motion to dissolve the injunction. Focusing on the possible cam-

95. *E.g.*, *M.I.T. v. Hahnel*, No. 30407 (Super. Ct. Middlesex County, Mass. Nov. 3, 1969) (restraining, *inter alia*, "employing force or violence, or the threat of force or violence against persons or property on Massachusetts Institute of Technology premises"). The federal district court refused to enjoin M.I.T. from enforcing the state court TRO, emphasizing that the decree "does not enjoin a rally. It does not enjoin the distribution of handbills . . . . Rather it enjoins acts [of violence] which plaintiffs say they were not intending to commit in the first place." *November Action Coalition v. Johnson*, Civil No. 69-1154-G (D. Mass. Nov. 4, 1969).

96. *Cf.* Blasi, *supra* note 82, at 1506. *But see* note 88 *supra*.

97. When the protest is aimed at individual administrators or school regulations, content censorship is likely to be involved, at least covertly. *See, e.g.*, *Scoville v. Board of Educ.*, 425 F.2d 10 (7th Cir.), *cert. denied*, 400 U.S. 826 (1970); *Norton v. Discipline Comm.*, 419 F.2d 195 (6th Cir. 1969), *cert. denied*, 399 U.S. 906 (1970).

98. 236 So. 2d 120 (Fla. 1970).

99. The acting president first denied SDS official recognition as a student organization and then invoked a university rule that only officially recognized student organizations could use university buildings for scheduled meetings, and, that, only with prior permission from the administration. In passing, the Florida court upheld this regulatory scheme under a clear and present danger test, 236 So. 2d at 124, commenting without explanation that "denial of recognition of SDS appears to have been valid," *id.* at 128.

100. The trial judge held that "the restraining order had been necessary because the confrontation planned and staged by SDS would have created a risk of violence and would have unduly disrupted the university campus." 236 So. 2d at 124. Since there was no evidence that the SDS members planned to damage the building or to interfere with other users, the "risk of violence" the lower court found must have inhered in the possibility of an uncontrolled audience reaction. Apparently, all that made the meeting controversial was the fact that the university had proscribed it.

pus reaction to the proposed SDS meeting,<sup>101</sup> it declared that an injunction would lie against "conduct which without exaggeration could be termed disruptive, contemptuous, defiant, highly visible and provocative, intended to bring about a confrontation, and carrying with it a virus of violence."<sup>102</sup>

In contrast to the approach taken in *Lieberman*, no prior restraints on expression should be imposed on the basis of predictions as to audience reaction. This conclusion can be derived from two independent lines of reasoning.

First, no detailed explication of the clear and present danger test, the incitement standard, or the ad hoc balancing technique<sup>103</sup> is necessary to see that both the trial and appellate courts must examine the expression in the context of the surrounding circumstances of each case before they can decide that the expression is punishable.<sup>104</sup> Unlike the obscenity area where prior restraints have been permitted because the expression is "fixed" and the constitutional tests "non-situational,"<sup>105</sup> when demonstrations or public speeches are prohibited in advance, there is normally no evidence of the contemplated expression,<sup>106</sup> and even if evidence were somehow available, it would be a rare case in which the context for the proposed expression were so

101. The decision may also have been based on a theory that the university could, consistent with the First Amendment, limit the use of its facilities to authorized student groups. This rationale is not, however, made explicit in the opinion, and the principle outlined at pp. 1009-10 *infra* casts doubt on this position as well.

102. 236 So. 2d at 126. To the extent that the entire "confrontation" consists of violation of an invalid rule, it should not be regulable. *See, e.g.,* *Crews v. Clones*, 432 F.2d 1259 (7th Cir. 1970); *Breen v. Kahl*, 296 F. Supp. 702 (W.D. Wis.), *aff'd*, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970). *But see* *Schwartz v. Schuker*, 289 F. Supp. 238 (E.D.N.Y. 1969).

103. These tests are discussed in Emerson, *Toward A General Theory of the First Amendment*, 72 YALE L.J. 877, 907-16 (1963). *See also* Strong, *Fifty Years of 'Clear and Present Danger': From Schenck to Brandenburg—and Beyond*, 1969 SUP. CT. REV. 41. It appears that the clear and present danger test has largely fallen into desuetude, and that the balancing test is usually applied only in the so-called "indirect cases" where the impact on speech is caused by a government regulation of "action." *See, e.g.,* *Konigsberg v. State Bar*, 366 U.S. 36, 50-51 (1961); Note, *Civil Disabilities and the First Amendment*, 78 YALE L.J. 842, 847 n.16 (1969); Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962).

104. This line of reasoning is equivalent to that introduced in Note, *Conspiracy and The First Amendment*, 79 YALE L.J. 872, 879-82 (1970).

105. *See* *Conspiracy*, *supra* note 104, at 881-82.

106. Requiring demonstrators to supply such evidence, even if constitutional, would be unsatisfactory. *See* Blasi, *supra* note 82, at 1505-06. Although past conduct of the demonstrators might be of some predictive value in limited circumstances, *see id.* at 1515-20, the Supreme Court has indicated that past conduct would not constitute sufficiently probative evidence of the contemplated expression to warrant a prior restraint. *See* *Kunz v. New York*, 340 U.S. 290 (1951). Lower federal courts, however, have not been unanimous in excluding consideration of prior expression. *See, e.g.,* *Molpus v. Fortune*, 432 F.2d 916, 18 (5th Cir. 1970); *Kasper v. Brittain*, 245 F.2d 92 (6th Cir. 1957), *cert. denied*, 355 U.S. 834 (1957).

clear that the application of one of the three constitutional tests employed could be anything but "hopelessly speculative."<sup>107</sup>

Second, the necessity for exclusion of all consideration of audience reaction in imposing prior restraints can be derived from Supreme Court dispositions of cases involving regulation of street demonstrations or public speakers in order to maintain order. Whether the threat to the public order came from a sympathetic or an antagonistic audience,<sup>108</sup> the Court has reversed the convictions of speakers who were arrested to prevent an outbreak of violence,<sup>109</sup> and has boldly declared that the exercise of constitutional rights cannot be allowed to depend on the degree of disorder that is threatened by their assertion.<sup>110</sup>

This general principle is the product of at least three considerations: (1) a certain amount of unrest and disorder is a price that must be paid lest there be only noncontroversial or impotent protest;<sup>111</sup> (2) measures less drastic than prior restraints are available to protect the peace and order of the community should protest result in disorder or violence;<sup>112</sup> and, (3) to grant officials the power to curtail assemblies before an outbreak of violence would be to give them "complete discretion to break up otherwise lawful public meetings."<sup>113</sup> Because

107. Cf. EMERSON, *supra* note 46, at 326.

108. The ideas outlined in the text apply equally when the threat to the public order comes from an exuberantly friendly audience or when it arises from an implacably hostile group. In a hostile audience case, however, an additional argument can be adduced—that of the heckler's veto. See, e.g., Note, *Regulation of Demonstrations*, *supra* note 66, at 1775; H. KALVEN, *THE NEGRO AND THE FIRST AMENDMENT* 140-45 (1965).

109. See, e.g., *Terminiello v. City of Chicago*, 337 U.S. 1 (1949); cf. *Gregory v. City of Chicago*, 394 U.S. 111 (1969); Note, *Freedom of Speech and Assembly: The Problem of the Hostile Audience*, 49 COLUM. L. REV. 1118 (1949). But see *Feiner v. New York*, 340 U.S. 315 (1951).

110. Statements to this effect have been made not only in regard to street demonstrations and public orators, but also in other First and even Fourteenth Amendment contexts. See *Street v. New York*, 394 U.S. 576, 592 (1969), quoted with approval in *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970):

It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas themselves are offensive to some of the hearers.

See also *Watson v. City of Memphis*, 373 U.S. 526, 535 (1963); *Wright v. Georgia*, 373 U.S. 284, 293 (1963); *Cooper v. Aarons*, 358 U.S. 1 (1958).

Incitement, however, is not encompassed by this principle, but its exclusion causes no inconsistency if incitement is defined as "action," see note 63 *supra*, and, hence, not a constitutional right. If it is treated as "expression" that is not protected by the First Amendment, then the formulation of the audience reaction principle remains intact on at least a purely verbal level, but, functionally, incitement would then constitute an exception to the general audience reaction principle.

111. See *Terminiello v. City of Chicago*, 337 U.S. 1 (1949).

112. *Kunz v. New York*, 340 U.S. 290 (1951).

113. *Feiner v. New York*, 340 U.S. 315, 320 (1951). See also *Hague v. C.I.O.*, 307 U.S. 496, 516 (1938). How much discretion should be placed in the hands of police officials is an issue the Court has not settled. For an enumeration of the salient considerations pertinent to permitting police to suppress a demonstration when crowd hostility is uncontrollable, see *Regulation of Demonstrations*, *supra* note 66, at 1775.

all these factors are pertinent to prophylactic restraints on campus demonstrations, exclusion of prognostications about audience reaction from the injunctive process is warranted.

First, although judicial prose occasionally displays a narrow conception of the role of the university,<sup>114</sup> it seems fair to suggest that since the campus is in many respects a microcosm of the larger society, and the college, a community to its students,<sup>115</sup> the willingness to embrace controversial, unsettling, and potentially disruptive protest on the campus should be at least as great as that which the Constitution demands equally of the tiny hamlet and the sprawling megapolis.<sup>116</sup> As in any municipality, every campus facility may not be appropriate for protest activities,<sup>117</sup> but the first ground of the Court's policy remains fully applicable. The university, like any other community, must endure a certain quantum of disorder lest protest be merely trivial or ineffectual.

Second, the Court's preference for "appropriate public remedies"<sup>118</sup> entails two approaches to coping with unruly public assemblies. One is subsequent punishment of the speaker<sup>119</sup> or members of the crowd,<sup>120</sup> and the other is contemporaneous crowd control.<sup>121</sup> In terms of campus demonstrations this would mean disciplinary or criminal proceedings against demonstrators or obstreperous observers, or police protection for the demonstration.

While the requirement of *a posteriori* punishment of those who engage in action or expression not protected by the First Amendment rather than *a priori* infringement of protected expression is as applicable to the university as it is to the larger society, the position that an orator may not be silenced if the crowd can be controlled,<sup>122</sup> is a slightly awkward one to assume in facing campus unrest. Observations

114. See pp. 1012-13 *infra*.

115. Cf. UNIVERSITY OF CALIFORNIA AT BERKELEY, REPORT OF THE STUDY COMM'N ON UNIVERSITY GOVERNANCE, THE CULTURE OF THE UNIVERSITY: GOVERNANCE AND EDUCATION 38 (1968), quoted in Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1043 (1969). See also PRESIDENT'S COMM'N, *supra* note 2, at 118. But see YALE UNIVERSITY STUDY COMM'N ON UNIVERSITY GOVERNANCE, FINAL REPORT 2-8 (1971).

116. See COMMISSION ON M.I.T. EDUCATION, CREATIVE RENEWAL IN A TIME OF CRISIS 68 (1970). See also note 42 *supra*.

117. Injunctive regulation of protest according to place is discussed in detail at pp. 1008-16 *infra*.

118. *Kunz v. New York*, 340 U.S. 290, 294 (1951).

119. See *Kunz v. New York*, 340 U.S. 290, 295 (1951); cf. note 63 *supra*.

120. See *Feiner v. New York*, 340 U.S. 315, 327 n.9 (1951) (Black, J. dissenting).

121. See *Feiner v. New York*, 340 U.S. 315, 326-27 (1951) (Black, J. dissenting); cf. *Hague v. C.I.O.*, 307 U.S. 496, 516 (1938). But see *Feiner v. New York*, 340 U.S. 315, 288-89 (Frankfurter, J. concurring).

