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PROTESTS, ACTIVISM, AND STUDENT RIOTS

Lawrence White
Chief Counsel, Pennsylvania Department of Education

*Something is happening here,
And you don't know what it is,
Do you, Mr. Jones?*
—“Ballad of a Thin Man,” Bob Dylan

Everyone is nineteen, only at different times.
—THE STRAWBERRY STATEMENT, James Simon Kunen

I. The “Who,” “What” and “Why” of Student Protests

A. A Sampler of Readings on Student Protests.

- THE REPORT OF THE PRESIDENT'S COMMISSION ON CAMPUS UNREST (U.S. Government Printing Office, 1970). President Nixon appointed the Scranton Commission (named after Pennsylvania Governor William Scranton, who served as its chair) shortly after the killings of student protestors on the campuses of Kent State and Jackson State Universities in the spring of 1970. The Commission's massive report, while not politically dispassionate, is the starting point for serious consideration of the causes of demonstrations and disruptions that swept American college campuses in the late 1960s and early '70s. The report contains detailed interviews with witnesses and participants at Kent State and other campuses, and offers a series of recommendations for preventing and coping with campus protests.
- Carnegie Commission on Higher Education, DISSENT AND DISRUPTION—PROPOSALS FOR CONSIDERATION BY THE CAMPUS (1971). In the wake of violent campus protests in the late 1960s, many organizations—the American Civil Liberties Union, the American Bar Association, the American Council on Education, Congress, state legislatures—weighed in with analyses and suggestions. The Carnegie Commission's were among the most comprehensive and thoughtful. It contains long chapters with titles such as “Consultation and Contingency Planning,” “Procedures for Determining Violations of Campus Regulations and Assessing Penalties,” and “A Bill of Rights and Responsibilities,” all designed to give campus leaders tools for coping with protests in the future.

- John Searle, *THE CAMPUS WAR: A SYMPATHETIC LOOK AT THE UNIVERSITY IN AGONY* (1971). Professor Searle, a member of the Philosophy Department at the University of California, Berkeley and a 1950s student activist, tries to get inside the minds of student activists.
- Daniel Bell and Irving Kristol, eds., *CONFRONTATION: THE STUDENT REBELLION AND THE UNIVERSITIES* (1968). This book, assembled in the immediate aftermath of violent student demonstrations at Columbia University in the spring of 1968, consists of a collection of essays originally published in a special edition of the conservative journal *The Public Interest* in the fall of that year. From a distance of a third of a century, the essays powerfully capture the tremendous fissures and divisions that Vietnam-era student demonstrations opened among faculty members and intellectuals on university campuses.
- James Simon Kunen, *THE STRAWBERRY STATEMENT: NOTES OF A COLLEGE REVOLUTIONARY* (1968). This popular book (later turned into a mediocre movie) was written by a Columbia University undergraduate. It chronicles his radicalization and subsequent actions as a self-described “militant protesting student” during the occupations, sit-ins and police confrontations at Columbia in the spring of 1968. For those of you who didn’t experience 1960s-style higher education first-hand, this book brilliantly captures the confusion and emotion of that turbulent time.

B. Student Activism: Some Snapshots and Generalizations.

- (1) *There are few activists on campus.* Asked to characterize themselves on the political spectrum, most students respond that they are “middle-of-the-road.” That was true even at the height of student activism in the 1960s.
- (a) From a survey conducted by the Carnegie Commission in 1969-70 (the absolute epicenter of the campus demonstration era):

Undergraduates in All Institutions—Political Ideology and
Participation in at Least One Campus Demonstration

% of undergraduates

Left and participated	5
Left and did not participate	1
Liberal and participated	19
Liberal and did not participate	21
Middle-of-the-road and participated	6
Middle-of-the-road and did not participate	30
Conservative and participated	2
Conservative and did not participate	16

Even in the late '60s, when campuses were being torn apart by demonstrations, two-thirds of all students were non-participants. Today, it's a safe guess that the proportion of non-participants is substantially higher.

- (b) From Seymour Martin Lipset, "The Activists: A Profile," reprinted in Daniel Bell and Irving Kristol, eds., *CONFRONTATION: THE STUDENT REBELLION AND THE UNIVERSITIES* 45, 51 (1968):

The powerful 2 per cent. The university campus is an ideal place in which to be a radical activist. Many universities have tens of thousands of students concentrated in a small area. It takes only a small percentage of these massive student bodies to make a large demonstration. Thus, in 1965-67, although opinion polls indicated that the great majority of American students supported the Vietnam War and that anti-war sentiment within the group was no greater than in the population as a whole, the campus opposition was able to have an inordinately great impact because it could be mobilized. ...

According to national surveys of student opinion taken by the Harris Poll in 1965 and the Gallup Poll in 1968, approximately one-fifth of the students have participated in civil rights or political activities. ... The radical activist groups generally have tiny memberships. ... A Harris Poll of American students taken in the spring of 1968 estimates that there are about 100,000 radical activists, or somewhere between 1 and 2 per cent of the college population.

- (2) *Student activists are kids.* I don't mean that pejoratively. Like college students of every background and political persuasion, they are idealistic. They see the world in black and white terms. They bristle at authority. They're impatient. They think they know it all.

