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## Symposium: Student Rights and Campus Rules

### INTRODUCTION

“IN ORDER to end the present crisis, to establish . . . confidence and trust . . . , to create a campus environment that encourages students to exercise free and responsible citizenship . . .”<sup>1</sup> So ran the preamble of a December 8, 1964, statement on the free speech controversy by the Berkeley Division of the University of California Academic Senate. The crisis has ended, but despite substantial progress the other goals are not yet achieved. The Berkeley campus still seeks viable principles of freedom and fairness, of academic inquiry and political disputation. In deciding to present a selection of views by law faculty members involved in the free speech controversy, the editors of the *California Law Review* did not wish to reopen old wounds just begun to heal, or to rekindle acrimonious debate. We thought rather to provide a forum in which lawyers and law teachers could address themselves to the problems that beset not just Berkeley but all institutions of higher education. The reservations of those who thought it too soon for restrained and enlightened dialogue,<sup>2</sup> we could not help sharing to some degree.

The free speech crisis at Berkeley is, analytically, cognate to any hiatus in the normal modes of settling disputes. Lawyers have vested interests in preserving those modes. First, of course, their financial and professional well-being depends upon the need for advocates before legislative and adjudicative tribunals. Second, one hopes more important, lawyers are trained in procedures for settling disputes and they should be astute to discover defects in existing procedures and to press for methods to handle claims expeditiously and fairly. Third, the lawyer's methodology—fact discrimination, analysis, orderly conclusion-drawing

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<sup>1</sup> Note 83 *infra* and accompanying text. The content of the resolution is the subject of discussion by Professors O'Neil and Louisell and Dean Newman, *infra* this Symposium.

<sup>2</sup> See, e.g., Professor Louisell's reservations about contributing. Louisell, *Responding to the December 8th Resolution: Of Politics, Free Speech, and Due Process*, *infra* this Symposium.

—lends itself to reasoned consideration of a broader range of disputes than reaches the courts. Fourth, lawyers, especially those who litigate questions of constitutional law and federal-state relations, should be sensitive to discrepancies between our fundamental ideas and our regime of statutory, administrative, and case law, and quick to sense conflicts between the overlapping normative orders of state and federal law and policy. Here, too, is an analogy: The university makes its own rules, but within the statutory and constitutional rules of the larger community.<sup>3</sup> The university may punish certain acts committed on campus which the larger community also holds to be criminal, but when ought it to do so and when ought it to leave such matters to the criminal courts? The dual questions of higher law overriding the academic scheme of rules and of overlapping allocations of sovereignty arise, therefore, in the university. The questions of procedural fairness, and of overriding and overlapping normative orders are of continuing concern for lawyers in the free speech controversy. In this collection of views, Professors Heyman and Linde discuss academic rule making and adjudication. Professor Sherry discusses the relationship of criminal law rules of the larger community to the university's own disciplinary machinery and summarizes the relevant considerations in making and enforcing campus rules. Professors Louisell and O'Neil discuss the December 8, 1964, resolution of the Academic Senate at Berkeley<sup>4</sup> which lent support to certain of the aims of the Free Speech Movement. Dean Newman has provided "Recollections, Overview, and Response to Professor Louisell."

We have included, in addition, a student comment on a statute<sup>5</sup> passed partly in response to the controversy. Introduced by Assemblyman Don Mulford of Berkeley, new section 602.7 of the California Penal Code provides that the Chief Campus Officer of each state college and University of California campus may request certain nonstudents to leave the campus and upon their failure to do so order their arrest as trespassers.<sup>6</sup>

This introduction seeks also to set out facts and documents relating

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<sup>3</sup> Granted, the impingement of state and federal constitutional and statutory rules will be greater upon a state university than upon a private one. The state university relies on the legislature for its funds. Also, its action is "state action" and it must observe constitutional guarantees. However, the concept of state action has expanded recently, and a private university may well find its connection with the state makes its action "state action." See, e.g., *Evans v. Newton*, 86 Sup. Ct. 486 (1966); *Hammond v. University of Tampa*, 344 F.2d 951 (5th Cir. 1965).

<sup>4</sup> Reproduced and discussed at text accompanying note 83 *infra*.

<sup>5</sup> Assembly Bill 1920, passed as an emergency measure effective immediately and signed into law on June 1, 1965, Cal. Stats. 1965, ch. 475, is discussed in Comment, 54 CALIF. L. REV. 132 (1966).