122. This is the minimum principle which can be culled from *Feiner*, *Terminello*, and *Kunz*, taken together. See *Regulation of Demonstrations*, *supra* note 66, at 1785-87.

of how police or National Guard have exacerbated tensions and prolonged disruptions on campuses are now legion,<sup>123</sup> and the presence of police on campus may be a qualitatively different phenomenon that that of police on a city street.<sup>124</sup> Nevertheless, the widespread antipathy of students and political protestors toward the police is a relatively recent development<sup>125</sup> and can be ameliorated by improved police practices.<sup>126</sup> To the extent that the hostility cannot be eradicated in this fashion, it is symptomatic of a schism in American society which can only be widened by repression of expression that is in itself peaceful.<sup>127</sup>

Finally, the third basis for the Court's declarations—that to allow officials the power to curtail meetings on the basis of predictions of violence or disorder would lead to veiled censorship and undue suppression of lawful expression—is pertinent to injunctive regulation on the campus as well. Although the officials responsible for deciding are judges rather than police officers and presumably more objective, the very fact that the demonstration is still in the planning stage means that their predictions will often approach prophecies and be strongly influenced by predispositions toward the protestors. The excessive discretion which resides in anything short of a per se rule excluding predictions about audience reaction is revealed by the chaos of numerous lower court decisions in which audience reaction is considered in passing on the validity of subsequent punishments<sup>128</sup> for expression in the high schools and colleges.<sup>129</sup>

123. See, e.g., PRESIDENT'S COMM'N, *supra* note 2, at 288; W. ORRICK, JR., SHUT IT DOWN! A COLLEGE IN CRISIS 154 (Nat'l Comm'n on the Causes and Prevention of Violence Staff Report No. 6, 1969); COX COMM'N, CRISIS AT COLUMBIA (1968).

124. See generally Goodman & Niederhoffer, *Universities and The Police: Force and Freedom on Campus*, 1 YALE REV. LAW & SOCIAL ACTION 5 (1970).

125. See SKOLNICE, *supra* note 2, at 185-86.

126. The President's Commission on Campus Unrest recommended several departures from the standard operating procedure of police and National Guard on campuses designed to reduce the inflammatory nature of their presence. For example, massive displays of force and issuance of lethal weapons can be minimized. See PRESIDENT'S COMM'N, *supra* note 2, at 165-82. Cf. N.Y. Times Nov. 29, 1970, at 111, col. 1.

127. Cf. PRESIDENT'S COMM'N, *supra* note 2, at 182-83.

128. Because most of the post-*Tinker* litigation has involved subsequent punishments, evidence of disorder in these cases should have been available on the record, the allegedly disruptive behavior having already been consummated. Thus, the divergence, conflict, and confusion apparent in the lower court decisions could only be magnified if the audience reaction factor were to be used to effect *prior* restraint of campus protest by injunction.

129. Following *Tinker*, many cases have purported to require a showing that the forbidden expression would interfere with the maintenance of appropriate discipline in the operation of the school. Many have, however, incorrectly construed *Tinker* to allow punishment of student protestors because of audience reaction, actual or potential. See note 163 *infra*. These cases are consequently a paradigm of the unacceptable latitude inherent in regulation as to audience reaction, compare, e.g., *Butts v. Dallas Independent School Dist.*, 306 F. Supp. 488 (N.D. Tex. 1969), *rev'd*, 436 F.2d 728, 731 (5th Cir. 1971) and *Hernandez v. School Dist.*, 315 F. Supp. 289 (D. Colo. 1970) with *Aguirre v. Tahoka Independent School Dist.*, 311 F. Supp. 664 (N.D. Tex. 1970), and comprise a conflicting if not bizarre

In short, the policies underlying the Supreme Court's repeated suggestions that the exercise of constitutional rights cannot be impeded by the fear that violence and unrest may occasion their assertion are fully applicable to injunctive regulation of university demonstrations. As several federal courts have acknowledged, predictions as to audience reaction should not curtail the right of demonstrators—be they students or adults—to travel in First Amendment territory.<sup>130</sup>

*Geographic Restrictions.* Since a system of prior restraints on expression cannot utilize forecasts of what the demonstrators might say, how they will behave, or how the audience could react, the university, in utilizing prospective injunctions, can regulate campus protest only by reference to its time, place and manner.<sup>131</sup> Campus injunctions usually effect this control by outright prohibitions on the use of certain areas<sup>132</sup> for First Amendment activities.<sup>133</sup> Direct geographic restriction of this sort is represented by orders such as the one previously mentioned in *Regents of University of Colorado v. Fulks*,<sup>134</sup> extending to "any demonstration, protest or remonstrance [in] any academic or administrative building."

To evaluate the constitutional validity of such orders necessitates an examination of those cases which have passed on the acceptability

collection of cases euphemistically described by one Court of Appeals as afloat in "choppy waters left by *Tinker*," *Eisner v. Stamford Board of Educ.*, No. 35345 (2d Cir. Mar. 5, 1971).

130. See, e.g., *Crews v. Cloncs*, 432 F.2d 1259, 1265 (7th Cir. 1970) (high school):

We agree with the sentiments voiced by Professor Chafee when he observed that it is absurd to punish a person 'because his neighbors have no self-control and cannot refrain from violence . . . .'

131. When used in this context, "manner" has a limited meaning:

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

O'Neil, *Reflections on the Academic Senate Resolution*, 54 CALIF. L. REV. 88, 104 (1966).

Notice, also, that many of these features of "manner" are intertwined with "place." For instance, noise, an attribute of manner, becomes significant only in relation to its location: a boisterous demonstration on an isolated portion of the campus green becomes an entirely different creature if moved into a classroom during a seminar.

132. The restricted areas are generally academic and administrative buildings, though sometimes all indoor meetings are forbidden. See, e.g., *Lieberman v. Marshall*, 236 So. 2d 120 (Fla. 1970).

133. Some orders may constitute indirect place regulations in that the power to declare portions of the campus *loci prohibita* is delegated by the injunction to school officials. These decrees are discussed at p. 1018 *infra* where it is shown that inasmuch as they provide no standards to guide the administrator's discretion, they are void for vagueness. Indeed, by failing to limit the grant of power, these decrees allow recourse to the forbidden standards of content, participant behavior, and audience reaction; hence, depicting them as "place regulations" is misleading.

134. Civil No. 26035 (Dist. Ct. Boulder County, Colo. Apr. 20, 1970).

of particular geographic restrictions on the exercise of First Amendment freedoms. The existence, though not the bounds, of a basic constitutional right to conduct First Amendment activities in most locations is evident in the flow of cases that has, in recent years, dramatically enlarged the domain of demonstrations.<sup>135</sup> The courts have affirmed the rights of protestors to use streets and parks,<sup>136</sup> state capitol grounds,<sup>137</sup> a public library,<sup>138</sup> a bus terminal,<sup>139</sup> and numerous other facilities.<sup>140</sup>

Obversely, they have held or intimated that a jailhouse,<sup>141</sup> a prison,<sup>142</sup> a courthouse,<sup>143</sup> a high school classroom,<sup>144</sup> a hospital,<sup>145</sup> a National Guard armory,<sup>146</sup> a military base,<sup>147</sup> and the chambers of a state legislature<sup>148</sup> are not suitable places for noisy, disruptive demonstrations.

At least two major doctrines wind their way through these opinions. One is that facilities not normally open to the general public may not be used, even for First Amendment purposes, by members of that public.<sup>149</sup> This consideration is relevant to situations in which those who seek to use campus facilities are not members of the college com-

135. Since there can be no discrimination of the right to expression between different users of the same facilities, protestors may be entitled to access to facilities, even where this fundamental right is unavailing. Cf. EMERSON v. al., *supra* note 90, at 426.

136. *Hague v. C.I.O.*, 307 U.S. 496 (1939) (plurality opinion); cf. *In re Lane*, 71 Cal. 2d 872, 457 P.2d 561, 79 Cal. Rptr. 729 (1969) (privately owned street). *But see Cox v. Louisiana*, 379 U.S. 559 (1965).

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

138. *Brown v. Louisiana*, 383 U.S. 131 (1966).

139. *Wolin v. Port of New York Authority*, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968).

140. *E.g.*, *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968) (privately owned shopping center); *Tucker v. Texas*, 326 U.S. 517 (1946) (federally built housing project); *Marsh v. Alabama*, 326 U.S. 501 (1946) (company owned town); *Kissinger v. New York City Transit Authority*, 274 F. Supp. 438 (S.D.N.Y. 1967) (subway); *Farmer v. Moses*, 232 F. Supp. 134 (S.D.N.Y. 1964) (World's Fair grounds); *In re Hoffman*, 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967) (privately owned railroad terminal).

141. *Adderley v. Florida*, 385 U.S. 39 (1966) (5-4 decision). The case did not hold that no demonstration can ever be held on jailhouse grounds. The Court characterized the particular demonstration being punished as having obstructed the jail driveway and having interfered with the functioning of the jailhouse. *Id.* at 54 n.5. A demonstration that does not obstruct the flow of traffic to and from a jail and that does not otherwise disrupt jailhouse operations might warrant different treatment. Cf. Note, *The Supreme Court, 1966 Term*, 81 HARV. L. REV. 69, 139-41 (1967).

142. Cf. *Brown v. Peyton*, 437 F.2d 1228 (4th Cir. 1971); *Berrigan v. Norton*, 322 F. Supp. 46, 51 (D. Conn. 1971).

143. Cf. *Cameron v. Johnson*, 390 U.S. 611 (1968); *Cox v. Louisiana*, 379 U.S. 559 (1965) (Black, J. dissenting).

144. *Tinker v. Des Moines Independent School Dist.*, 393 U.S. 503 (1969) (dictum).

145. See 393 U.S. at 512 n.6 (dictum).

146. *Jones v. District of Columbia Armory Bd.*, 438 F.2d 138 (D.C. Cir. 1970).

147. See *Kilskila v. Nichols*, 433 F.2d 745 (7th Cir. 1970) (rehearing en banc); *United States v. Bradley*, 418 F.2d 688 (4th Cir. 1969).

148. See *United States v. Woodard*, 376 F.2d 136 (7th Cir. 1967); *State v. Smith*, 46 N.J. 510, 218 A.2d 147 (1966), *cert. denied*, 385 U.S. 838 (1966).

149. See *Adderley v. Florida*, 385 U.S. 39, 41 (1966); *Jones v. District of Columbia Armory Bd.*, 438 F.2d 138 (D.C. Cir. 1970).

munity, and the few cases that have faced this problem have held that school grounds need not be opened to the general public.<sup>150</sup> At the same time, school grounds are open to the university public. Members of the college community—at least<sup>151</sup>—are normally permitted to walk freely through campus and to enter academic and administrative buildings for various reasons. While there may be a few spots on campus analogous to the jailhouse in *Adderley* from which even the university community is absolutely excluded, the geographic restrictions imposed by most campus injunctions include areas, like classrooms, which are very much open to the relevant public for various purposes.<sup>152</sup> Therefore, even if the “open to the public” reading of the cases were without its difficulties,<sup>153</sup> it could not be used to justify most of the injunctions that ban campus protest according to its location.

A second doctrine is also implicit in the territorial limitation cases. In each instance in which First Amendment rights were upheld, the use of the site as a forum for expression did not conflict with the facility's usual function. For example, the dissemination of antiwar literature to servicemen in the public bus terminal in *Wolin v. Port of New York Authority*<sup>154</sup> did not interfere with the terminal's opera-

150. *Clemson Univ. Vietnam Moratorium Comm. v. Clemson Univ.*, 306 F. Supp. 129 (D.S.C. 1968); *Evers v. Birdsong*, 287 F. Supp. 900 (S.D. Miss. 1968); *Ellis v. Allen*, 4 App. Div. 2d 343, 165 N.Y.S.2d 624 (1957), *appeal dismissed*, 4 N.Y.2d 693, 148 N.E.2d 302, 171 N.Y.S.2d 86 (1958); *cf. Saunders v. Virginia Polytechnic Institute*, 417 F.2d 1127 (4th Cir. 1969). *But cf. Jones v. Board of Regents*, 436 F.2d 618 (9th Cir. 1970).

151. Defining the membership of the college community is nontrivial. A definition must take into account such non-students as alumni, those on leaves of absence, drop-outs those expelled or suspended for disciplinary or academic reasons, “street people,” and the like. This definitional problem is especially crucial if the geographic restrictions cases are read as always allowing exclusion of persons from areas not normally open to the public.

152. The fact that students may never have been permitted to use these areas for First Amendment purposes in the past does not satisfy the “not normally open to public” principle. *Cf. note 153 infra*. For example, the public that frequented the Logan Valley Plaza, *see* 391 U.S. 308 (1968), had never been allowed to use the property for First Amendment objectives, but the area was undeniably “open to the public.” The issue is only whether a property owner—public or private—having opened his property to one use by the public can then deny them the right to use it as a forum for expression.