- (a) From Up Against the Wall/Motherfuckers, "What the Students Really Want," reprinted in Barbara and John Ehrenreich, *LONG MARCH, SHORT SPRING: THE STUDENT UPRISING AT HOME AND ABROAD* 21 (1969):

Each day brings new areas under our control.
Each day a new victory is reported.
Each day fantasy discovers new forms of organization.
Each day it further consolidates its control, has less to fear, can afford to
 spend more time in self discovery.
Even in the midst of battles it plans the cities of the future.

We are full of optimism.
We are the future.

(b) From Alan Adelson, SDS 122 (1972):

During the 1968 Columbia rebellion, then-University President Grayson Kirk made the charge that the protesting students were out on a foolish, anti-authority, hate everything jag with no real goal: “Our young people reject authority and take refuge in turbulent, inchoate nihilism,” he claimed. Mark Rudd ... answered for the SDSers¹:

“Your cry of nihilism represents your inability to understand our positive values. We do have a vision of the way things could be: how the tremendous resources of our economy could be used to eliminate want; how people in other countries could be free from your domination; how a university could produce knowledge for progress, and not wasteful consumption and destruction; how men could be free to keep what they produce, to enjoy peaceful lives, to create. These are positive values—but since they mean the destruction of your order, you call them nihilism. ... We will have to destroy at times, even violently, in order to end your system, but that is a far cry from nihilism.”

(c) From James Simon Kunen, *THE STRAWBERRY STATEMENT: NOTES OF A COLLEGE REVOLUTIONARY* 4-6 (1968):

People want to know who we are, and some think they know who we are. Some think we're a bunch of snot-nosed brats. It's difficult to say who we are. ... A lot of the time we are unhappy, and we try to cheer ourselves up by thinking. We think how lucky we are to be able to go to school, to have nice clothes and fine things and to eat well and have money and be healthy. But we remain unhappy. Then we attack ourselves for self-pity, and become more unhappy, and still more unhappy over being sad.

We're unhappy because of war, and because of poverty and the hopelessness of politics, but also because we sometimes get put down by girls or boys, as the case may be, or feel lonely and alone and lost. ...

¹ For those who don't remember, SDS—Students for a Democratic Society—was the largest, most visible student radical organization of the 1960s and '70s. Here's how it described itself in 1969: “SDS is an association of young people on the left. It seeks to create a sustained community of educational and political concern: one bringing together liberals and radicals, activists and scholars, students and faculty. It maintains a vision of a democratic society, where at all levels the people have control of the decisions which affect them and the resources on which they are dependent.” Quoted in Lawrence E. Eichel *et al.*, *THE HARVARD STRIKE* 28 (1970). Mark Rudd was the almost mythic leader of the SDS chapter at Columbia University in the spring of 1968.

But sadness is not despair so long as you can get angry. And we have become angry at Columbia. Not having despaired, we are able to see things that need to be fought, and we fight. We have fought, we are fighting, we will fight.

(3) *Student activists are inherently disorganized and their actions are almost willfully uncoordinated.*

(a) From John Searle, *THE CAMPUS WAR: A SYMPATHETIC LOOK AT THE UNIVERSITY IN AGONY* 53-54 (1971):

One of the most striking contrasts between the present radical student movement and earlier radical student groups, such as the Communist group of the 30's, lies in the difference of organizational and leadership style. Rejecting the Leninist model of a disciplined, self-perpetuating, tightly organized, hierarchical party structure of professional revolutionaries, today's young radicals ... strive for an ideal of "participatory democracy," a system in which organizations have very little organization, party discipline is non-existent, leaders don't lead, and organized groups have only a temporary existence. ... The Free Speech Movement, for example, was formed in the fall of 1964 and deliberately dissolved the following spring. During its brief existence it grew to immense power, but it never had a president or a secretary or a membership list. Decisions were either taken at mass meetings, by a vote of whoever showed up, or more commonly by a twelve-man² steering committee, ... some of whom were just self-selected or co-opted by the others. ... One consequence of this was that on close questions the same decision sometimes had to be made four or five times at separate meetings before the issue was regarded as settled.

(b) From James Simon Kunen, *THE STRAWBERRY STATEMENT: NOTES OF A COLLEGE REVOLUTIONARY* 4-6 (1968):

We all go into [Columbia University President Grayson] Kirk's office and divide into three groups, one in each room. We expect the cops to come any moment. After an hour's discussion my room votes 29-16 to refuse to leave, to make the cops carry us out. The losing alternative is to escape through the windows and then go organize a strike. The feeling is that if we get busted, *then* there will be something to organize a strike

² That gender-specific word comes from the original text and is surprisingly accurate. In the 1960s and '70s, men led almost all campus activist organizations. "Women have long had grievances with the way they've been treated on the Left. One of the most quoted things Mark Rudd ever said in SDS before he left to build bombs was: 'Get me a chick to do some typing.' And Black Panther leaders went through a period when their line was that the most appropriate position for a woman in the movement is 'prone.'" Alan Adelson, SDS 141 (1972).

about. The man chairing the discussion is standing on a small wooden table and I am very concerned lest he break it. We collect water in wastebaskets in case of tear gas. Some of it gets spilled and I spend my time trying to wipe it up. I don't want to leave somebody else's office all messy.

We check to see what other rooms have decided. One room is embroiled in a political discussion, and in the other everyone is busy playing with office machines.