<sup>6</sup> CAL. PEN. CODE § 602.7.

to the controversy. To recapitulate in detail would be largely redundant, as the critical facts have been set forth elsewhere.<sup>7</sup> We have limited ourselves to an attempt to clarify the issues discussed in the faculty contributions by alluding to and quoting from the principal sources to which they refer. In addition, we have set forth some of the legal arguments advanced during the trial of the nearly eight hundred students arrested in the administration building sit-in of December 1964. We have, moreover, appended a bibliography of material on academic freedom, academic due process, and on the events at Berkeley.

## I

### SOME FACTS AND DOCUMENTS

#### A. 1957 to 1964<sup>8</sup>

Early in 1957 the long silence of the early and mid-fifties at Berkeley began to end with the formation of TASC—Toward An Active Student Community—a liberal organization concerned mainly with civil liberties issues.<sup>9</sup> In the fall of 1957, TASC regrouped as Slate, the name of the latter denoting that it ran a slate of candidates for student body office.<sup>10</sup> From 1957 to 1964, the campus went through periodic crises dealing with student government,<sup>11</sup> freedom of expression on campus,<sup>12</sup> compulsory participation in ROTC,<sup>13</sup> and student political activity off the campus.<sup>14</sup> The beginning of the Southern sit-in movement in February of 1960 intensified campus interest in “demonstration politics” as students picketed Berkeley stores of Woolworth’s and Kress’, two of the dime store chains whose Southern lunch counters refused to serve Negroes.<sup>15</sup>

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<sup>7</sup> For a chronology of events and a collection of documents, see *California Monthly*, Feb. 1965, pp. 4-96; *id.*, June 1965, pp. 52-56; *id.*, July-August 1965, pp. 48-63. Most of the material from the *California Monthly* appears in *THE BERKELEY STUDENT REVOLT: FACTS AND INTERPRETATIONS* (Lipset and Wolin eds. 1965).

<sup>8</sup> Some of the relevant history appears in the Ballantine paperback, HOROWITZ, *STUDENT* (1962). See also Heirich & Kaplan, *Yesterday's Discord*, *California Monthly*, Feb. 1965, p. 20. The Heirich-Kaplan article does contain some errors, however. One is pointed out in *California Monthly*, June 1965, p. 4. Another appears in their article at page 26. The authors' version of a 1960 student body election is contradicted by *The Daily Californian*, Oct. 14, 1960, p. 14, col. 1.

<sup>9</sup> Heirich & Kaplan, *supra* note 8, at 24; see HOROWITZ, *op. cit. supra* note 8, at 17-22.

<sup>10</sup> *Ibid.*

<sup>11</sup> See HOROWITZ, *op. cit. supra* note 8, at 29-36; Heirich & Kaplan, *supra* note 8, at 24.

<sup>12</sup> Heirich & Kaplan, *supra* note 8, at 24.

<sup>13</sup> HOROWITZ, *op. cit. supra* note 8, at 22-28, 115-21.

<sup>14</sup> *Id.* at 46-104, detailing the May 1960 demonstrations against the House Committee on Un-American Activities and the subsequent controversy over their character and political orientation.

<sup>15</sup> Heirich & Kaplan, *supra* note 8, at 26.

The execution of Caryl Chessman on May 2, 1960,<sup>16</sup> and the student demonstration against the House Committee on Un-American Activities on May 12, 13, and 14, 1960,<sup>17</sup> focussed national attention on Berkeley as an activist center.<sup>18</sup>

In this period it had been the custom of student groups to hold outdoor meetings at or near the entrance to the Berkeley campus, and to set up card tables there soliciting donations, inviting interest from prospective members, and publicizing activities.<sup>19</sup>

This activity has rightly been regarded as a precursor to the events of Fall 1964—Berkeley's students had garnered a reputation as active and concerned with political issues. Some, such as Governor Brown, spoke favorably of the student activists.<sup>20</sup> Others, such as Senator Hugh Burns of the California State Committee on Un-American Activities, sought to identify the students and their protests with Communist organizations and doctrine.<sup>21</sup>

Were one to seek to identify more specifically the forerunners of the free speech controversy, he would have to mention two sets of circumstances. First, beginning in the fall of 1963, San Francisco Bay Area civil rights groups had picketed and demonstrated against employment discrimination in the Bay Area food and hotel industries.<sup>22</sup> Their actions culminated in sit-ins at San Francisco drive-in restaurants, at the Sheraton-Palace Hotel in San Francisco, and in the showrooms of San Francisco auto dealers. More than six hundred arrests were made.<sup>23</sup> In

<sup>16</sup> HOROWITZ, *op. cit. supra* note 8, at 36-40.