153. Primarily, there is the difficulty of defining what is meant by “open to the public” in a logically consistent manner. *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968) and its progeny make it clear that characterizing a facility as open to a subset of the general public, in those cases, patrons, will not by itself suffice to exclude other members of the public, in those cases, non-patrons, from access to the facilities for First Amendment purposes. Perhaps what is determinative is not so much “the population who take advantage of the general invitation extended,” *Wolin v. Port of New York Authority*, 392 F.2d 83, 89 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968), as it is the population to whom the general invitation is extended. For example, whereas the shopping center invites any member of the general public on its grounds, the army base allows only soldiers and civilian employees. Thus, if a proprietor grants only a subset of the general population access to his property, and if that subset is defined by some other characteristic than nonexercise of First Amendment rights, then members of the general public who are not members of the allowed subset might be denied access to the property.

154. 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968).



## Equity on the Campus

tion as a transportation service. Since, in these cases, mutual coexistence was possible, deciding between the two uses was unnecessary, and it sufficed to say, as the Court did in the *Logan Valley* case,<sup>155</sup> that "the State may not delegate the power . . . to exclude members of the public wishing to exercise their First Amendment rights on the premises" when the protest is "generally consonant with the use to which the property is put."<sup>156</sup>

On the other hand, in the situations where the expression and usual function were mutually incompatible, that is, where the proposed First Amendment activity would necessarily constitute intolerable interference with the usual operation of the property, the courts have favored the property's normal use over its potential as a forum for such expression. Viewed in this manner, the territorial limitation cases can be said to stand for the proposition that while demonstrators have no First Amendment right to use private or public property for such manner of expression as would substantially interfere with the normal use to which the property is dedicated, they are protected in conducting protests that are not incompatible with the property's usual function.<sup>157</sup>

This mutual incompatibility standard underlying the geographic restriction cases has an immediate impact on the territorial limitations in campus injunctions. At the most elementary level, it means that demonstrations cannot be extirpated from the college campus.<sup>158</sup> In this regard, the Supreme Court's use of the mutual incompatibility standard in its most recent opinion on the suitability of a particular location for protest activities, *Tinker v. Des Moines Independent School District*,<sup>159</sup> is instructive. In *Tinker* the Court invalidated the suspensions of high and junior high school students for wearing black armbands to class to dramatize their opposition to the Vietnam War. The holding of the Court was quite narrow, being only that "where there is no finding and no showing that the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the pro-

155. 391 U.S. 308 (1968).

156. 391 U.S. at 319.

157. It is possible, to read *Adderley v. Florida*, 385 U.S. 39 (1966), as holding that "the state may designate certain sensitive government facilities as totally off limits to public debate . . .," *The Supreme Court, 1966 Term, supra* note 141, at 139, but the interpretation of note 141 *supra* is preferable.

158. Of course, this fairly simple result can be reached without the aid of the intellectual apparatus that has been constructed. One need merely note that "the college campus is a type of community analogous to a town or city," Haskell, *Student Expression in the Public Schools: Tinker Distinguished*, 59 *Geo. L.J.* 37, 43 (1970), and invoke *Marsh v. Alabama*, 326 U.S. 501, 508 (1945).

159. 393 U.S. 503 (1969).

hibition cannot be sustained."<sup>160</sup> The Court proceeded, however, to introduce the influential dictum<sup>161</sup> that protest is permissible in the high school only to the extent it does not disrupt classwork or interfere with the rights of others.<sup>162</sup> This proscription of "disruption"<sup>163</sup> is, in short, a simple variation on the mutual incompatibility theme of the geographic restriction cases, allowing some protest in the classroom but excluding noisy or obstreperous ones.

Since protest acceptable in the high school is a fortiori suitable for the university,<sup>164</sup> *Tinker*, as a specific application of the more general incompatibility standard, disposes of the argument that "the facilities

160. 393 U.S. at 508. The *Tinker* Court was not confronted with the material and substantial disruption it eschewed. *Id.* at 508. Nor did it say what would constitute an adequate showing of the forbidden conduct. At most, it pointed out that "undifferentiated fear" would not suffice. *Id.* In addition, the opinion was not directed to the prior restraint issue. *But cf.* *Eisner v. Stamford Bd. of Educ.*, No. 35345 (2d Cir. Mar. 5, 1971).

161. For a survey of post-*Tinker* litigation applying (or, if the analysis of note 163 *infra* is accurate, misapplying) the disruption dicta in the high schools, see Haskell, *supra* note 158, at 40-50; *cf.* note 129 *supra*.

162. The Court admonished, 393 U.S. at 513:

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

163. The opinion seems to proceed on a rhetorical theory that clarity is to be achieved through prolixity. What is meant by the numerous references to "disruption" is obscure. *Ab initio*, two overlapping interpretations are plausible. One is that "disruption" means conduct which, by virtue of being noisy, obstructive, or violent, interferes with the operation of the high school. Hence, when the Court condemns disruption which "stems from time, place, or type of behavior," *see* note 162 *supra*, it is saying that if a demonstration is held at a time and place and in a manner so as to directly interfere with a class, obstruct corridors, etc., the participants can be punished, but the fact that it creates a risk of stimulating other students to the condemned activities is not germane.

The other interpretation of "disruption" would include conduct which is itself peaceful but distracts students from their school work or provokes a hostile reaction. Proponents of this exegesis might rely on the fact that the Court cites approvingly *Blackwell v. Issaquena Cty. Board of Ed.*, 363 F.2d 749 (5th Cir. 1966), the case which allowed hostility to the wearing of freedom buttons to curtail that form of peaceful expression.

This latter bit of hermeneutics must, however, be rejected. The majority clearly maintains that "there is no indication that the work of the schools or any class was disrupted." 393 U.S. at 508. Yet, Justice Black finds "detailed testimony" to supply ample evidence of interference with particular classes. *Id.* at 517-18. This discrepancy can best be reconciled if the disruption of which the majority speaks relates exclusively to the conduct of the demonstrators and not all to the reactions of the audience. *Cf. id.* at 517. Furthermore, only this interpretation is possible if *Tinker* is to be compatible with the hostile audience cases, *see* notes 108-10 *supra*; *cf.* Berkman, *Students in Court: Free Speech and the Functions of Schooling in America*, 40 HARV. ED. REV. 567, 591-95 (1970). *But see* *Eisner v. Stamford Board of Educ.*, No. 35345 (2d Cir. Mar. 5, 1971); *Butts v. Dallas Independent School Dist.*, 436 F.2d 728 (5th Cir. 1971).

164. Not only are different levels of maturity involved, *see* 393 U.S. at 515 (Stewart, J. concurring); Haskell, *supra* note 158, at 43-44; Wright, *supra* note 115, at 1052-53, but the physical environment and social structure make it, if anything, a more appropriate site for demonstrations. *See* note 115 *supra*.

Although it is clear that the rights of college students cannot be less than those of their high school colleagues, some courts have been unwilling to equate the two. *See, e.g.*, *Schwartz v. Schuker*, 298 F. Supp. 238, 242 (E.D.N.Y. 1969). *Contra* *Scoville v. Board of Educ.*, 425 F.2d 10, 13 n.5 (7th Cir.) (rehearing en banc), *cert. denied*, 400 U.S. 826 (1970).

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of state colleges and universities, dedicated as they are to the specialized function of education, may be utilized solely for that purpose."<sup>165</sup> If nondisruptive protest in even a high school classroom cannot be punished, a court commits flagrant constitutional error when it enjoins members of the college community from holding equally nondisruptive demonstrations in university buildings, as state courts in Colorado and Florida have done.<sup>166</sup>

Of course, the mutual incompatibility standard has two components. The first—that if protest is nondisruptive, it cannot be prohibited—is affirmative in its protection of First Amendment rights. In its inverse form, however, the rule can be used to curtail expression as the *Tinker* dictum expressly contemplates. If the restrictive aspect of the standard is applicable to all parts of the university, nonviolent and nonobstructive protest could be excluded from a specified area where the expression would take place in such a manner as to cause substantial interference with the normal activities that are conducted therein. Examples of such innately disruptive and, hence, enjoicable First Amendment activities would include marching down the aisles of an ongoing class, chanting slogans in the school library and shouting down campus speakers.<sup>167</sup> In these situations the enjoicable conduct is

165. *Stacy v. Williams*, 306 F. Supp. 963, 969 (N.D. Miss. 1969); *Snyder v. Board of Trustees*, 286 F. Supp. 927, 933 (almost identical dictum). The Supreme Court specifically rejected this limited conception of education in *Tinker*, writing:

The principal use to which the schools are dedicated is to accommodate students during prescribed hours for certain types of activities. Among these activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. 393 U.S. at 512.

166. See p. 1008 & note 132 *supra*. Thus, one federal district court recently struck down a university rule against indoor demonstrations by observing "[n]o showing has been made that every building on campus houses such facilities that the presence of even a limited number of persons would be disruptive of those facilities." *Sword v. Fox*, 317 F. Supp. 1055 (W.D. Va. 1970).

167. Examples of such conduct are, unfortunately, not hard to find. See, e.g., *Donald v. University of Mississippi*, Civil No. WC-70-13-5 (N.D. Miss. June 29, 1970) (eight students suspended for disrupting performance of singing group "Up with People"), 3 COLL. L. BULL. 4-5 (1970); *State of Wisconsin ex rel. LaFollette v. Cohen*, No. 124008 (Cir. Ct. Dane County, Wis. Nov. 7, 1967) (complaint for TRO alleging "organized heckling" against Senator Edward Kennedy); *State v. Davis*, 21 Ohio App. 2d 261, 257 N.E.2d 79 (1969) (heckling Vice President Agnew at Ohio State Commencement exercises). Of course, in all these situations the disruption must be substantial. For example, the volume of noise permissible for an outdoor demonstration near an office normally filled with the clatter of typewriters is surely larger than that tolerable for a protest in the school library. A case that "comes close to the borderline, and that emphasizes how permissive the courts have been to the universities," *Wright*, *supra* note 115, at 1048-49, is *Powe v. Miles*, 407 F.2d 73 (2d Cir. 1968). Demonstrators at Alfred University disrupted a scheduled ROTC review by forming a line between the reviewing stand and the field, willfully obstructing the view. The Second Circuit held that the dozen or so students who, although peaceful and orderly, refused to honor a Dean's request to leave the field were properly punished, and Judge Friendly, writing for the Court, remarked somewhat simplistically that "[t]he fact that the demonstration was much less violent than other unhappy incidents of the

neither violent nor physically obstructive, but when held in certain places at certain times, it inevitably becomes substantially disruptive. This judgment may be made under the restrictive part of the mutual incompatibility standard to impose a prior restraint because it entails no consideration of content or audience reaction. The disfavored conduct is disruptive no matter what its message and no matter how calmly or vehemently the audience behaves.<sup>168</sup>

A few injunctions have apparently attempted to operate along the lines of the mutual incompatibility standard. For example, at Columbia University the conduct enjoined in 1970 included "disturbing or interfering with any lawful assemblage or meeting of persons . . . on campus" as well as "creating or broadcasting . . . loud or excessive noise that . . . interferes with the conduct of normal activities by members of the University community."<sup>169</sup> Although overly vague in the specification of "disturbing or interfering,"<sup>170</sup> such orders at least reflect a rudimentary awareness that in dealing with nonviolent and nonobstructive demonstrations, a court cannot give the university the power to exclude protest that is not intrinsically incompatible with the activities usually conducted in the location to which the demonstrators lay claim.

In short, strict application of the mutual incompatibility standard to all campus facilities would afford complete protection for all non-disruptive protests. Orders like the one restraining "entering any academic or administrative building of the University of Colorado for the purpose of conducting any demonstration, protest, or remonstrance"<sup>171</sup> would be voided not because dissident students would be given the right to interrupt classes or occupy offices, but because, as with the armbands in *Tinker*, their demonstration might not substantially interfere with university operations in classrooms and offices. Inversely, the restrictive side of the mutual incompatibility standard would enable the university to protect itself from all conduct which would preclude its facilities from being put to their normal use. Students wishing to

recent past does not mean that it had not passed the limits Alfred was permitted to tolerate; the R.O.T.C. cadets and parents had rights too." 407 F.2d at 85.

168. Prohibition of such conduct would be, in the terminology introduced by Professor Emerson, traffic control regulation, allocating facilities among activities which are intrinsically incompatible if held simultaneously. The "traffic control" metaphor is most valuable in analyzing administrative control of facilities which may be used for First Amendment purposes. See EMERSON *supra* note 58, at 102.