- (4) *Universities are inviting targets*. Like parents, universities are authority figures in the eyes of most undergraduate students. And as they do with their parents, students manifest the adolescent urge to rebel by listening to what university administrators say and believing the opposite. Too often, universities (like parents) react by digging in their heels rather than being patient or empathetic.
- (a) Soon after the cataclysmic events on the Columbia campus in 1968, the university established a fact-finding commission to investigate and report on the causes of the violent student demonstrations that spring. From *Crisis at Columbia: Report of the Fact-Finding Commission Appointed to Investigate the Disturbances at Columbia University in April and May 1968* (1968), page 193:

At a time when the spirit of self-determination is running strongly, the administration of Columbia's affairs too often conveyed an attitude of authoritarianism and invited distrust. In part, the appearance resulted from style: for example, it gave affront to read that an influential University official was no more interested in student opinion on matters of intense concern to students than he was in their taste for strawberries.³ In part, the appearance reflected the true state of affairs. The machinery of student government had been allowed to deteriorate to the point where Columbia College had no student government. ... The President was unwilling to surrender absolute disciplinary powers. In addition, government by improvisation seems to have been not an exception, but the rule.

- (b) Universities by their very nature are complex organizations that engage in activities on a global scale. Universities accommodate the demands of government (viewed by committed social activists as suspect) and seek the largesse of individual and corporate donors (viewed by those activists as hopelessly self-serving and corrupt). Inevitably, the university's interests will require them to adopt institutional policies and undertake transactions that collide

³ The influential university official who made that widely reported and widely ridiculed statement was Dean Herbert Deane—known by the Joseph-Heller-like appellation “Dean Deane.” Dean Deane's remark was immortalized in the title of Jim Kunen's book on the Columbia demonstrations, *THE STRAWBERRY STATEMENT*.

with the altruism of student activists. Managing the endowment to maximize return, dealing with employee unions, buying and selling property, licensing the university's name to appear on apparel manufactured in overseas plants, performing research paid for by the Defense Department—we, as grizzled veterans of university life, might see both the benefits and the drawbacks of these activities, but some students view them as intolerable compromises of the university's integrity.

C. Student Activism Today.

- (1) There are signs that both the number and the scale of student protests, demonstrations and sit-ins are on the rise. "In the past twelve to eighteen months, colleges and universities have seen a level of student activism not equaled since the anti-apartheid movement of the 1980s." Eric A. Tilles, *Hell No, We Won't Go: Responding to the Resurgence in Student Activism*, a paper presented at the 41st Annual Conference of the National Association of College and University Attorneys, June 20-23, 2001, and available from NACUA ((202) 833-8390).
- (2) Among the issues that galvanized student protestors over the last two or three academic years:
 - (a) *Sweatshops*. Many universities have been the sites of peaceful demonstrations and peaceful-but-edgy disruptions protesting licensing agreements for the manufacture of apparel bearing the university logo in overseas plants that pay non-living wages, don't permit unionization, provide inadequate benefits, and otherwise exploit workers. Several coalitions with college and university members, including the Fair Labor Association (www.fairlabor.org) and the Worker Rights Consortium (www.workersrights.org), are struggling to formulate codes to which apparel manufacturers will adhere when they manufacture apparel offshore. Their Web sites contain good explanations of the issues, as does the site of the more militant Sweatwatch Watch (www.sweatshopwatch.org).
 - (b) *Wages and living conditions for university employees*. In the spring of 2001, Harvard University saw a series of demonstrations and sit-ins orchestrated by the Living Wage Campaign, a loose coalition of students, workers, unions, faculty members, community groups and local elected officials. The purpose of the Campaign was to compel Harvard to increase wages for hourly employees, some of whom (according to Campaign organizers) "face 90-hour work weeks, days and months without seeing their children or spouses, medical emergencies without health care, evictions and homelessness." On May 8, 2001, following a three-week occupation of the Harvard administration building containing the President's office, the University and the Campaign agreed to create a committee of faculty, administrators, students and workers to study Harvard's labor policies. At the same time, the University agreed to a moratorium on job outsourcing and

the renegotiation of the University's controversial contract with the janitors' union. For a (somewhat one-sided) description of the issues and the outcome, go to the Campaign's Web site at www.hcs.harvard.edu/~pslm/livingwage/-portal.html. Harvard was not the first or the only campus wracked with demonstrations over the issue of equity for blue-collar employees. See Nora Koch, "Hopkins Students Stage Sit-In Over Workers' Pay; 'Poverty Wages' Protest Moves to Garland Hall," *Baltimore Sun*, February 29, 2000, page 2B.