<sup>17</sup> See note 14 *supra*, and material there cited.

<sup>18</sup> The Horowitz book, *op. cit. supra* note 8, was one example of the national interest. For other indications of interest, see SENATE FACT-FINDING SUBCOMM. ON UN-AMERICAN ACTIVITIES, CALIFORNIA LEGISLATURE, ELEVENTH REPORT 15-97 (1961), which also gives the Committee's version of the events of 1959-61; Rexroth, *The Students Take Over*, 191 THE NATION 4 (1960); *On Growing Up Absurd*, The Progressive, May 1961, p. 11. J. Edgar Hoover published a widely-quoted account of the May 1960 San Francisco demonstrations, and the House Committee on Un-American Activities issued a film. See HOROWITZ, *op. cit. supra* note 8, at 81-104.

<sup>19</sup> This was a finding of the *Ad Hoc* Committee on Student Conduct, in its report of November 12, 1964. *Report of the Ad Hoc Committee on Student Conduct*, California Monthly, Feb. 1965, p. 83. Dean Towle, in issuing regulations concerning campus political activity on September 14, 1964, conceded that political activity had gone on relatively unhindered prior to her announcement. *Chronology of Events, Three Months of Crisis*, California Monthly, Feb. 1965, p. 36. The *Chronology* appeared in three issues, those of February, June, and July-August 1965, and hereinafter is cited simply as *Chronology* with month of issue and page.

<sup>20</sup> WARSHAW, THE TROUBLE IN BERKELEY 90 (1965), quoting a 1961 speech.

<sup>21</sup> See SENATE FACT-FINDING SUBCOMM. ON UN-AMERICAN ACTIVITIES, CALIFORNIA LEGISLATURE, *op. cit. supra* note 18, at 15-98; SENATE FACT-FINDING SUBCOMM. ON UN-AMERICAN ACTIVITIES, CALIFORNIA LEGISLATURE, TWELFTH REPORT 177-94 (1963).

<sup>22</sup> Heirich & Kaplan, *supra* note 8, at 30-31; WARSHAW, *op. cit. supra* note 20, at 8-9.

<sup>23</sup> *Ibid.* For details of the arrests and subsequent trials, see 9 CIVIL LIBERTIES DOCKET 41, 80-81 (1964); 10 *id.* 96 (1965).

the summer of 1964 the supporters of William Scranton's candidacy for the Republican nomination for President organized groups of students at Berkeley to work on the Scranton campaign.<sup>24</sup> Later in the summer of 1964 and continuing into the fall, students from Berkeley were among those picketing the *Oakland Tribune*—published by former U.S. Senator William F. Knowland, a leading figure in the 1964 Goldwater campaign—alleging that the paper discriminated against Negroes in its hiring practices.<sup>25</sup> The political activities of students in the community focussed critical community attention upon the Berkeley student body.

A second precipitating factor was the students' attitude. Local campaigns on issues of civil rights involved many students. As the 1964 elections drew nearer, students of all points of view began to organize groups to support this or that candidate or issue: the Republican nomination contest, and later the Presidential election, Proposition 14—which invalidated California's fair housing legislation—and the contests for state and federal elective offices.<sup>26</sup> Students of all persuasions wanted to speak out. The community was concerned. As Chancellor Strong later said to the Academic Senate: "The situation was brought to a head by the multiplied activity incident to the primary election [June 1964], the Republican Convention, and the forthcoming fall elections."<sup>27</sup>

On September 14, Dean of Students Katherine Towle issued a letter to student organizations, setting forth rules governing the use of University property in general, and the twenty-six foot strip of sidewalk at the University entrance in particular.<sup>28</sup> The controversy began with that letter.

### B. Issues of the Controversy

The issues were four: the content of campus rules relating to speech and political activity; campus procedures for adjudicating violations of campus rules; the relation between campus rules and the criminal law; and, the role of the faculty.

#### 1. The Content of Campus Rules

Dean Towle's letter of September 14 set the tone:

"Provisions of the policy of The Regents concerning 'Use of University Facilities' will be strictly enforced in all areas designated as

<sup>24</sup> WARSHAW, *op. cit.* *supra* note 20, at 11-13.

<sup>25</sup> *Id.* at 18-20. Indeed, pressure from the *Tribune* may well have precipitated Administration restriction of on-campus advocacy. See *id.* at 17.

<sup>26</sup> See DRAPER, *BERKELEY: THE NEW STUDENT REVOLT 22-28* (1965).