169. Trustees of Columbia Univ. v. December 4 Movement, No. 4340/1970 (Sup. Ct. N.Y. County Mar. 19, 1970).

170. See note 177 *infra*.

171. Regents of Univ. of Colo. v. Fulks, Civil No. 26035 (Dist. Ct. Boulder County, Colo. Apr. 20, 1970).

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stage guerilla theatre would be able to use such areas as the campus green, the school auditorium, even unoccupied classrooms, but their performance would be excluded from taking place in the midst of, say, a physics lecture.

The most serious objection to a literal adherence to the mutual incompatibility standard as just stated is that the protective side to the standard might encroach on the university's power to fashion reasonable place regulations.<sup>172</sup> For example, since even the noisiest protest cannot be said to interfere with the use of a classroom building at a time when no classes are using the building, it might seem that the university could never enforce a reasonable closing hour. Similarly, if the university administration or the student government has adopted a regulatory system for the auditorium in which student groups must register in advance to reserve the room, letting First Amendment users who have not complied with this requirement into the facility merely because no one else happens to be in the room at the time might interfere with the operation of what may be an acceptable administrative scheme for the allocation of university facilities.<sup>173</sup>

The simplest solution to this dilemma is to allow the injunction to incorporate previously existing administrative regulations if the university desires. One important qualification must be attached to this option. The previously existing regulations must themselves be reason-

172. It might also be suggested that where the protective aspect of the standard does not allow the university adequate regulatory power, the restrictive half grants it an excessive amount. Specifically, using the negative half of the standard to deny demonstrators access to parts of the campus when and where the exercise of First Amendment freedoms would necessarily constitute intolerable interference with normal university operations is tantamount to deciding that the usual uses to which any and all campus facilities are put inevitably outweigh the potential of the property as a forum for expression. Cf. *The Supreme Court, 1966 Term*, *supra* note 141, at 140. However, in view of the Supreme Court's unwillingness to countenance any disruptive demonstrations in such facilities as jails, courthouses, high schools, and hospitals, *see* cases cited, notes 141-45 *supra*, such an argument could only apply to areas within the campus that are neither academic nor administrative buildings, and even in these areas, the problem is usually one of sharing resources rather than exclusive use. Cf. note 168 *supra*.

Furthermore, it should be emphasized that even under the mutual incompatibility standard, the university would be unable to exorcise all First Amendment activities from any location by defining "normal use" so as not to include expression. Cf. note 152 *supra*. For example, a university could not successfully argue that the "normal use" of its auditorium is to house concerts, plays, and non-political speakers so that an SDS-sponsored appearance of Abbie Hoffman would necessarily interfere with "normal use." This argument is equivalent to that rejected by the Second Circuit in *Wolin v. New York Port Authority*, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968), where it was contended that a bus terminal exists to accommodate travellers and not to serve as a platform for anti-war protestors. Once the university public is allowed to use the auditorium for the first set of reasons, they cannot be denied access to it as a forum for expression except in a situation where the latter use would actually interfere with a concert, play or nonpolitical speaker.

173. The validity of a registration requirement should not be accepted without question. *See* note 80 *supra*.

able rules as to time, place and manner, not involving any of the forbidden standards of content or audience reaction. A general definition of "reasonableness" in this context is virtually impossible,<sup>174</sup> but courts have struck down particular per se rules as unreasonable restraints on expression.<sup>175</sup>

In summary, then, the mutual incompatibility standard, as derived from the direct geographic restriction cases, should mean that campus injunctions which impose prospective territorial restraints on peaceful protest are valid if and only if: (1) they are limited to expression which would inescapably produce substantial interference with the usual activities conducted in those locations; or (2) they incorporate established, valid per se rules or permit systems for sharing the facility in question.

b. *Vagueness and Overbreadth.* Drafting campus injunctions which can serve as acceptable prior restraints is no simple task. The orders must be written with sufficient generality to protect the campus from all forms of "action" which would render unrealizable the educational mission of the university, but at the same time, it is essential that such generality be achieved without encroaching on protected forms of "expression."<sup>176</sup>

In an overzealous pursuit of the requisite generality, prospective injunctions are frequently replete with ambiguous phraseology and

174. Professor Blasi has attempted to place the problem in a manageable context. See Blasi, *supra* note 82, at 1501-03.

175. See, e.g., *LeFlore v. Robinson*, 434 F.2d 933 (5th Cir. 1970); *Mosley v. Police Dept.*, 432 F.2d 1256 (7th Cir. 1970); *Davis v. Francois*, 393 F.2d 730 (5th Cir. 1969); *Rowe v. Campbell Union High School Dist.*, Civil No. 51060 (N.D. Cal. Sept. 4, 1970), 3 COLLEGE L. BULL. 34 (1971).

Usually, injunctions which enforce pre-existing university closing times for buildings are acceptable. Cf. *Cholmakjian v. Board of Trustees*, 315 F. Supp. 1335 (W.D. Mich. 1970); *In re Bacon*, 240 Cal. App. 2d 34, 49 Cal. Rptr. 322 (1966). Because most of the time, the university would be justified in desiring a firm closing hour for indoor facilities, a per se rule is tolerable. On the other hand, when departure from rigid closing times would not impose any burden on the university, the validity of this type of per se restriction may be seriously challenged. For example, to the extent that an injunction against "[u]nauthorized occupation after the customary closing time . . . of areas normally open to public traffic or gathering," *Trustees of Dartmouth College v. John Doe*, No. 10795 (Super. Ct. Grafton County, N.H. May 6, 1969), prevented a peaceful assembly in, say, a parking lot or dormitory, it would be improper as enforcing overly restrictive per se rules. Unlike the student center situation, where a departure from the normal closing time requires the university to provide the demonstrators with light and heat, and might necessitate keeping a security guard on duty throughout the night, allowing students to assemble in these facilities need not entail any added expenditures on the part of university. Therefore, on most occasions it would be unreasonable for the university to ban meetings in these areas after officially designated closing times, and such per se restraints should fail.

176. For a general discussion of the vagueness and overbreadth doctrines, see, e.g., Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970); Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808 (1969).

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consequently may fail to afford the defendants fair notice of what is proscribed.<sup>177</sup> It is not uncommon, for instance, to be enjoined from "impairing lawful activities on university premises,"<sup>178</sup> from "congregating or assembling . . . in such manner as to disturb or interfere with normal functions and activities,"<sup>179</sup> or from "committing any act which will obstruct the orderly processes of [the] college."<sup>180</sup>

Even when injunctions specify in crystal-clear terms the behavior enjoined, all too frequently they are overbroad in that they inadvertently outlaw protected expression in their sweeping prohibitions. Campus injunctions have suffered from overbreadth as to the people, places, and conduct they have governed. Whether under any circumstances equity has the power to issue an order binding all who receive notice is doubtful,<sup>181</sup> but when the decree may impair the First Amendment rights of those unrelated to the civil controversy giving rise to the injunction, there can be no question but that an order running to "all other persons receiving notice of the order"<sup>182</sup> is improper. Some injunctions, like the one in *Lieberman v. Marshall*,<sup>183</sup> denying a student group the use of *all* campus buildings at *all* times for *all* meet-

177. The resemblance between the language of campus injunctions and that utilized in early labor injunctions is striking. Compare the excerpts quoted in the text with, for instance, the portion of the order in *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 422 (1911), forbidding "in any manner whatsoever impeding, obstructing, interfering with, or restraining complainant's business," and long criticized as "terminology of vague and profoundly controversial significance," FRANKFURTER & GREENE, *supra* note 1, at 97. *Cf. Severson v. Duff*, 322 F. Supp. 4 (M.D. Fla. 1970); *Neal v. Still*, 455 S.W.2d 921, 922 (Ark. 1970). *But cf. Sill v. Pennsylvania State Univ.*, 318 F. Supp. 608 (M.D. Pa. 1970).

178. *George Washington Univ. v. Tizer*, Civil No. 1390-70 (D.D.C. May 6, 1970).

179. *Board of Higher Educ. v. Marcus*, 63 Misc. 2d 268, 311 N.Y.S.2d 579 (Sup. Ct. Kings County 1970).

180. *Trustees of Dartmouth College v. John Doe*, No. 10795 (Super. Ct. Grafton County, N.H. May 6, 1969).

181. 18th and 19th century courts repeatedly declared that an injunction bound only parties to the suit. *See, e.g., Iveson v. Harris*, 32 Eng. Rep. 102 (Ch. 1802). Although the modern view is more expansive, *see generally Note, Binding Nonparties to Injunction Decrees*, 49 MINN. L. REV. 719 (1965), it is generally agreed that attempts to bind all persons cognizant of an injunction are void. *See Developments, supra* note 27, at 1030; *Binding Nonparties, supra*, at 736-737.

At the same time, injunctive orders need not be limited to named individuals. Those like the one issued for George Washington University in a 1970 building occupation case, *George Washington Univ. v. Tizer*, Civil No. 1390-70 (D.D.C. May 6, 1970), phrased so as to bind "said defendants and all persons acting in active concert and participation with them," are not objectionable. *See cases cited, Binding Nonparties, supra*, at 723 n.28. Similarly, the class action concept, as codified, for example, in FED. R. CIV. P. 23, can be used to extend the binding force of an injunction beyond the individuals named. However, even under this approach, it is doubtful that an effort to enjoin "all persons on the premises of [the] College," *Trustees of Dartmouth College v. John Doe*, No. 10795 (Super. Ct. Grafton County, N.H. May 6, 1969), can be redeemed. *Cf. Binding Nonparties, supra*, at 732-33.

182. *Trustees of Columbia Univ. v. December 4th Movement* No. 4340/1970 (Sup. Ct. N.Y. County Mar. 19, 1970).

183. 236 So. 2d 120 (Fla. 1970).

ings,<sup>184</sup> prevent access to facilities, such as the student center, that are completely acceptable forums for protest.<sup>185</sup> Even the University of Colorado order covering only academic and administrative buildings is overbroad for, although the places it lists are unsuitable for noisy, mass demonstrations, that TRO extends to "any demonstration, protest, or remonstrance,"<sup>186</sup> including, presumably, a single picketer carrying his sign up and down the corridor of an almost empty classroom building.<sup>187</sup> Similarly, the decrees which vest in school officials unlimited power to terminate or prohibit any protest in any campus building<sup>188</sup> or simply forbid student leaders from returning to campus<sup>189</sup> go far beyond the objective of preventing disruptive conduct but potentially preclude participation in perfectly permissible protest. Because one of the great benefits of the injunctive remedy in handling campus disputes is that the orders can be patterned to the specific disruption without jeopardizing First Amendment rights,<sup>190</sup> the large

184. See pp. 1003-04 *supra*. The Florida Supreme Court found the order sufficiently narrow because it "did not ban S.D.S. from the Florida State University campus . . .," *Lieberman v. Marshall*, 236 So. 2d 120, 128 (Fla. 1970), but "merely restrained unlawfully occupying and unauthorizedly using any building . . .," 236 So. 2d at 126-27 (emphasis in original).

185. See pp. 1008-16 *supra*.

186. Trustees of Univ. of Colorado v. Fulk, Civil No. 26035 (Dist. Ct. Boulder County, Colo. Apr. 20, 1970).

187. Cf. cases cited, note 175 *supra*.

188. Examples of this species of overbreadth are plentiful. The TRO found defective in *Board of Higher Educ. v. Anderson*, 162 N.Y.L.J. No. 68 (Oct. 6, 1969) at 17, col. 4 (Sup. Ct. N.Y. County), criminalized "[c]ongregating or assembling within or adjacent to any . . . academic buildings, recreational rooms or athletic facilities or in any corridors, stairways, doorways, . . . except as may be expressly permitted . . .," and the same provision was employed in the order at issue in *Board of Higher Educ. v. Marcus*, 63 Misc. 2d 268, 311 N.Y.S.2d 579 (Sup. Ct. Kings County 1970). Even when students are not forced to obtain authorization from college officials to assemble in or around school buildings, much the same result is achieved by delegating to the officials unlimited power to disband demonstrations in specified facilities. See *George Washington Univ. v. Tizer*, Civil No. 1390-70 (D.D.C. May 6, 1970); *Scott v. Alabama Bd. of Educ.*, Civil No. 2865-N (M.D. Ala. May 14, 1969), reported in *STUDENT PROTEST*, *supra* note 12, at 315; *Trustees of Dartmouth College v. John Doe*, No. 10795 (Super. Ct. Grafton County, N.H. May 6, 1969).