- (c) *Campus finances*. When the Maryland General Assembly eliminated funding for a library construction project on campus, more than a thousand Morgan students—one-sixth of all students on campus—traveled to Annapolis, "marched single file around the statehouse and staged a sit-in at a House office." Meline Toumani *et al.*, "Protests that Make the Grade, *Mother Jones*, September/October, 2002, www.motherjones.com/news/outfront/2002/37/ma_99_01.html. On other campuses, protest activity is turned inward—against increases in tuition and fees. Will Potter, "North Carolina and Texas Try to Buck Trend of Tuition Increases," *Chron. of Higher Ed.*, February 21, 2003, page A23.
- (d) *Military recruiters on campus*. Federal legislation enacted in 1996 and known as the Solomon Amendment (10 U.S.C. § 983) authorizes the Secretary of Defense to cut off federal funding for any college or university that prevent military recruiting on campus or bar the operation of a Reserve Officer Training Corps unit. Over the years, as campuses have sought to evade the impact of the Amendment by, for example, barring military recruiters from campus but allowing them to meet with students at hotels adjacent to campus, the Defense Department has promulgated increasingly restrictive regulations designed to force campuses into complying. Many colleges and universities have done so reluctantly, to the dismay of campus gay and lesbian groups that see the presence of military recruiters as a dilution of institutional bans on recruiters from organizations that discriminate on the basis of sexual orientation. The result has been demonstrations and counterdemonstrations. See, for example, Richard Morgan, "Amid Protests, Defense Department Steps Up Recruitment at Top Law Schools," *Chron. of Higher Ed.*, October 18, 2002, page A26.

For useful background material on the Solomon Amendment, see the resource page on the Web site of the American Association of Collegiate Registrars and Admissions Officers at www.aacrao.org/federal_relations/solomon/history.htm.

- (e) *Unionization activities of graduate teaching assistants*. Just a few months ago, demonstrations, strikes and sit-ins at the University of Illinois led to a decision by the administration of that university to negotiate a collective bargaining agreement with the Graduate Employees' Organization, a union affiliated with the American Federation of Teachers. News Release, "GEO Sit-In Results in First-Ever Negotiations With UI Administration; Administration Agrees to Negotiate

With Grad Employees,” March 13, 2003, www.shout.net/~geo/news/-pr/2002/020313negotiations.html. At other universities, including Brown, the University of Pennsylvania, Columbia and Yale, teaching assistants have divided into noisy pro-union and anti-union factions and collective bargaining efforts have generated leafleting, protests, sit-ins, and demonstrations. Scott Smallwood, “Union? No Thanks. Some Graduate Students at Elite Universities Fight the Push for Collective Bargaining,” *Chron. of Higher Ed.*, May 17, 2002, page A12.

- (f) *Israeli-Palestinian relations*. Some of the angriest demonstrations on college campuses in recent years have been prompted by the friction between pro-Palestinian student groups and groups of Jewish students.

As violence in the Middle East has escalated in recent weeks, pro-Palestinian groups at many colleges have increased their efforts to promote their cause, organizing demonstrations and national campaigns to condemn U.S. policy toward Israel. The groups have generated far greater support than antiwar activists were able to drum up during the U.S. bombing of Afghanistan last fall. Even some students who were uncomfortable denouncing the United States after September 11 are now picking up the flag for Palestine on dozens of campuses, staging sit-in protests, setting up information tables, and helping to organize a movement that aims to force colleges to stop investing in corporations that do business with Israel.

Eric Hoover, “A Diverse Pro-Palestinian Movement Emerges on College Campuses—Many on the Left Embrace the Cause, while Jewish Students Feel a Rise in Hostility,” *Chron. of Higher Ed.*, May 17, 2002, page A41.

- (g) *Accession of Native American artifacts*. Legislation passed by Congress in 1990—the Native American Graves Protection and Repatriation Act, Pub. L. No. 101-601, 25 U.S.C. § 3001 *et seq.*—requires museums, including university museums, to compile an inventory of Native American human remains or funerary objects in their collections, contact appropriate tribes and Native Hawaiian organizations, and, if requested to do so, return items from whence they came. In 2000 the University of Michigan was the site of a lengthy sit-in protesting the university’s alleged slowness in complying with the timetables and deadlines for inventorying under NAGPRA. Flynn McRoberts, “Michigan Experiences ’60s Déjà Vu—Student Sit-Ins Target Sweatshops, Indian Artifacts,” *Chicago Tribune*, February 17, 2000, page 21.

The National Park Service maintains a useful Web site with information on NAGPRA (www.cr.nps.gov/nagpra).

- (h) *The 2000 presidential election*. During and after the recount of disputed ballots in Florida, students at Florida State and Florida A&M Universities distributed leaflets, held campus vigils, and organized a 22-hour sit-in at the Florida state capitol in Tallahassee. David Hefner and Merlin Jean Baptiste, “A Need to be Heard,” *Tallahassee Democrat*, December 26, 2000, page B1.

D. Two Differences between Today’s Campus Activists and Those of a Generation Ago:

- (1) Communications are quicker and more ubiquitous today. In 1968, when Jim Kunen joined other students occupying the President’s Office at Columbia, his only mode of communicating to the outside was the President’s desk phone. (And he was wary of using that—“As I am talking someone puts a piece of paper beside me and writes ‘This ... phone ... is ... tapped.’” [Page 30.]) More than thirty years later, when a group of students protesting the University of Pennsylvania’s apparel licensing policies occupied the president’s office there, they brought their own cell phones and laptop computers. Anecdotally, I’m told that one student was embarrassed in front of his peers when his cell phone rang and his mother asked him if he was okay.
- (2) The issues that animate today’s college activists are decidedly different from those of thirty years ago. From a fascinating article by Arthur Levine, President of Teacher’s College at Columbia University, reporting on the results of a large survey of college students during the 1990s:

This generation is working locally. Today’s students are focusing on community issues, attempting to accomplish what they see as manageable and possible. A student at the University of Colorado explained the philosophy by saying, “I can’t do anything about the theft of nuclear-weapons materials from Azerbaijan, but I can clean up the local pond, help tutor a troubled kid, or work at a homeless shelter.”