<sup>27</sup> *Chronology*, Feb. 1965, p. 36, quoting from a report to the Academic Senate dated October 26, 1964.

<sup>28</sup> *Id.* at 35-36.

property of the Regents, including the 26-foot strip of brick walkway at the campus entrance on Bancroft Way and Telegraph Avenue . . . .

"Specifically," . . . "Section III of the . . . policy . . . prohibits the use of University facilities 'for the purpose of soliciting party membership or supporting or opposing particular candidates or propositions in local, state or national elections,' except [the Chancellor may make facilities available for candidates or their representatives to speak] . . . 'where the audience is limited to the campus community.' [The Chancellor may make similar provisions respecting speakers supporting or opposing propositions]. . . .

" . . . Section IV of the policy states further that University facilities 'may not be used for the purpose of raising money to aid projects not directly connected with some authorized activity of the University . . .'

" . . . [Students may present speakers on a 'special event' basis, provided rules respecting notice and sponsorship are respected, and] . . . The 'Hyde Park' area in the Student Union Plaza is also available for impromptu, unscheduled speeches by students and staff.

" . . . [Handbills may be distributed at the campus entrance, but] posters, easels and card tables will not be permitted in this area because of interference with the flow of (pedestrian) traffic. University facilities may not, of course, be used to support or advocate off-campus political or social action."<sup>29</sup>

Initially, the principal points of contention centered on the ban on card tables at the campus entrance, the students taking the view that reasonable rules respecting the number of permissible tables would be sufficient to prevent blockage of pedestrian traffic.<sup>30</sup> Second, students urged that they be permitted to distribute material relating to the current election campaign.<sup>31</sup> Third, they wanted to collect donations to finance such activity.<sup>32</sup> Fourth, they wanted to advocate off-campus activity from picketing to public meetings.<sup>33</sup>

Dean Towle later modified certain of the rules,<sup>34</sup> and Chancellor Strong issued a "reinterpretation of Regents' policy" which further met

<sup>29</sup> *Ibid.*

<sup>30</sup> *Id.* at 36-37.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.* The restriction on advocacy was not confined to students. Dean Towle announced that even nonstudents invited to appear on campus could not advocate political or social action. *Id.* at 37. Dean Towle, on October 28, 1964, restated the distinction between permissible and impermissible debate. "A speaker may say, for instance, that there is going to be a picket line at such-and-such a place, and it is a worthy cause, and he hopes people will go. But, he cannot say, 'I'll meet you there and we'll picket.'" *Id.* at 50. A special assistant to Vice Chancellor Alex Sherriffs said that the ban was to discourage "advocacy of action without thought." *Id.* at 37. This rationale is difficult to understand as the ban made no distinction between advocators who thought and those who did not—it prohibited them all.

<sup>34</sup> *Id.* at 37.

certain student requests.<sup>35</sup> Students could advocate yes or no votes on electoral propositions and could advocate votes for candidates. Bumper strips, campaign literature, and buttons could be distributed at the Bancroft-Telegraph entrance. The bans on advocacy of off-campus action and collection of donations remained.<sup>36</sup>

On November 20, the Board of Regents passed the following resolution:

- "1) The Regents restate the long-standing University policy as set forth in Regulation 25 on student conduct and discipline that 'all students and student organizations . . . obey the laws of the State and the community . . .'
- "2) The Regents adopt the policy effective immediately that certain campus facilities, carefully selected and properly regulated, may be used by students and staff for planning, implementing or raising funds or recruiting participants for lawful off-campus action, not for unlawful off-campus action."<sup>37</sup>

The Free Speech Movement, stating that it had conferred with counsel and on an informal basis with the Berkeley-Albany American Civil Liberties Union, restated its position in light of point two of the Regents' resolution:

Civil liberties and political freedoms which are constitutionally protected off campus must be equally protected on campus for all persons. Similarly, illegal speech or conduct should receive no greater protection on campus than off campus. The Administration, like any other agency of government, may not regulate the content of speech and political conduct. Regulations governing the time, place and manner of exercising constitutional rights are necessary for the maintenance and proper operation of University functions . . . .

By making the distinction between advocating "lawful" and "unlawful" action, the Regents propose to regulate the *content* of speech on campus. It is this distinction that is at the heart of FSM opposition to these regulations. The U.S. Supreme Court has made clear that advocacy of unlawful conduct cannot constitutionally be punished—even in the courts—so long as the advocacy will not clearly and presently cause some substantial evil that is itself illegal.<sup>38</sup>

The FSM statement further indicated that designation of certain areas for the conduct of speech and political action, removed from the normal flow of traffic, could not be justified. Such limits on the place where speech may take place may be justified, the FSM argued, only if the

<sup>35</sup> *Id.* at 38.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Id.* at 57. This concession followed two months of controversy. See *id.* at 35-57.