Orders such as these should not survive even the most superficial analysis. Assuming that enough state involvement to trigger the First Amendment can be found, see note 43 *supra*, it is firmly established that the vesting of such unfettered authority is constitutionally unpalatable. See *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969); *LeFlore v. Robinson*, 434 F.2d 933 (5th Cir. 1970); *Wisconsin Student Ass'n v. Regents of Univ. of Wisconsin*, 318 F. Supp. 591 (W.D. Wis. 1970) (3 judge court). *But cf. O'Leary v. State*, 441 S.W.2d 150 (Ky.), *appeal dismissed*, 396 U.S. 40 (1969).

189. See *Hearings on SDS Before House Comm. on Internal Security*, 91st Cong., 1st Sess., pt. 2, at 479 (1969) (reporting SDS leaders enjoined from returning to Kent State University after being criminally charged); cf. *Board of Higher Educ. v. Anderson*, 162 N.Y.L.J. No. 68 (Oct. 6, 1969) at 17, col. 4 (Sup. Ct. N.Y. County 1969) (striking down portion of order enjoining faculty member from entering Queens College campus without permission of administration); *Wis. STAT. ANN. § 36.47* (1970 Supp.); *N.Y. Times*, Mar. 14, 1971, at 46, col. 1 (tenured professor at Stanford enjoined from entering central portion of campus).

190. ABA Report, *supra* note 24, at 28.



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number of vague and overbroad injunctions that have issued is especially unjustifiable.

If injunctions are to realize their potential as a device for encouraging free exercise of First Amendment rights while maintaining campus order, several simple principles should guide their deployment. Only named parties, members of the same class,<sup>191</sup> and individuals personally served should be bound. The vague language of eschewing "disrupting" or "interfering" with "lawful missions" or "normal operations" must be abandoned in favor of terminology which leaves no doubt that it is only intolerable interference with university operations that is proscribed, and this, only when the interference is caused by the protestors rather than the audience.<sup>192</sup> Likewise, to cure the defect of overbreadth, it is not "any demonstration" that should be forbidden, but only those that do not satisfy the modified mutual incompatibility standard. Implementing these principles might make for more wordy injunctions, but it would also eliminate the possibility—and all too frequently, the actuality—of decrees which are so vague that it is impossible to say whether they engulf protected expression or else are so broad that it is obvious that they do abridge First Amendment freedoms on the campus.<sup>193</sup>

c. *Procedural Safeguards.* In addition to the constraint that campus injunctions against expression must be narrowly and precisely drafted to function as a system of traffic controls based on a standard of mutual incompatibility allocating campus facilities between their ordinary uses and their role as forums for expression, the demands of what has been called "First Amendment due process" should also condition the granting of campus injunctions. In recent years the Supreme Court has displayed increasing sensitivity to the procedural problems raised by prior restraints on demonstrations,<sup>194</sup> and lower courts have begun to

191. *I.e.*, members of an association with an established structure formed prior to the commencement of the suit. See *Binding Nonparties*, *supra* note 182, at 732.

192. If the injunction contains provisions against violence and physical obstruction, *see* note 95 *supra*, then the problem of a hostile audience is solved quite as effectively as can be accomplished with the picturesque restraint of "vigilante action" found in *Trustees of Dartmouth College v. John Doe*, No. 10975 (Super. Ct. Grafton County, N.H. May 6, 1969).

193. An injunction which is almost free of vagueness and overbreadth was requested by the University of Wisconsin. See note 3 *supra*. Although that order contained terminology as to counseling and inciting that is troublesome, *see* note 63 *supra*, it successfully spelled out the meaning of "disruption" in terms of the demonstrators' behavior. See *State of Wisconsin ex rel. LaFollette v. Cohen*, No. 124008 (Cir. Ct. Dane County, Wis. Nov. 7, 1967), reprinted in *STUDENT PROTEST*, *supra* note 12, at 295-96.

194. The majority in *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969), observed that the constitutionality of a permit scheme depends in part on "the availability of expeditious judicial review of the Commission's refusal of a permit," *id.* at 155 n.4, and stressed the relevance of *Freedman*, and Mr. Justice Harlan's concurring opinion

apply the principles of *Freedman v. Maryland*,<sup>195</sup> the case that imposed constitutional requirements on the procedures chosen for film censorship,<sup>196</sup> to schools,<sup>197</sup> and to demonstrations as well.<sup>198</sup>

In *Freedman* a Baltimore theater owner exhibited a film without first submitting it to the State Board of Censors as statutorily mandated. Acknowledging that the requirement of prior submission was not in itself invalid,<sup>199</sup> the Court proceeded to enumerate a series of procedural strictures, providing, in essence,<sup>200</sup> that an administrative agency cannot restrain exhibition unless the following conditions are met: (1) the exhibitor is assured that the agency will take prompt action;<sup>201</sup> (2) the burden of proving the film should be banned lies with the agency; (3) an agency decision adverse to the exhibitor is affirmed and enforced by judicial decree;<sup>202</sup> (4) a restraint imposed in the interim only preserves the status quo; and (5) the final judicial decision is obtained promptly.<sup>203</sup>

Although the *Freedman* standards were formulated with the idea of an administrative regulatory system in mind,<sup>204</sup> the fact that the

argued that the *Freedman* principles should apply a fortiori to regulatory schemes for political demonstrations. *See id.* at 162-63.

In that same year the Court imported *Freedman's* demand for an adversary proceeding into the context of injunctive regulation of demonstrations. *See Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175 (1968) (discussed at pp. 1022-25 *infra*).

195. 380 U.S. 51 (1968).

196. *Freedman* was by no means the first case to impose procedural limitations on obscenity regulation; it is, in fact, the synthesis of a line of cases establishing the necessity for prior adversary hearings in state obscenity determinations. *See generally* Note, *Prior Adversary Hearings on the Question of Obscenity*, 70 COLUM. L. REV. 1403, 1403-07 (1970).

197. *Eisner v. Stamford Bd. of Educ.*, No. 35345 (2d Cir. Mar. 5, 1971) *Scoville v. Board of Educ.*, 425 F.2d 10 (7th Cir.) (rehearing en banc), *cert. denied*, 400 U.S. 826 (1970); *Stacy v. Williams*, 306 F. Supp. 963, 973 (N.D. Miss. 1969).

198. *See, e.g., LeFlore v. Robinson*, 434 F.2d 933, 946-48 (5th Cir. 1970); *Hurwitt v. City of Oakland*, 247 F. Supp. 995 (N.D. Cal. 1965).

199. 380 U.S. at 53-57.

200. The Court's enumeration of the rules is at 390 U.S. at 58-59.

201. Subsequent cases provide quantitative upper bounds on the period allowed for administrative action. Fifty-seven days is too long, *Teitel Film Corp. v. Cussack*, 390 U.S. 139 (1968), and the least upper bound, though still undefined, exceeds 12 days plus at-the-earliest-practical time, *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968).

Other than the allocation of burden of proof, what procedural safeguards may be required at the hearing stage has not yet been revealed.

202. This refers only to the trial court, *Interstate Circuit Inc. v. City of Dallas*, 390 U.S. 676 (1968), but means that a decision and not merely a hearing by the court must be made promptly, *Teitel Film Corp. v. Cussack*, 390 U.S. 139 (1968).

203. The interim period during which the administrative board may impose a temporary restraint is at least as long as 19 days. *See Interstate Circuit Inc. v. City of Dallas*, 390 U.S. 676 (1968); *Universal Film Exchanges, Inc. v. City of Chicago*, 288 F. Supp. 286 (N.D. Ill. 1968).

204. Although commentators have made substantial efforts to apply the *Freedman* principles to the administrative regulation of demonstrations, their application to the injunctive process has not been fully discussed. *See Blasi*, note 82 *supra*; Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518 (1970); Note, *Parade Ordinances and Prior Restraints*, 30 OHIO STATE L.J. 856 (1969); Note, *Parades and Protest Demon-*

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university dispenses with the administrative hearing stage and proceeds directly to court makes them no less meaningful. Indeed, the very omission of even a minimal hearing intensifies the need for later safeguards.

*Burden of Proof.* By moving into court immediately to obtain a TRO or preliminary injunction, the university substitutes a limited judicial hearing for the initial administrative determination in *Freedman*. In so doing the university circumvents the fundamental demand woven throughout the *Freedman* decision—that “the burden of proving that the [expression] is unprotected must rest on the censor.”<sup>205</sup> A TRO may be obtained without fulfilling this burden because the relief is only intended “to preserve an existing situation *in statu quo* until the court has an opportunity to pass on the merits of a demand for a preliminary injunction”;<sup>206</sup> likewise, the application for the preliminary injunction does not involve a hearing on the merits<sup>207</sup> for its function is to preserve the same status quo pending a final adjudication on a motion for a permanent injunction.<sup>208</sup> Thus, the plaintiff need make no showing on the First Amendment issues. Once he establishes his need for temporary relief, usually by demonstrating the probability of irreparable injury, it is the defendant who must prove that his conduct is protected by the First Amendment if the question is to be raised at all. Thus, although a TRO or preliminary injunction constitutes the sort of interim relief the *Freedman* Court exonerated, the injunctive procedure allows it to be obtained without the censor (here, the university) meeting the burden of proof the Court held constitutionally indispensable.

A university administration could fulfill this burden in two ways.

*strations: Punctual Judicial Review of Prior Restraints on First Amendment Liberties*, 45 *IND. L.J.* 114 (1969); Note, *The Supreme Court, 1966 Term*, 81 *HARV. L. REV.* 69, 145-46 (1967); cf. Note, 119 *U. PA. L. REV.* 512 (1971).

205. 308 U.S. at 58. The allocation of the burden of proof on one whose actions might adversely affect free expression is supported also by such cases as *Elfbrandt v. Russell*, 384 U.S. 11 (1966); *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Speiser v. Randall*, 357 U.S. 513 (1958).

206. *Pan American World Airways v. Flight Eng'rs Int'l Ass'n*, 306 F.2d 840, 842-43 (2d Cir. 1962).

207. *United States v. First Nat'l Bank*, 379 U.S. 378, 385 (1965); *Rogers v. Hill*, 289 U.S. 582 (1933). At most, some jurisdictions require a showing of the likelihood of success on the later hearing for a permanent injunction. See, e.g., *Exhibitors Poster Exchange, Inc. v. Nat'l Screen Service Corp.*, No. 30886 (5th Cir. April 30, 1971); *Anderon v. Laird*, 437 F.2d 912 (7th Cir. 1971). In addition, the showings by the pleadings as well as the evidentiary requirements for a temporary injunction are less than those for a permanent injunction. See, e.g., *O'Brien v. Matual*, 14 Ill. App. 2d 173, 144 N.E.2d 446 (1957).

208. *Exhibitors Poster Exchange, Inc. v. Nat'l Screen Service Corp.*, No. 30886 (5th Cir. April 30, 1971).

As with obscenity, the conduct against which the injunction is desired might be shown to lie entirely outside the First Amendment;<sup>209</sup> that is, the decree requested might be aimed exclusively at unprotected "action"—violence and physical obstruction.<sup>210</sup> Alternately, the university might concede that the conduct it opposes is "expression," but establish that it is nevertheless "unprotected" from the order being requested. This second course would normally consist of proving that the decree is simply a narrowly drafted traffic control regulation pursuant to the mutual incompatibility standard.<sup>211</sup> Whichever strategy might be chosen, though, *Freedman* should mean that, just as equity now demands proof of irreparable harm, a university administration which desires injunctive relief from student protest should also bear both the burden of coming forth with the evidence and the risk of non-persuasion on the question of whether the protest is "unprotected."

*Notice and Adversary Proceedings.* To impose the burden of proof on a party that is unopposed would implement little more than a revised rule of pleading.<sup>212</sup> Thus, the Supreme Court in *Freedman* emphasized the necessity of an adversary proceeding and in *Carroll v. President and Commissioners of Princess Anne*<sup>213</sup> it imposed the same requirement on state injunctive regulation of demonstrations. Rather than invalidate a TRO restraining a white supremacist organization from holding any rallies "which will tend to disturb or endanger . . . citizens"<sup>214</sup> on substantive grounds, the Court directed its opprobrium at a "basic infirmity" in procedure, namely, that it "was issued *ex parte*, without notice to petitioners and without any effort, however informal, to invite or permit their participation in the proceedings."<sup>215</sup>

*Carroll* therefore plainly established that some attempt to notify the named defendants must be made, but the opinion leaves three important questions unanswered. One is what quantum of effort must be expended to notify the named injunction defendants of the pending proceedings. A reasonable estimate of this quantity is readily available, however, in those cases defining what steps must be taken to serve no-

209. If only "action" is being enjoined, then the only other First Amendment due process requirement is that of an adversary hearing. See pp. 1024-25 *infra*.