In the 1960s, protests focused principally on two national issues—ending the Vietnam War and promoting civil rights. Protests then were highly visible and nationwide, mobilizing students in major U.S. cities. In contrast, current student protest, like student community service, focuses largely on local issues. That has the effect of making many of today’s demonstrations campus-specific—and, as a consequence, almost invisible in the national press. ...

Moreover, today’s college students are issue-oriented, not ideological. Neither the political groups on the left nor those on the right hold much sway on campuses. Gone is Students for a Democratic Society. Young Americans for Freedom still exists, but has little support among students. Such ideological groups have been replaced or overshadowed by a cornucopia of student advocacy and support groups—environmental-advocacy groups, gay-rights groups, groups for disabled students and for minority students.

The sit-ins in recent weeks have been typical of today's student protests in another way, as well. Demonstrations today are rarely campuswide. Colleges and universities are more divided than ever before by race, ethnicity, religion, gender, country of origin, student interests—almost any difference among students that one can imagine. At the same time, students are spending less time on the campuses: More than 40 per cent are attending part time, and a majority work while in college. That means that fewer students at a time are involved in campus activities -- and in campus protests. The recent sit-in at Georgetown involved 27 students, and the Duke action, which began with 90 students, concluded with 20.

Tactics have also changed. In the 1960s, students were disruptive: They engaged in building takeovers, threats of violence, strikes, and destruction of property. The frequency of those kinds of actions is down. On the rise are more peaceful—and perhaps more effective—approaches, including litigation, e-mail campaigns, and press conferences. Once again, such protests have been more successful in drawing local than national news-media attention.

Arthur Levine “A New Generation of Student Protesters Arises,” *Chron. of Higher Ed.*, February 26, 1999, page A52. While the degree of social activism in the 1960s and '70s has always been exaggerated in the popular memory, it was not difficult in that era to turn out a thousand or more students for mass meetings and rallies. A demonstration that size would be almost unthinkable on a college campus today.

II. Student Protests and Demonstrations—Legal Issues⁴

A. A threshold consideration: There is a significant distinction between the constitutional rights enjoyed by students at public institutions of higher education and the hazier contract rights accorded students at private universities.

(1) Picketing, demonstrations, leafleting, even sit-ins are all forms of expression. Students at public colleges and universities have a First Amendment right to engage in constitutionally protected forms of political and social expression, at least (but not necessarily only) on parts of the campus that are generally open to members of the campus community for speech and debate. *Burbridge v. Sampson*, 74 F. Supp. 2d 940

⁴ I draw in this section of the outline on two excellent papers presented at the 41st Annual Conference of the National Association of College and University Attorneys in 2001. The papers, each with the identical title “Hell No, We Won’t Go: Responding to the Resurgence in Student Activism,” were prepared by Eric A. Tilles, a lawyer in the General Counsel’s Office at the University of Pennsylvania, and Daniel Segal, a lawyer at Hangley Aronchick Segal & Pudlin in Philadelphia. I wish to acknowledge the contributions of those two authors to the discussion of legal issues in Part II of my outline. Their papers are more comprehensive than this outline and are good resources for campus counsel who are looking for a richer treatment of the legal issues associated with the regulation of student speech and conduct.

(C. D. Cal. 1999). They also have a “right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion.” *Pi Lambda Phi Fraternity, Inc. v. University of Pittsburgh*, 229 F. 3d 435, 438 (3d Cir. 2000) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984)). At the same time, as we’ll see below, the college has the right to regulate free speech and assembly by subjecting the exercise of constitutional rights to “time-place-manner” standards designed to strike a balance between the expressional rights of protestors and the legitimate rights of others to teach and be taught.

- (2) Private colleges and universities, on the other hand, are not subject to the strictures of the First Amendment. If a student were to challenge a private college’s policies about speech and protest, the challenge would have to be predicated on a breach-of-contract theory—a claim that the college violated its own internal policies and procedures, rather than a claim based on federal constitutional or statutory law. *Felheimer v. Middlebury College*, 869 F. Supp. 238, 245 (D. Vt. 1994).

In fact, many colleges and universities have adopted internal policies on free expression that incorporate, either by specific reference or indirectly, the constitutional standard embodied in the First Amendment. Examples:

(a) The University of Pennsylvania:

The University of Pennsylvania, as a community of scholars, affirms, supports and cherishes the concepts of freedom of thought, inquiry, speech, and lawful assembly. The freedom to experiment, to present and examine alternative data and theories; the freedom to hear, express, and debate various views; and the freedom to voice criticism of existing practices and values are fundamental rights that must be upheld and practiced by the University in a free society.

Recognizing that the educational processes can include meetings, demonstrations, and other forms of collective expression, the University affirms the right of members of the University community to assemble and demonstrate peaceably in University locations ... and undertakes to ensure that such rights shall not be infringed.

Guidelines on Open Expression, in THE PENNBOOK: RESOURCES, POLICIES & PROCEDURES HANDBOOK, www.vpul.upenn.edu/osl/openexp.html.