<sup>38</sup> *The Position of the Free Speech Movement on Speech and Political Activity*, California Monthly, Feb. 1965, p. 80.

University could demonstrate that limiting access to the "desirable" open areas was the only way to maintain the flow of traffic or to accomplish other legitimate University ends.<sup>39</sup>

The "free speech" issues in the controversy resolved into two, therefore: First, to what extent may the University regulate on-campus behavior of students and faculty directed toward organizing political or social action in the surrounding community?<sup>40</sup> Second, to what extent may the University regulate speaking and leafleting in its walkways and open spaces? The principal constitutional discussion must center, as indicated in the contributions to this discussion, on the extent to which a state university may impose more regulation than, say, a municipality with respect to open spaces suitable for speech activities.<sup>41</sup>

## 2. *Adjudicatory Fairness in Campus Discipline*

Most campuses have institutional means of dealing with violations of campus rules. The procedures followed by administration officials at Berkeley during the fall of 1964 were of concern to the students at least equally with the issues of freedom of speech.

The first invocation of University sanctions concerned student operation of card tables at the south entrance to the campus on September 29 and 30. Eight students were cited for operating such tables either without applying for permits to do so, or after permits had been denied, and for soliciting donations and advocating off-campus political action.<sup>42</sup> In addition, on the evening of September 30, until 2:40 a.m. on October 1, a number of students—perhaps three hundred—sat in the halls of the administration building.<sup>43</sup> An Academic Senate committee found after hearings that they did not block doors or hallways, and did not engage in an unusual amount of noise for a group in such a small space.<sup>44</sup>

A second imposition of University discipline concerned events on October 1, 1964. Two deans and a campus policeman approached a Congress of Racial Equality card table about noon and demanded that

<sup>39</sup> *Ibid.* The full statement is set forth in *THE BERKELEY STUDENT REVOLT: FACTS AND INTERPRETATIONS* 201-04 (Lipset and Wolin eds. 1965).

<sup>40</sup> This statement must be qualified insofar as student religious organizations also felt that the September 14 rules restricted their freedom to operate in the University community. See, e.g., the statement of The Inter-Faith Staff Workers and Student Leaders, *Chronology*, Feb. 1965, p. 44.

<sup>41</sup> The discussion at this writing centers on Provisional Regulations issued by Chancellor Roger Heyns on September 16, 1965.

<sup>42</sup> *Chronology*, Feb. 1965, pp. 38-39; *Report of the Ad Hoc Committee on Student Conduct*, California Monthly, Feb. 1965, p. 84.

<sup>43</sup> *Chronology*, *supra* note 42, at 39; *Report of the Ad Hoc Committee on Student Conduct*, *supra* note 42, at 84.

<sup>44</sup> *Report of the Ad Hoc Committee on Student Conduct*, *supra* note 42, at 84.



the nonstudent seated there soliciting funds identify himself. He refused and was arrested for trespassing. University police moved a police car into the area and installed the arrestee, later identified as Jack Weinberg, in it. Students surrounded the car and used its top as headquarters for a rally which lasted until the evening of October 2. Simultaneously, a number of students—perhaps five hundred—sat in the hallway outside the Dean of Students' Office in the administration building.<sup>45</sup> The building adjoins the walkway at the south entrance to the campus.

The December 2 and 3 sit-in in the administration building might also have led to University discipline, but on December 7, University President Clark Kerr announced that no such action would be taken.<sup>46</sup> Therefore, the two events which provoked controversy were the University and faculty responses to the disciplinary problems raised by the September 29-30 card table incidents, and the October 1-2 police car-administration building episode.