210. See pp. 995-97 *supra*.

211. See pp. 1008-16 *supra*.

212. At most, a rule analogous to FED. R. Civ. P. 55(c) governing default judgments against the United States might be constructed. Perhaps in cases where the injunction defendants do not appear, the plaintiff who would censor expression should still be required to establish his right to relief, including argumentation on First Amendment protections, "by evidence satisfactory to the court."

213. 393 U.S. 175 (1968).

214. 393 U.S. at 177.

215. 393 U.S. at 180.

tice of an injunction once issued. Actual, and not merely constructive knowledge of the order is essential, but this knowledge need not be imparted by personal service.<sup>216</sup> In fact, notice has been deemed sufficient when received by newspaper,<sup>217</sup> bulletin board,<sup>218</sup> and even word of mouth.<sup>219</sup> Accordingly, the techniques which have been used to serve completed orders on students, such as personal service on John and Jane Does numbered 1 through 100, posting notices on campus buildings, publication in school newspapers, and the use of public address systems,<sup>220</sup> should also suffice to comply with the *Carroll* demand that an effort be made to notify a party of the proceedings pending against him.<sup>221</sup>

A second problem in implementing *Carroll* can arise if there is no easily identifiable group to enjoin at the time the order is requested. In *King v. Jones*,<sup>222</sup> for instance, a federal district court declined to hold that *Carroll* extended to a TRO prohibiting demonstrations nearby a courthouse on the theory that unlike the white supremacist party in *Carroll*, here "there was no readily identifiable group . . . upon whom service could be had."<sup>223</sup> Because most campus demonstrations are organized by some pre-existing group, be it SDS or an ad hoc strike committee, the problem of having no defendants whatever to name and, hence the need for the TRO to be granted *ex parte*, is slight, but even where the administration can only name fictitious personalities, an undesirable tactic to begin with,<sup>224</sup> it should still be obliged to make some effort to publicize the suit. Posting notices on campus buildings or placing a prominent item in the school newspaper announcing the im-

216. See, e.g., *People v. Saffell*, 74 Cal. App. 2d 967, 168 P.2d 497 (App. Dep't Super. Ct. 1946). As stated in *Cape May and Schellinger's Landing R.R. v. Johnson*, 35 N.J. Eq. 422, 425 (Ch. 1882):

Notice, to be sufficient, need possess but two requisites—first, it must proceed from a source entitled to credit, and, second, it must inform the defendant clearly and plainly from what act he must abstain.

217. *United Packing House Workers v. Boynton*, 240 Iowa 212, 35 N.W.2d 881 (1949).

218. *In re Lennon*, 166 U.S. 548 (1897).

219. *Crucia v. Behrman*, 147 La. 144, 84 So. 525 (1920).

220. *Trustees of Columbia Univ. v. SDS, Columbia Univ. Chapter, No. 131A* (Sup. Ct. N.Y. Cty. June 10, 1969), reprinted in *THE CAMPUS CRISIS REVISITED*, *supra* note 41, at 62.

221. Once a suitable effort to notify named parties is made, the *Carroll* requirement is met, and the order may bind nonparties in the same manner as any injunction. See note 181 *supra* and note 256 *infra*.

Similarly, if reasonable notice is given but the defendants do not appear, the *ex parte* nature of an order, arising as it does from their waiver, would not invalidate the relief.

222. 319 F. Supp. 653 (N.D. Ohio 1970).

223. 319 F. Supp. at 656. The Court reached a similar result with respect to a portion of the same *ex parte* TRO restraining witnesses from making public the testimony given before a state grand jury investigating the disorders of last May at Kent State University. Both portions of the order were, however, struck down on other First Amendment grounds.

224. See note 254 *infra*.

pending litigation would not place an unreasonable burden on the university administration and would enable those members of the college community who felt threatened by the prospect of a TRO to present their legal objections to the university's petition at a time when their rights could be most effectively safeguarded.<sup>225</sup>

The final unresolved issue implicit in *Carroll* involves demarcating the set of situations in which an *ex parte* order is sought but *Carroll* governs. Since the facts in *Carroll* were limited to a public rally well within First Amendment confines, it has been thought distinguishable from campus injunctions against non-First Amendment conduct.<sup>226</sup> This distinction is without merit. Since the very question of whether the demonstration is "expression" and within the First Amendment may be disputed, the protection afforded by an adversary proceeding is crucial. Furthermore, the distinction is contrary to the reasoning in *Carroll*. The Court, reflecting a growing distaste for *ex parte* TROs,<sup>227</sup> derived the adversary requirement from the overbreadth doctrine as follows:

[T]he order must be tailored as precisely as possible to the exact needs of the case. The participation of both sides is necessary for this purpose. Certainly, the failure to invite participation of the party seeking to exercise First Amendment rights reduces the possibility of a narrowly drawn order, and substantially imperils the protection which the Amendment seeks to assure.<sup>228</sup>

This diagnosis is all too accurate when applied to injunctions issued in the midst of campus crises. *Ex parte* orders are the norm and adversary

225. A slight variation on this problem may occur if the university chooses not to name all defendants who are identifiable. In such circumstances, an unnamed party may seek representation. However, if the equitable and First Amendment principles as to binding nonparties are observed, *see note 181 supra*, the problem vanishes. Since an injunctive plaintiff should be powerless to bind unnamed parties whose interests are not adequately represented, such individuals or organizations may be denied representation.

226. The TRO in *Carroll* was said to be "plainly distinguishable" from the *ex parte* order against violence and the threat of violence on the part of the November Action Coalition, a loose conglomerate of anti-war groups protesting military research at M.I.T. *November Action Coalition v. Johnson*, Civil No. 69-1154-G (D. Mass. Nov. 4, 1969). Likewise, a state court in *Board of Higher Educ. v. Marcus*, 63 Misc. 2d 268, 311 N.Y.S.2d 579 (Sup. Ct., Kings County 1970), regarded *Carroll* as inapplicable to the activities of the Brooklyn College Strike Steering Committee because it found the protest organized by the Committee to include "an unlawful occupation, violence, the rights of others being violated and irreparable injury to plaintiff." *Id.* at 272; 311 N.Y.S.2d at 587.

227. *See Walker v. City of Birmingham*, 388 U.S. 307, 330 (1967) (Warren, C.J. dissenting) ("The *ex parte* temporary injunction has a long and odious history in this country . . ."). For examples of the abusive use of *ex parte* orders to prohibit demonstrations, *see Brief for Appellants*, at 30 n.15, *Fields v. City of Fairfield*, 375 U.S. 248 (1963). Because the *ex parte* procedure provides no guarantee of the truth of the facts upon which the order is based, abuse is inevitable. *See Developments*, note 27 *supra*, at 1060; Note, *Temporary Restraining Orders*, 40 Ky. L.J. 98 (1951).

228. 393 U.S. at 184.

proceedings exceptional.<sup>229</sup> Often the judge simply signs the order as it has been handed to him by the university's lawyers.<sup>230</sup> They, in turn, have been hard pressed to procure the order in time to forestall future disturbances.<sup>231</sup> In the process the order may have been hurriedly drafted with little concern for precise language, perhaps grafting on whole paragraphs from past injunctions issued in similar cases.<sup>232</sup> Given these ineluctable pressures producing vague and overbroad TROs in cases of student protest,<sup>233</sup> *Carroll* should apply to all student demonstrations both inside and outside the substantive coverage of the First Amendment as previously defined.

*Time Limits.* Two of the *Freedman* rules reflected the Supreme Court's concern over the possibility of protracted censorship proceedings. The Court demanded "a specified brief period" for administrative action<sup>234</sup> as well as "a prompt final judicial decision."<sup>235</sup> Although the *Freedman* Court cautioned that different time limits for a judicial determination might be acceptable in other contexts,<sup>236</sup> the need for expeditious review procedures for suppression of political protest is, if anything, greater than that for motion picture censorship. Justice Harlan, in his concurring opinion in *Shuttleworth v. City of Birmingham*,<sup>237</sup> left no doubt as to this. Stressing the relevance of the *Freedman* time limits to political demonstrations, he wrote:

The right to assemble peaceably to voice political protest is at least as basic as the right to exhibit a motion picture which may have some aesthetic value. Moreover, slow-moving procedures have a much more severe impact in the instant case than they had in *Freedman*. Though a movie exhibitor might suffer some financial loss if he were obliged to wait a year or two while the administrative and judicial mills ground out a result, it is nevertheless quite likely that the public would ultimately see the film. In contrast, timing is of the essence in politics; it is almost impossible to predict the

229. Universities in Washington, D.C., must attempt to serve notice under Fed. R. Civ. P. 65(a). Thus, an exception to the usual *ex parte* practice occurred in May 1970 when George Washington University sought, for the second time in as many years, a TRO against a building occupation. Counsel for defendants came to the court from the midst of dinner, contested the petition, and succeeded in modifying its language slightly.

230. *E.g.*, Trustees of Dartmouth College v. John Doe, No. 10795 (Super. Ct., Grafton County, N.H. May 6, 1969).

231. *Campus Confrontation*, *supra* note 14, at 19; *cf.* note 12 *supra*.

232. *Id.*

233. Examples of vague and overbroad campus injunctions are indicated at p. 1017 *supra*.

234. 380 U.S. at 58-59.

235. 380 U.S. at 59.

236. 380 U.S. at 60-61.

237. 394 U.S. 147 (1969).

political future; and when an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all.<sup>238</sup>

The relevant time period in the injunctive process is that which runs from the issuance of a TRO or preliminary injunction to the final disposition on a motion for permanent injunction. The length of the period may vary from days,<sup>239</sup> to months,<sup>240</sup> and even to years.<sup>241</sup> When delay of this magnitude is juxtaposed with the 19<sup>242</sup> and 23 days<sup>243</sup> permitted for *Freedman*-type pendente lite restraints, it becomes clear that the injunctive process does not comply with *Freedman's* procedural strictures as to time limits.

In fact, the time limit problem with respect to suppression of political expression (national and campus, alike) is so critical that, except in unusual circumstances, pendente lite relief should not be granted at all. Recognizing the short span of time during which it may be possible to organize the campus about a particular incident in order to effect constructive policy change, even the two and three week time limits adequate for movie censorship are too long. If the university has had good reason to anticipate enjoined conduct, it should be required to present its case on the merits at the outset, bearing the full burden of proof necessary for a permanent injunction. In the event of disruption so spontaneous that the university has had no opportunity to prepare its case, but can show irreparable injury from protest properly subject to injunction, temporary relief for the period—no more than a few days—the university's counsel need to marshal the evidence and the law to permit them to argue the justice of their cause in its entirety might be granted.

238. 394 U.S. at 162-63. Justice Brennan expressed the same idea succinctly in the dissenting opinion in *Walker v. City of Birmingham*, 388 U.S. 307 (1967), when he stated "[t]he ability to exercise protected protest at a time when such exercise would be effective must be as protected as the beliefs themselves." *Id.* at 349 (Brennan, J. dissenting; Warren, Ch. J., Douglas, J., Fortas, J. concurring).

239. A federal *ex parte* TRO, for example, cannot last for more than 10 days unless extended for good cause. See FED. R. CIV. P. 65(b).

240. In *Board of Higher Educ. v. SDS, Queensborough Community College Chapter*, 60 Misc. 2d 114, 300 N.Y.S.2d 983 (Sup. Ct. Queens Cty. 1969), the interval between issuing the TRO and granting the permanent injunction was 59 days. *Campus Confrontation*, *supra* note 14, at 5 n.20.

241. The *ex parte* anti-picketing order of a Pennsylvania court of common pleas in *Amalgamated Food Employees v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1967) had been continued indefinitely. Last year, anti-poverty workers campaigning for a school lunch program unsuccessfully petitioned the federal courts to enjoin a school board from enforcing an *ex parte* TRO restraining their "trespassing upon the property of the Floyd County Board of Education" that had been issued without a termination date by a Kentucky court. *Appalachian Volunteers Inc. v. Clark*, 432 F.2d 530, 532 (6th Cir. 1970).

242. See note 203 *supra*.

243. *Universal Film Exchange v. City of Chicago*, 288 F. Supp. 286, 288-89 (N.D. Ill. 1968).