(b) Stanford University:

... [T]he rights of free speech and peaceable assembly are fundamental to the democratic process Stanford firmly supports the rights of all members of the University community to express their views or to protest against actions and opinions with which they disagree.

Policy on Campus Disruptions, www.stanford.edu/dept/vpsa/judicialaffairs/-guiding/pdf/other.disruptions.pdf.

B. Regulating the Time, Place and Manner of Campus Protests.

- (1) At public colleges and universities (and at private institutions that, by contract, agree to adhere to constitutional standards), the free-speech rights of student protestors are weighed differently depending on the on-campus location where protest activities take place. The law recognizes three gradations:
 - (a) *A traditional “public forum”*—part of the campus where members of the general public are welcome to go. A sidewalk on a public road running through campus is an example of a traditional public forum. Speech here is accorded the greatest protection, and can be regulated only if (i) the regulation is content-neutral, (ii) it is narrowly tailored to serve a significant governmental interest, and (iii) speakers have access to alternative communication channels to express their message. *Linnemer v. Board of Trustees of Purdue University*, 260 F. 3d 757(7th Cir. 2001); *Pro-Life Cougars v. University of Houston*, 259 F. Supp. 2d 575 (S. D. Tex. 2003).
 - (b) *A limited or designated public forum*—an area that would not otherwise qualify as a public forum but is designated by campus officials as a “free speech zone” or a zone accessible to all and made available to speakers for the discussion of ideas and subjects. University property qualifies as a limited public forum if it can be characterized as “a government facility, not typically used for expressive activities, but which the government has opened to the public for expressive activities.” *Student Government Ass’n v. Board of Trustees of the University of Massachusetts*, 676 F. Supp. 384, 387 (D. Mass. 1987). An example of a limited public forum might be the plaza outside the Student Union if speakers are freely allowed to mount soapboxes and make speeches there. Once the college designates an area as a limited public forum, the same rules apply with respect to the regulation of speech there that apply to a traditional public forum: regulations must be content-neutral, narrowly tailored, and exclusive of other communication alternatives.
 - (c) *A nonpublic forum*—an area not designated for public assembly and debate. A classroom, a dormitory room, a faculty member’s office, the president’s office, the campus bookstore, the football stadium—all are examples of nonpublic forums. *Sabatini v. Reinstein*, 2000 U.S. Dist. LEXIS 10797 (E. D. Pa. 2000).

Colleges and universities have more latitude when it comes to regulating speech or expressive conduct in a nonpublic forum. In general, any regulation concerning the time, place or manner of speech in a nonpublic forum will survive constitutional scrutiny “as long as the regulation on speech is reasonable and is not an effort to suppress expression merely because public officials oppose the speaker’s views.” *State of Ohio v. Spingola*, 736 N. E. 2d 48, 53 (Ohio App. 1999).

(2) Some sample time-place-manner policies available on-line (with hard copies appended to this outline):

- Arizona State University, “Freedom of Expression Policy,” www.asu.edu/-studentprgms/orgs/sorc/new_web/freedom.htm. Note in this policy the clear description of the area on campus designated as a limited public forum (“Hayden Lawn”).
- University of Maryland, “Guidelines on Demonstrations and Leafletting,” www.inform.umd.edu/CampusInfo/Departments/PRES/legal/demonstrations.html. This sophisticated policy draws distinctions between “scheduled demonstrations” (for which permits must be applied for in advance, and which can be held only in designated areas on campus), “unscheduled demonstrations” (which, although limited to designated areas, can happen without advance notice), and “small demonstrations” (of ten people or fewer, which can occur at any outdoor location on campus).
- Carleton College, “Freedom of Expression,” http://webapps.acs.carleton.edu/-campus/doc/faculty_resources/faculty_handbook/fh_community_standards/-fh_freedom_of_expression. This short policy—shorter, almost, than the URL for its Web site—is more permissive than the Arizona State and Maryland policies and might serve as a good model for small colleges with traditions of tolerance for free speech and open expression.

(3) The battle over free-speech zones. In the last few years, campus free-speech zones have become something of a flashpoint for First Amendment fundamentalists. See Scott Street, “Promoting Order or Squelching Campus Dissent? Protesters and Civil Libertarians Object to the Use of ‘Free-Speech Zones,’” *Chron. of Higher Ed.*, January 12, 2001, page A37.

- (a) *West Virginia University*: In June, 2002, a coalition of student organizations sued West Virginia University alleging that the school’s free-speech zone policy, which designated seven campus free-speech zones, violated students’ First Amendment rights. In their complaint, the students alleged that the areas set aside for unregulated speech and expressive conduct “do not constitute more than five percent (5%) of the total campus area,” and were deliberately selected to exclude

buildings and sites (such as the main administration building and the building that houses the student newspaper) involving “core functions of the University.” In December, just a few months after the lawsuit was filed, the university agreed to relax its policy by allowing leafleting and other forms of protest everywhere on campus. Debra Bonn, “West Virginia U. Abolishes Campus Free Speech Zones,” *University Wire*, December 9, 2002.