(a) *The September 29-30 Episode.*—Five of the eight students cited were asked to appear at the Dean of Students' Office at 3:00 p.m. on September 30. Four hundred students signed petitions saying that they too had manned tables. A spokesman for the students ordered to appear, other students cited for manning tables but not ordered to appear, and the petition signers told the Dean of Students that the cited students would not appear unless all the petition signers were also proceeded against. The Dean declined to accept this condition.<sup>47</sup>

The Dean conferred with Chancellor Strong, who at 11:45 p.m., without notice to the students involved, issued a statement announcing the indefinite suspension from the University of the cited students.<sup>48</sup> As an *ad hoc* committee of the Academic Senate later concluded:

The procedures followed were unusual. Normally, penalties of any consequence are imposed only after hearings before the Faculty Student Conduct Committee. Such procedure was not followed here with the result that the students were suspended without a hearing. This must be set against the extraordinary circumstances created by the sit-in [of the four hundred students asking that all cases be considered together] and the cited students' refusal to confer with Dean Williams except on a condition unacceptable to him. One of Dean Williams' purposes in asking for such conference was in fact to explain the hearing procedures available before the Faculty Student Conduct Committee, although this purpose had not been explained to the five students involved. Nevertheless, and in hindsight, it would have been more fitting to announce that the students were to be proceeded

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<sup>45</sup> *Chronology*, *supra* note 42, at 39-44.

<sup>46</sup> *Id.* at 67.

<sup>47</sup> *Report of the Ad Hoc Committee on Student Conduct*, *supra* note 42, at 84.

<sup>48</sup> *Ibid.*

against before the Faculty Committee rather than levying summary punishments of such severity.<sup>49</sup>

The confusion in the initiation of charges was compounded by the text of an agreement signed by University President Clark Kerr and the free speech spokesmen on the evening of October 2. That agreement provided that the cases of the suspended students would be submitted "within one week to the Student Conduct Committee of the Academic Senate."<sup>50</sup> Unfortunately, there has never been such a committee, and the Academic Senate had no meeting scheduled within the one week time limit.<sup>51</sup> Chancellor Strong submitted the cases to the regular Faculty Committee on Student Conduct, which is appointed by the University Administration.<sup>52</sup>

This decision was rescinded after vigorous protest from the students concerned, and the Academic Senate was asked, by President Kerr and Chancellor Strong on October 15 to set up an *ad hoc* committee to consider the suspensions, the committee to be advisory to the administration.<sup>53</sup> The committee's procedures were worked out by the committee members, chaired by Boalt Hall Professor Ira M. Heyman and included the right to counsel.<sup>54</sup> The Committee decided that it "was not competent" to consider the students' claims that the regulations violated the first amendment.<sup>55</sup> It did, however, consider the fairness of the procedures followed by the Chancellor and Dean Williams in summoning the students and suspending them.<sup>56</sup>

The Committee concluded:

On the one hand, it seems clear that the students violated regulations and interpretations of regulations. That their behavior was motivated by high principle may influence the severity of punishment recom-

<sup>49</sup> *Id.* at 84-85.

<sup>50</sup> *Chronology*, *supra* note 42, at 43, quoting in full the text of the October 2 agreement and setting out the circumstances surrounding it.

<sup>51</sup> *Id.* at 45.

<sup>52</sup> *Id.* at 44-45.

<sup>53</sup> *Id.* at 45-46, 48.

<sup>54</sup> *Id.* at 48. The Committee's provision of the right to counsel and to a tape recorded transcription of the proceedings was specified in the unanimous resolution of the Academic Senate on October 15, 1964. *Ibid.* The unanimity of the Senate is noted. The resolution is set forth in full at the beginning of the Committee's report, which is reprinted in full in *Report of the Ad Hoc Committee on Student Conduct*, *supra* note 42, at 82-87, and in *THE BERKELEY STUDENT REVOLT: FACTS AND INTERPRETATIONS* 560-74 (Lipset and Wolin eds. 1965).

<sup>55</sup> *Report of the Ad Hoc Committee on Student Conduct*, *supra* note 42, at 83.

<sup>56</sup> *Id.* at 84-85, 87. The Committee does not make explicit that it is considering "fairness"; it notes, however, that the procedures used by the Chancellor and the Dean are subject to "serious criticism," and criticizes those procedures on administrative due process grounds. *Id.* at 87.

mended, but does not cause the violations to disappear. On the other hand, the procedure by which the University acted to punish these wrongdoings is subject to serious criticism. The relevant factors are: first, the vagueness of many of the relevant regulations; second, the precipitate action taken in suspending the students sometime between dinner time and the issuance of the press release at 11:45 p.m. [on September 30]; third, the disregard of the usual channel of hearings for student offenses—notably hearings by the Faculty Committee on Student Conduct; fourth, the deliberate singling out of these students (almost as hostages) for punishment despite evidence that in almost every case others were or could have been easily identified as performing similar acts; and fifth, the choice of an extraordinary and novel penalty—"indefinite suspension"—which is nowhere made explicit in the regulations, and the failure to reinstate the students temporarily pending actions taken on the recommendations of this committee. . . .