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*Assurance of a Final Hearing on the Merits.* Finally, when a TRO or temporary injunction to curtail protest is granted, it might seem that demonstrators are given no assurance that a final decision on the merits will ever be made, let alone be made promptly. Temporary relief generally suffices to meet the administration's needs,<sup>244</sup> and permanent injunctions are rarely sought.<sup>245</sup> Nonetheless, if the foregoing safeguards are observed, the philosophy underlying the code of procedure in *Freedman*—that the administrative official who would ban expression must first obtain “a final judicial determination on the merits”<sup>246</sup>—will have been adequately incorporated into the injunctive process.<sup>247</sup> If the injunctive procedure ensures that a university prove in an adversary proceeding that it faces irreparable injury from student protest which is either outside the First Amendment or amenable to valid traffic control regulation as to place, and if the court's decree does not exceed a few days even in exceptional circumstances, then the procedure cannot be said to jeopardize the First Amendment rights of the protestors. To impose an additional constitutional requirement that the university petition for permanent relief, especially if the campus has been restored to relative tranquility, would be unnecessary and artificial.

### III. The Efficacy of Injunctive Relief: An Assessment

Chairman Ichord, during his committee's hearings on SDS, commented that “most university administrators have concluded the best way to control campus disturbances is the injunction or temporary restraining order method.”<sup>248</sup> Administrators who have reached this conclusion base their judgment on factors other than the traditional

244. In other contexts, a few courts have refused to issue a temporary injunction when to do so would give the plaintiff all the relief he could expect after a successful trial on the merits. See *Developments in Injunctions*, *supra* note 27, at 1058. When the cases may quickly become moot, as is often true of student protest, the full relief rule may be justified. The best solution, as indicated in the discussion of time limits, is to advance the trial on the merits. *Id.* at 1058-59.

245. An exception is the practice of the corporation counsel of New York City to seek permanent injunctions in all cases on the theory that the decision in favor of granting the TRO should be vindicated. See *Campus Confrontation*, *supra* note 14, at 5 n.22.

246. 380 U.S. at 59.

247. The basic premise of *Freedman* is also applicable to administrative regulation of demonstrations, see authorities cited, note 204 *supra*, in the colleges and high schools, see, e.g., *Stacy v. Williams*, 306 F. Supp. 963, 973 (N.D. Miss. 1969); *Snyder v. Board of Trustees*, 286 F. Supp. 927, 936 (N.D. Ill. 1968). See also *Haskell*, *supra* note 158, at 57; Note, 119 U. Pa. L. Rev. 512 (1971). But see *Eisner v. Stamford Bd. of Educ.*, No. 35345 (2d Cir. Mar. 5, 1971); *Kuszynski v. City of Oakland*, 39 U.S.L.W. 2487 (N.D. Cal. Feb. 11, 1971).

248. *Hearings on SDS*, *supra* note 189, pt. 2, at 484.

tests for equitable jurisdiction and a concern for the protection of First Amendment freedoms. From the perspective of a beleaguered administration quick recourse to the injunctive process may seem advantageous for a variety of purely strategic reasons. An authoritative declaration that the conduct of the demonstrators is unlawful can help gain community and student support for the administration's position.<sup>249</sup> It may forestall vigilante action on the part of those opposed to the demonstrators.<sup>250</sup> Perhaps it will help insulate the university from the second wave of disturbances which seek to coerce amnesty for students arrested in earlier disruptions.<sup>251</sup> If the order is obeyed, it may avert the indiscriminate application of force and the open hostility that so often accompany the presence of police on campus.<sup>252</sup> Of course, these appealing items must be balanced against certain legal complications which may attend the enforcement of an injunction on campus. For example, difficulties may arise in binding nonparties,<sup>253</sup> serving the

249. ABA Report, *supra* note 24, at 27. The order may help the university administration focus attention on the leaders of the disruption and their violent tactics. *Campus Confrontation*, *supra* note 14, at 7-8.

250. By serving a court order the university proves it is not capitulating to the protestors and reduces the incentive for counter-demonstrations. *Campus Confrontation*, *supra* note 14, at 8. This factor played some role in the decision of Dartmouth College to seek injunctive relief from a building seizure in 1969. Interview with Carroll Brewster, Dean, Dartmouth College, Aug. 5, 1970, on file with the *Yale Law Journal*.

251. *Campus Confrontation*, *supra* note 14, at 8. It is generally thought that the effect arises from "[t]he shift in the role from complainant, as the university would appear in a trespass action to that of fact finder, as it appears in the contempt action . . ." *Id.* This scenario is oversimplified. Although a constructive contempt, being an offense against the state, should be prosecuted by an attorney for the state, *e.g.*, *Peterson v. Peterson*, 278 Minn. 275, 153 N.W.2d 825 (1967), the university is normally the party to initiate the proceedings. Typically it serves an order on the defendants to show cause why they should not be held in contempt, *e.g.*, *Trustees of Columbia Univ. v. SDS*, No. 5637/69 (Sup. Ct. N.Y. County April 30, 1969) (Order To Show Cause), reprinted in *THE CAMPUS CRISIS REVISITED*, *supra* note 41, at 50-52. This mode reflects the view that an injunction is granted as a civil remedy for the benefit of the plaintiff who can, if he wishes, hold it in abeyance.

At the same time, university counsel show a keen appreciation for the fact that if they consistently petition a court for injunctive relief but never enforce it, they will cause the court to be reluctant to issue further orders on their behalf. For example, the University of Wisconsin has obtained two injunctions against protesting students but has served neither. Their former counsel has indicated that should it be necessary to obtain a third, the university will enforce it for fear that failure to do so would alienate the court, if for no other reason. Bunn Interview, *supra* note 3. In addition, under one theory violation of a decree is an affront to the court, and contempt, a vindication of the court's authority. *See, e.g.*, *Bessette v. W.B. Conkey Co.*, 194 U.S. 324, 328 (1904), quoting *In re Nevitt*, 117 F. 448, 458 (8th Cir. 1902). Accordingly, a court (or prosecutor) on its own initiative may institute indirect contempt proceedings, *e.g.*, *Board of Junior College District No. 508 v. Cook County College Teachers Union*, Local 1600, No. 52465 (Ill. App. June 26, 1970), 74 L.R.R.M. 2909, *pet. for cert. filed sub nom. Cook County College Teachers Union v. Swenson*, 39 U.S.L.W. 3299 (U.S. Jan. 4, 1971). *Cf. Regents of Univ. of Colorado v. Fulks*, Civil No. 26035 (Dist. Ct. Boulder County, Colo. Apr. 20, 1969) (Modified TRO).

252. *See* pp. 1006-07 *supra*.

253. *See* note 181 *supra*. Furthermore, even if the class action approach is pursued and a proper class named, formidable problems in establishing membership in the

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order,<sup>254</sup> and acquiring jurisdiction over juveniles.<sup>255</sup> In addition, the limited and confused character of the defenses available to alleged contemnors may place the injunction defendants in an unfair position.<sup>256</sup>

class may be present. Injunctions like those obtained by M.I.T. against the November Action Coalition, Massachusetts Institute of Technology v. Hahnel, No. 30407 (Super. Ct., Middlesex Cty. Nov. 3, 1969), or by Columbia University against the December 4th Movement, Trustees of Columbia Univ. v. December 4th Movement, No. 4340/1970 (Sup. Ct. N.Y. County, N.Y. Mar. 19, 1970) (Order to Show Cause), although they do name acceptable classes, are aimed at "the most ephemeral organizations on the face of the earth," *Hearings on Riots, supra* note 12, pt. 21, at 4588 (testimony of Dr. Richard Lyman, Vice President and Provost, Stanford University). In addition, those schools which have refused to allow SDS chapters to form on campus, such as the University of Florida, *Hearings on SDS, supra* note 189, pt. 1, at 11, and Florida State University, Lieberman v. Marshall, 236 So. 2d 120, 123 (Fla. 1970), those that have effectively discouraged chapters from organizing, such as Georgetown University, *Hearings on SDS, supra*, pt. 1-B, at 345, and those that have outlawed existing units, such as Kent State University, PRESIDENT'S COMM'N, *supra* note 2, at 236, face an even more fundamental obstacle in utilizing the class action technique.

254. The methods for serving the orders employed by universities are usually legally sufficient, *see* p. 1023 *supra*, but there is a real possibility that the defendants will refuse to accept service. For example, at one point the University of Wisconsin, having secured a TRO, was unable even to find the students named as defendants. Bunn Interview, *supra* note 3. After the Pennsylvania State University computer center take-over, a federal court reviewing disciplinary proceedings commented "[t]he noise and confusion from the crowd and the interference from the squeal of a public address system used by one of the students was so great that the reading of the injunction was unintelligible to those who were in a position to hear it and inaudible to most of those in the building." *Sill v. Pennsylvania State Univ.*, 318 F. Supp. 608, 612 (M.D. Pa. 1970). *Cf. Rosenthal, supra* note 19, at 760. Certainly, the refusal to accept service is no legal obstacle to a contempt conviction in view of the numerous cases holding service of process to be sufficient if the attempt to serve is made but the physical failure to complete is due to the refusal of the individual to accept the papers. *See* cases cited, *Rosenthal, supra*, at 761 n.74. However, the resentment the John Doe technique generates is a more fundamental problem. For this reason a few schools will serve only known individuals and organizations. Interview with John Cantini, Vice President for Administration, George Washington University, July 28, 1970, on file with the *Yale Law Journal*.

255. For instance, of the five students who violated the 1969 TRO at George Washington University, one was a juvenile and therefore not charged with contempt. *Hearings on SDS, supra* note 189, pt. 3-A, at 680.

256. Excluding questions of identification, the only possible defenses are constitutional and jurisdictional. *See CHAFFEE, supra* note 16, at 296-380; *Blasi, supra* note 82, at 1555-67. On the jurisdictional issue, although actual knowledge of the order must be proved for a defendant to be held in contempt, *see* p. 1023 *supra*, and although certain persons cannot be held in contempt even with knowledge, *see* note 181 *supra*, if the university makes a strong effort to publicize the injunction, a court will probably be willing to impose contempt sentences in the absence of individualized evidence of actual knowledge. Thus, in the third Columbia incident of 1969, *see* note 261 *infra*, the state court held that:

[T]he defendants had knowledge of the terms and conditions of the restraining order of April 19, 1969. Not only was service made personally upon some of the defendants but the campus was saturated with newspaper, radio, pamphlet distribution, conversation, pronouncements and oratory and the injunctive order was headline news of the first magnitude.

*Trustees of Columbia Univ. v. SDS, Columbia Univ. Chapter, No. 131A (Sup. Ct. N.Y. County June 10, 1969)*, reprinted in *CAMPUS CRISIS REVISITED supra* note 41, at 62, 64.

As for constitutional defenses, perhaps the alembic of future decisions will bring order into the chaotic world of *Thomas v. Collins*, 323 U.S. 516 (1945), *Walker v. City of Birmingham*, 388 U.S. 307 (1967), and the intervening cases. *See generally* *Blasi, supra*, at 1555-57; *CHAFFEE, supra*, at 296-380. But as they now stand, these decisions force on dissident students who feel that any portion of the TRO issued against them is substantively improper, a difficult choice. They must delay their proscribed activities until their legal

Thus if injunctions are framed in the light of the equitable and constitutional principles described earlier, their use on campus presents tactical rather than legal problems. Of all the strategic considerations that have been outlined, the most important by far is the hope that voluntary compliance with the injunction will avoid the prospect of the campus' being turned into an exercise in riot control. Inversely, the gravest problem with the use of the injunctive process is that posed by the spectre of widespread defiance of court orders. Accordingly, advocates of the campus injunction point out that many of the early orders issued to terminate building seizures were successful in clearing the buildings without resort to police;<sup>257</sup> in the words of one administrator, the use of injunctions has had "a great tranquilizing effect."<sup>258</sup> Yet, unqualified success has not been forthcoming,<sup>259</sup> and the prospects for continued voluntary compliance are diminishing.

challenge is complete or face an almost certain contempt citation. While injection of the procedural safeguards of *Freedman v. Maryland* into the injunctive regulation of demonstrations, see pp. 1019-27 *supra*, would ameliorate the severity of the problem, the same difficulties exist in somewhat attenuated form in injunctions banning protest not strictly within First Amendment confines. See *Campus Confrontations*, *supra* note 14, at 9.

257. A survey conducted by the National Association of College and University Attorneys in 1969 revealed that of the 22 instances in which universities reported seeking injunctions:

Voluntary compliance to court order was obtained within hours in fourteen cases (including three in City University of New York), in days for one institution. In one case compliance was obtained in minutes and before orders could be processed. In five cases the court order was not obeyed and enforcement was sought in the form of contempt citation. In another . . . case the question was not answered . . . .