- (b) *New Mexico State University*: Under a free-speech policy dating from the 1980s, students at New Mexico State University were allowed to speak on any topic as long as they did so in one of three designated areas. In September, 2000, a student activist was arrested for distributing leaflets promoting his new venture, an underground newspaper. The New Mexico chapter of the American Civil Liberties Union filed suit, alleging that “NMSU has designated three extremely small areas of its campus as ‘open forum’ or ‘free speech’ areas. Two of these areas have virtually no pedestrian traffic, and thus are unusable as areas in which to distribute literature to other students.” Less than two months later, the university agreed to appoint a task force to develop a new policy, and in March, 2001—after the lawsuit was withdrawn—the university adopted a new policy allowing petitioning, leafleting, and “speech acts” in “[a]ny outdoor area that is generally accessible to the public” on the NMSU campus. David L. Hudson, Jr., “Overview: Free Speech Zones,” reprinted on the Web site of the Freedom Forum’s First Amendment Center at www.firstamendmentcenter.org/speech/-pubcollege/topic.aspx?topic=free-speech_zones.
- C. “Outside agitators.” To what extent is a campus free to regulate or even ban the presence of non-students who wish to speak or protest within campus boundaries? A non-member of the university community has no generalized right of access to the non-public portions of a university campus. *See, e.g., Bader v. State of Texas*, 15 S. W. 3d 599 (Tex. App. 2000) (conviction for trespass upheld against a non-student who casually strolled into the television lounge in a University of Texas residence hall). But a non-student who enters a campus specifically for the purpose of engaging in protected speech or expressive conduct enjoys the same rights as a student: the regulation of constitutionally protected speech or conduct must be content-neutral and narrowly tailored. *State of Ohio v. Spingola*, 736 N. E. 2d 48, 53 (Ohio App. 1999) (the ravings of an itinerant preacher who set up shop uninvited on a grassy campus quadrangle cannot be abridged except in accordance with institutional time-place-manner regulations).
- D. Disciplining student protestors. A long line of cases dating from the Vietnam era holds that students who participate in the destruction of campus property or the unauthorized occupation of campus buildings can be subjected to disciplinary action. *See, e.g., Blackwell v. Issaquena County Board of Education*, 363 F.2d 749 (5th Cir. 1966); *Zanders v. Louisiana State Board of Education*, 281 F. Supp. 747 (W. D. La. 1968); *Scott v. Alabama State Board of Education*, 300 F. Supp. 163 (M. D. Ala. 1969). In general, student disciplinary procedures must comply with the rudiments of constitutional due

process by providing accused students with notice of the charges against them and an “opportunity to be heard.” *Gorman v. University of Rhode Island*, 837 F.2d 7, 12 (1st Cir. 1988).

What does that term in quotation marks—an “opportunity to be heard”—mean in the real world? It most emphatically does not mean a full-blown, trial-type hearing with lawyers on all sides, court reporters, riveting cross-examination of witnesses, and so forth. In the context of a student disciplinary proceeding, whether the dictates of due process are satisfied depend on whether the student “has had an opportunity to answer, explain, and defend, and not whether the hearing mirrored a common law criminal trial.” *Gorman*, *supra*, 837 F. 2d at 19. In general, this means—

- A neutral factfinder.
- The opportunity to explain—to “present one’s own side of the case” (which is not the same, constitutionally, as the opportunity to present and confront witnesses). *Esteban v. Central Missouri State College*, 415 F. 2d 1077, 1089 (8th Cir. 1969).
- Time to prepare.

It does *not* mean—

- The right to be represented at the hearing by a lawyer or by anyone else;
- The right to call witnesses;
- The right to command the production of documents; or
- The right to have the proceedings recorded or transcribed—

—although *any* of these rights *can* be afforded if the institution chooses to do so in its student disciplinary policy.

For some exemplary model policies of student discipline, see the University of Connecticut’s “Student Code” (www.ucc.uconn.edu/~dosa8/code2.html); the University of California’s “Policy on Student Conduct and Discipline” (www.ucop.edu/ucophome/-uwnnews/aospol/uc100.html); and the University of North Carolina-Chapel Hill’s “Instrument of Student Governance” (<http://instrument.unc.edu>).

III. Some Practical Suggestions for Planning for and Dealing with Campus Protests

- A. *Have policies in place.* Don't draft those policies under the gun or in a rush; have them on the books before the first protest occurs. You want, at a minimum, a time-place-manner policy setting the ground rules for speech and expressive conduct on campus and a process for adjudicating student disciplinary cases involving violations of the time-place-manner policy. You also want a good way to disseminate your policies (for example, by placing them on an easy-to-access Web site, publishing them as appendices to student handbooks, and circulating them once a year to the heads of student organizations). Everyone should know—or be able to find out easily—what the rules are.
- B. *Have a management team in place to make decisions during a protest.* The team will vary depending on the allocation of responsibility on your campus, but it will include these sorts of people:
 - (1) The provost or the dean of students;
 - (2) The director of public safety;
 - (3) The communications director;
 - (4) Campus counsel.
- C. *Do your homework. Know the legal standards.*
 - (1) Make triple-sure the members of the management team understand and have copies of pertinent campus policies.
 - (2) Ask the lawyer for some help understanding pertinent provisions of local law. In most states, criminal statutes come into play when students engage in disruptive behavior on campus. It's a crime in many states to trespass; to obstruct a public highway; to vandalize works of art or library materials in public collections; to advocate unlawful conduct; to engage in "terrorism" (vaguely defined in most state criminal codes) or perpetrate terrorist hoaxes; to "riot" (another relatively vague term); and (although this isn't happening on many campuses today) to use bombs, use explosives, or make telephone bomb threats. Your campus lawyer will know whether, when and how to invoke these statutes in the context of an out-of-hand student demonstration.