. . . . We have enumerated the felt shortcomings in the confident faith that the University Administration will be as desirous as we are of correcting them.<sup>57</sup>

(b) *October 1-2.*—On November 28, Chancellor Strong sent letters to the homes of two student leaders—Mario Savio and Arthur Goldberg—notifying them that the Faculty Committee on Student Conduct would consider his charges that they violated University rules on October 1 and 2 and would recommend what punishment, if any, should be inflicted.<sup>58</sup> The students were informed, "You may be represented by counsel at the hearing."<sup>59</sup> The letter contained a fairly detailed statement of the conduct that was alleged to have violated University rules.<sup>60</sup>

The Free Speech Movement protested reinstitution of proceedings against the students.<sup>61</sup> Chancellor Strong said that his action was justified in that the *Ad Hoc* Academic Senate Committee had refrained from considering the students' behavior on October 1 and 2.<sup>62</sup>

In fact, the students were never to appear before the faculty Committee, for President Kerr and the chairmen of all academic depart-

<sup>57</sup> *Ibid.*

<sup>58</sup> *Chronology, supra* note 42, at 58.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.* Mario Savio and Arthur Goldberg were charged with leading a group of demonstrators that kept a police car trapped for thirty-two hours. Savio was charged with leading and encouraging demonstrators in blocking access to and egress from the Dean of Students' Office, and with biting a named policeman on a described portion of the said policeman's body. Goldberg was additionally charged with threatening a named police officer. *Ibid.* The letter did not, apparently, specify the provisions of campus rules which were alleged to have been violated by the above conduct.

<sup>61</sup> "The action violates the spirit of the Heyman Committee [the *Ad Hoc* Committee on Student Conduct] report and can only be seen as an attempt to provoke another October 2." *Id.* at 59, quoting from a statement of the Free Speech Movement Steering Committee.

<sup>62</sup> *Id.* at 59, quoting from a statement of Chancellor Strong rejecting Free Speech Movement demands that the charges be dropped.

ments at Berkeley issued a statement on December 7 that the University would not act against students for any actions taken prior to December 2 and 3, but would leave such matters to the courts.<sup>63</sup>

(c) *Retrospect on Adjudication.*—The controversy leading to the appointment of the *Ad Hoc* Academic Senate Committee, the procedural difficulties attendant upon the suspensions of October 30, and the controversy which surrounded the procedural aspects of campus political regulation gave way to a focus upon two major issues: First, what procedures ought a committee to follow in considering discipline of students—right to counsel, privilege to remain silent, the administrative law principle of exclusivity of the record,<sup>64</sup> cross-examination, and so forth? Second, in what proportions ought student, faculty, and administration representatives to comprise the committee? These matters were considered in the December 8 resolution of the Berkeley Division of the Academic Senate, which is set out below.<sup>65</sup> They are also the subject of Professor Heyman's, Professor Linde's, and Professor Sherry's contributions to the discussion below.

### 3. *The University's Rules and the Community's Rules*

Questions of free speech and of procedural fairness are largely constitutional in nature. The accommodation of the oftentimes overlapping normative orders of the community and the university is more a question of wisdom and judgment than of obeisance to an overriding set of positive rules. Professor Sherry, drawing on his experience as attorney, legislative draftsman in the Revision of the Penal Code, and experienced law teacher and faculty member, discusses these questions in detail. Our purpose is to present the conflicting views which emerged during the controversy.

The positions began to crystallize at a meeting of an advisory committee on campus political activity on November 7, 1964. At that meeting, the administration representative, Dean Frank Kidner, offered the following proposal: "If acts unlawful under California or Federal law directly result from advocacy, organization or planning on the campus, the students and organization involved may be subject to such disciplinary

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<sup>63</sup> *Id.* at 67.

<sup>64</sup> This principle requires that the final decision maker not hear *ex parte* evidence unless the opposite side is given a chance to know its content and to respond. Since the committees, both established and *ad hoc*, that heard charges against students during the free speech controversy were only advisory to the Chancellor, the problem would be raised if the Chancellor consulted other information outside the record in making the final disposition of cases. The principle of exclusivity appears as §§ 5(c) and 7(d) of the Federal Administrative Procedure Act, 60 Stat. 240, 241 (1946), 5 U.S.C. §§ 1004(c), 1006(d) (1964).