In all cases enforcement orders were obtained without difficulty. Voluntary compliance was normally obtained . . . .

Nat'l Ass'n of College and University Attorneys, *Report to the American Council of Education on the Use of Injunction Against Campus Disorders*, 4 COLLEGE COUNSEL 1, 5 (1969) [hereinafter cited as NACUA]. See also PRESIDENT'S COMM'N, *supra* note 2, at 140; *Hearings on SDS*, *supra* note 189, pt. 1-A, at 47; *Hearings on Riots*, *supra* note 12, pt. 21, at 4542.

258. Cantini Interview, *supra* note 253.

259. In several cases large numbers of students have simply flaunted the order. At least 56 of the original 150-200 students occupying Dartmouth's administration building in 1969 had to be forcibly removed and were later convicted of contempt and sentenced to thirty days imprisonment. Brewster Interview, *supra* note 250; Herman, *supra* note 18, at 224. At Florida State University 58 were arrested when they refused to leave the prohibited SDS meeting in the student union after the TRO was read to them, *Lieberman v. Marshall*, 236 So. 2d 120, 124 (Fla. 1970). Likewise, many students remained in a building at Pennsylvania State University despite warnings, and fifteen state policemen were injured in enforcing the injunction. *Sill v. Pennsylvania State University*, 318 F. Supp. 608, 612 (M.D. Pa. 1970) (no report of injuries to students given by court). At Boston University six students were sentenced to three months in jail for contempt of an order directing them to vacate a university building. Herman, *supra*, at 230. Finally the most tragic example of the complete futility of injunctive control is provided by the events at Kent State University in May 1970. See PRESIDENT'S COMM'N, *supra* note 2, at 245.

Sometimes when the incident covered by the injunction is resolved without police force, the value of the injunction is nevertheless illusory in that police are called in to deal with a related event anyway. For instance, in December 1969 the University of Wisconsin obtained an order against disruption of classes. Although the injunction

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The probability that a court order will be complied with voluntarily is a function of at least three variables. First, thus far, injunctive relief is an extraordinary remedy, imbued with more judicial majesty than a riot stick can command. In this respect its use, as one radical group pointed out, is "psychological warfare."<sup>260</sup> If so, as the novelty of the invocation of injunctions wears off at particular campuses, prospects for voluntary compliance will dwindle. Already, at those institutions where multiple resort to injunctive relief has been had, growing numbers of students have become increasingly less cooperative with the process.<sup>261</sup> Apparently, "[y]oung blood doth not obey an old decree."<sup>262</sup>

Second, for the injunction defendants the order is a specific weapon pointing directly at them.<sup>263</sup> This factor has its maximum impact on

was itself obeyed, the unrest terminated in a march on the ROTC building and a fight with police at that point. Bunn Interview, *supra* note 3. During the November 4th protest at MIT, where it was felt that the few instances of violence arguably in violation of the TRO were not sufficiently serious to demand contempt proceedings, police were nevertheless used to clear entrances on city streets to some laboratories. Letter from Kevin Hern to author, at 3, Aug. 14, 1970, on file with the *Yale Law Journal*. Similarly, limited use of police was made despite deployment of TROs at C.U.N.Y., Board of Higher Educ. v. Rubain, 62 Misc. 2d 978, 310 N.Y.S.2d 972 (Sup. Ct. Bronx County 1970), and at Brooklyn College, Board of Higher Educ. v. Marcus, 63 Misc. 2d 268, 311 N.Y.S.2d 579 (Sup. Ct. Kings County 1970).

Finally, as with several of the instances reported to NAGUA, note 257 *supra*, police had to be called onto campus shortly before the incident covered by the injunction, so that the voluntary compliance was of reduced strategic value.

260. K. BOUDIN et al., *THE BUST BOOK: WHAT TO DO UNTIL THE LAWYER COMES* 81 (1969). Jack Greenberg, director of the N.A.A.C.P. Legal Defense Fund, has attributed much of the effectiveness of the injunction to "the mystique of the courts." See Herman, *supra* note 18, at 229. This factor should be most persuasive with "moderates" whose respect for the judiciary exceeds that possessed by "radicals," *cf. Campus Confrontation*, *supra* note 14, at 12, but even the seasoned dissident may pause at the fact that it is the court that is ordering him out of a building or to refrain from violence. For example, after the third building seizure at Columbia in 1969, *see* note 261 *infra*, an SDS leader was asked in a university radio interview why the demonstrators finally left before the arrival of the police. He replied:

Well, the injunction escalates the risk of conducting a sit-in. It is no longer a question of simply violating university rules, or even being subjected to charges of criminal trespass, which may be later withdrawn. It brings us into confrontation with the court.

STUDENT PROTEST, *supra* note 2, at 154.

261. The 1969 experience of Howard University is instructive. On February 18, law students occupied the law building but left in the face of an injunction. On March 11, various students occupied the President's Office and the New Classroom Building; they left peaceably following the issuance of a TRO. On May 8, about five buildings were seized, and, once again, an injunction secured. This time a contempt citation had to be issued, and 100 federal marshals moved onto the campus, making arrests. *Hearings on Riots*, *supra* note 12 pt. 22, at 4678 & 4778. See also *In re Anderson*, 306 F. Supp. 712 (D.D.C. 1969). The same trend was evident at Columbia University that same year. See STUDENT PROTEST, *supra* note 2, at 153-54. Similarly, a 1968 order at George Washington University to terminate a building seizure proved eminently successful, but one the following year resulted in five arrests and four contempt convictions. See *Hearings on SDS*, *supra* note 189, pt. 3-A, at 680.

262. Love's Labours Lost IV, iii, 218.

263. As BOUDIN et al., *supra* note 260, put it:

Criminal laws are not directed at any one person or any one situation. An injunction, however, is directed at specific people in a specific situation. This makes us feel

those named in the order, and by clearly announcing what activity is intolerable, has a secondary effect on those not named. Nonetheless, the possibility that an injunction defendant will risk a contempt citation is by no means chimeric. Many protesting student groups have excellent legal advice, and, as further use of the injunction is made, these students will be informed of differences between state injunction statutes and criminal laws.<sup>264</sup> When they realize that with the recent barrage of criminal statutes trained on the campus<sup>265</sup> a contempt conviction will often result in a sentence less severe than that imposed for a criminal violation,<sup>266</sup> they will be less hesitant to defy a court's authority.

Third, to the extent that students perceive the administration's use of the injunction as "illegitimate,"<sup>267</sup> they will be disinclined to honor it. From the standpoint of the demonstrators, the injunctive process is but a judicial subterfuge purporting to resolve the crisis but avoiding the underlying issues; the court acts as a lackey of the university, attempting to legitimize the administration's inaction or rejection of the protestors' grievances.<sup>268</sup> If the university repeatedly seeks the aid of the courts, especially in instances where the complaints voiced by the dissenting students have substantial support among the campus community, this analysis is likely to prevail among more moderate students as well. Therefore, rather than "tranquilizing" students, interposition

more threatened; we feel as if we've been singled out by the court and there will be no escape if we in any way violate the injunction.

See also Herman, *supra* note 18, at 229.

264. This educational process is already underway:

When first used, many of us feared that contempt meant arrest at any time, jail without a trial, and no right to bail or appeal. In fact, contempt proceedings are, alternatively, no worse for us than regular criminal trials.

BODIN et al., *supra* note 260, at 82-83.

265. See note 25 *supra*.

266. Sentences and fines for violating an injunction vary from state to state. See, e.g., N.Y. JUDICIAL LAW 751 (McKinney 1968) (\$250 and/or 30 days); 17 PA. STAT. ANN. 2018 (1930) (\$100 and/or 15 days); 34 ARK. STAT. ANN. 902 (1947); (\$50 and/or ten days); 9 ALAS. STAT. 09.50.020 (1956) (\$300 or 6 mo.); ARIZ. REV. STAT. ANN. 12-863 (1956) (\$1000 and/or 6 mo.); CAL. CIV. PROC. 1218 (West 1955) (\$500 and/or 5 days).

It is, however, possible that the same act may be punished as both a crime and a contempt, see note 29 *supra*; Herman, *supra* note 18, at 231 (reporting multiple prosecutions arising from Columbia University incidents), but students will probably be advised that such double prosecution is unlikely in most cases, *Campus Confrontations*, *supra* note 14, at 12. In the Dartmouth case, for example, see note 259 *supra*, ACLU lawyers advised the offending students that if they remained in the administration building, thirty day sentences would be forthcoming. Brewster Interview, *supra* note 250. Their prediction was correct and no other criminal charges were brought.

267. In employing this term, the distinction drawn by Professors Graham and Gurr between "legality" and "legitimacy" is assumed. See H. GRAHAM & T. GURR, *VIOLENCE IN AMERICA: HISTORICAL AND COMPARATIVE PERSPECTIVES* xiv-xv (Staff Report to Nat'l Comm'n on the Causes and Prevention of Violence No. 1, 1969).

268. See *Campus Confrontation*, *supra* note 14, at 10.

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of the court may polarize resistance to university discipline and generate animosity toward the judiciary.<sup>269</sup> If demands for vague and overbroad orders persist, and if improper resort to the injunction is made for the purpose of restraining First Amendment freedoms, it may, as the ABA cautioned, "result in lower court denials or appellate court reversals embarrassing to the university, and may contribute to the arguments of dissidents that the university does not respect basic constitutional rights."<sup>270</sup>

For such reasons one administrator recently expressed the fear that if the proliferation of campus injunctions continues unchecked, in a year or so the tactic will no longer be potent in inducing voluntary compliance.<sup>271</sup> Although this prognosis may be overly pessimistic, slogans like the one in vogue at George Washington University in 1970—LIFT THE RESTRAINING ORDER NOW! JOIN US!<sup>272</sup>—will undoubtedly attract more adherents in the coming years.

To summarize, it would be a serious mistake to believe that injunctive control will automatically defuse a campus crisis. Whatever their constitutional and equitable merits, the success of injunctions in dislodging students from barricaded buildings and curtailing other militant tactics has varied considerably, sometimes effecting immediate compliance and, increasingly, evoking mass defiance. Considering the three major factors which appear to influence the efficacy of injunctive relief, three parallel principles should guide its deployment. First, if familiarity is not to breed contempt, relief should be sought sparingly,<sup>273</sup> and reserved for major confrontations in which seriously disruptive conduct well beyond the limits of the First Amendment has already occurred.<sup>274</sup> Second, it should not be used prospectively, as a

269. Cf. ABA Report, *supra* note 24, at 28.

270. *Id.*

271. Cantini Interview, *supra* note 254.

272. *Hearings on SDS, supra* note 189, pt. 3-B, at 1025.

273. PRESIDENT'S COMM'N, *supra* note 2, at 141. The National Association of College and University Attorneys went so far as to recommend that injunctions be used only when the demonstrators are seeking an "excuse" to end the protest. NACUA, *supra* note 257, at 9; cf. ABA Report, *supra* note 24, at 27; THE CAMPUS CRISIS REVISITED, *supra* note 41, at 15.

274. The stated policy of Columbia University embodies this idea. According to their counsel:

In the fall of 1968 we at Columbia made a policy decision not to seek recourse to an injunction for frivolous reasons, but to reserve it for an activity so serious as to create an imminent peril of widespread disruption or interference with university activities. Having made that decision we also decided that even when such conduct was imminent we would not seek an injunction anticipatorily, but would wait until there had been an occurrence. An advantage of this approach is that when the institution *does* seek an injunction the campus knows it is necessary and that it is not intended as a menacing or restrictive ploy.

STUDENT PROTEST, *supra* note 12, at 152.

prior restraint on protest,<sup>275</sup> but should be restricted to ongoing, unprotected, disruptive actions. Finally, it should be obtained only when the rallying potential of the issues advocated by the demonstrators is small.<sup>276</sup> Otherwise, if these admonitions are ignored and the device displayed too frequently, campus injunctions will be flaunted by students, police or patience will be necessary to weather the crisis, respect for the administrations' positions will have been undermined, and the moral force of the courts squandered.

275. Not only are constitutional infirmities almost certain to afflict an injunction used as a prior restraint, *see* pp. 1000-19 *supra*, but the probability that the order will be perceived by the campus community as repressing legitimate protest is considerably enhanced by the fact that it forbids future expression.

276. *Cf. Campus Confrontation, supra* note 14, at 13.