For an example of the panoply of state criminal statutes that could conceivably come into play during a student demonstration, see Ned Bastow, "Resources for Dealing with Campus Demonstrations," www.okhighered.org/admin-fac/memo-studentdemonandprotests.pdf.

- (3) Consider the possibility of injunctive relief. 'Way back in 1971, the Carnegie Commission recommended applying to courts for injunctions "in static situations like building occupations." DISSENT AND DISRUPTION—PROPOSALS FOR CONSIDERATION BY THE CAMPUS, page 68. Daniel Segal, writing on this subject in 2001, described injunctions as "a last resort" and warned that applications for injunctive relief face formidable obstacles: "An institution pursuing this avenue should be mindful that prior restraints of speech are strongly disfavored. Also, the institution must show that protestors will immediately violate or have violated property or other rights." *Hell No, We Won't Go: Responding to the Resurgence in Student Activism*, a paper presented at the 41st Annual Conference of the National Association of College and University Attorneys, June 20-23, 2001, available from NACUA ((202) 833-8390).

- D. *Communicate with protesting students in advance.* Usually, because students want maximum turn-out, protests are preceded by leaflets and posters. Campus administrators will have at least a day or two of advance notice. Use that time to communicate with organizers. Explain the rules. Make sure organizers understand applicable campus policies.

Most policies draw a crucial distinction between protests and disruptions. A protest is a noisy form of free speech. A disruption takes a protest to the next level; a disruption is aimed at interfering with regular business, for example by occupying an office, blockading access to campus, striking, or causing property damage. Everyone, student and administrator alike, should understand from the outset that the college's tolerance for protests is almost boundless—but its tolerance for disruption has limits. Make sure those limits are clearly communicated and understood.

- E. *Don't overreact. Be patient.* Although nobody to my knowledge has ever done an empirical study, we all know that the overwhelming majority of protests are short-lived and end without any adverse consequences. Let protests run their course. Don't do anything that might convert the administration's reaction to a protest into a separate and independent ground for protest.

But if the situation shows signs of escalation and tension, and if a protest slowly evolves into something more ominous, then—

- F. *Don't overreact. Be patient.* Any administrator worth his or her salt can cope with a protest. But it takes guts, experience and *sang froid* to handle an escalating campus confrontation with campus activists hell-bent on achieving an idealistic goal. Although situations like that are dynamic and not easily susceptible to generalization, I would offer two pieces of practical advice.

- (1) *Time works to your advantage.* Students pay awesome amounts in tuition. Neither protestors nor uninvolved bystander students want their parents to start griping about classroom days missed. Eventually, exam time comes, followed by vacation—both of

which can dissipate disruptions quickly. Without being disrespectful to students who are acting for the best of motives, it will always be true that our time horizon is longer than theirs. We can afford to be patient.

- (2) *Try to convert disagreements over substance into agreements on process.* Administrators may never agree with dissident students about the university's policy for licensing apparel. But all can agree to set up a committee to study that problem and make recommendations. We can agree on the composition of the committee and the schedule for its deliberations. By the time the committee completes its work six months hence, the leaders of the protesting students may have graduated.

G. *Know your campus, and touch your campus bases.* One of the most interesting things about reading Columbia University's post mortem of the events of 1968 was the University's acknowledgment that campus geography played a big role in the evolution of the crisis that hit that campus with hurricane force. *Crisis at Columbia: Report of the Fact-Finding Commission Appointed to Investigate the Disturbances at Columbia University in April and May 1968* (1968), pages 3, 194-95. Every campus is different. Campus cultures vary widely. When tensions escalate during a student demonstration, it's critically important for the administrative management team to—

- (1) Appreciate what makes the campus unique socially, historically, culturally and geographically.
- (2) Know who the campus opinion-makers and opinion-shapers are and how to communicate the university's story to them effectively.
- (3) Be able to gauge the mood on campus. Again, Columbia's experience in 1968 is instructive. After the fact, Columbia senior leaders were criticized for maintaining a "bunker" mentality, failing to communicate, failing to meet with student leaders, and misinterpreting warning signs. In contrast, recent demonstrations at Georgetown University were conducted peaceably in large part because lines of communication between administrators and protestors were open and heavily utilized. "It is increasingly commonplace ... for students to plan protests in consultation with campus administrators and university security personnel, to insure the least disruption and to minimize the danger of non-compliance with university rules. The watchword in campus protests today is, 'No Surprises.' One administrator at Georgetown ... told me that administrators had spent time before the sit-in discussing ground rules with students, and continued to meet with them during the 85-hour protest." Arthur Levine "A New Generation of Student Protesters Arises," *Chron. of Higher Ed.*, February 26, 1999, page A52.

H. *Remember: they're kids. We're not.* I was a student at Harvard in 1969 when that campus was wracked by serious student protests. The leader of SDS was a charismatic undergraduate named Michael Ansara, whom I got to know through my duties as a

reporter for the campus radio station. Ansara struck me as the epitome of worldly experience and sophistication. He knew everything. I was nineteen years old at the time. Ansara was twenty.