<sup>65</sup> See text accompanying note 83 *infra*.

action as is appropriate and conditioned upon a fair hearing as to the appropriateness of the action taken.'<sup>66</sup>

In the ensuing discussion, Dean Kidner stated that the finding of illegality of the off-campus acts need not be made by a court of law, but that the University disciplinary authorities could make that finding themselves.<sup>67</sup>

The student representatives countered with this proposal: "In the area of first amendment rights and civil liberties, the University may impose no disciplinary action against members of the University community and organizations. In this area, members of the University community and organizations are subject only to the civil authorities."<sup>68</sup>

The faculty members of the advisory committee later issued a report containing the following proposal for accommodating University rules and criminal laws: "The on-campus advocacy, organization or planning of political or social action . . . may be subject to discipline where this conduct directly results in judicially-found violations of California or Federal criminal law; and the group or individual can fairly be held responsible for such violations under prevailing legal principles of accountability."<sup>69</sup>

Thus, the faculty position would have permitted discipline, but only after a court had found the off-campus acts illegal—whether this court could be a court of first instance or whether the University would have to abide the results of appeals was not specified. Further, the "prevailing legal principles" apparently referred to such tests of illegal advocacy as the "clear and present danger" test<sup>70</sup> and to such principles as the general criminal rules on aiding and abetting and principal and accessory.<sup>71</sup>

At the Board of Regents meeting on November 20, 1964, the Board prohibited advocacy of unlawful off-campus action but did not adopt any resolution on discipline for such advocacy.<sup>72</sup>

<sup>66</sup> *Chronology, supra* note 42, at 51-52.

<sup>67</sup> *Id.* at 52.

<sup>68</sup> *Ibid.*

<sup>69</sup> *Id.* at 54. This proposal was presented in a somewhat different form on November 7 by Professor Sanford Kadish of Boalt Hall. *Id.* at 52.

<sup>70</sup> The "clear and present danger" test has found its principal use not so much in cases involving the responsibility of an advocator for an act advocated, but in cases wherein the question is whether the act of advocacy may be punished upon a showing of the circumstances in which it was committed, irrespective of its consequences. See, *e.g.*, *Schenck v. United States*, 249 U.S. 47 (1919); *Wood v. Georgia*, 370 U.S. 375 (1962).

<sup>71</sup> The general federal rules for criminal complicity short of commission of a principal offense appear in 18 U.S.C. §§ 2 (aiding and abetting), 3 (accessory after the fact). The California rules appear in California Penal Code §§ 30 (parties to crime), 31 (defining principals broadly), 32 (accessories), 33 (punishment for accessories), 663-65 (attempt in general), 653f (solicitation for certain major crimes).

<sup>72</sup> *Chronology, supra* note 42, at 57.

The Free Speech Movement responded to the Regents' action with a statement of its own views on advocacy, but also included a comprehensive statement of its views on the relation between the University disciplinary proceedings and the civil courts:

Under the November 20th regulations, if the Chancellor accuses a student of advocating an unlawful act, the student and his sponsoring organization are liable to punishment by the University. A student so accused may appear before the Faculty Committee on Student Conduct, whose members are appointed by the Chancellor, and whose opinions are only advisory to him.

The Free Speech Movement considered this to be unconstitutional and unwise for the following two reasons.

(1) Since such a procedure allows the Chancellor to assume the role of prosecutor, judge and jury simultaneously, the students have no confidence that the final verdict will be fair. In fact, the history of the treatment of civil liberties cases by the campus administration reveals an insensitivity to safeguarding such liberties.

. . . . [T]he Free Speech Movement insists that the question whether . . . *advocacy* is legal or illegal must be left to the courts, which are institutionally independent of the shifting pressures of the community. Moreover, the standard that the Chancellor is free to apply is only one of "responsibility" of the act of advocacy for the act advocated, which is far more inclusive and vague than the "clear and present danger" test. . . .

(2) Even if complete mutual trust existed between the Administration and the student body, and even if the University attempted to observe the requirements of due process, it would be impossible for it to provide all of the safeguards of our judicial system, or otherwise to fulfill the functions of a court. The points in controversy, relating to the degree of responsibility of an act of advocacy for an act advocated, are of such a delicate and complex nature that even the courts have not built up wholly adequate precedents. Certainly, then, a nonjudicial body should be considered incompetent in this area.

On the other hand, the students' position that the courts alone have jurisdiction does not in any way imply the creation of a haven for illegal activity on the campus. On the contrary, it involves just the opposite of this—the *removal* of any special protection the University may now afford, as well as any extra-legal punishment. The student becomes subject to the same process of trial and punishment for illegal acts that all other citizens must accept.<sup>73</sup>

In the same statement, the FSM conceded that the University may regulate the time, place, and manner as opposed to the "content" of speech in order that "political activity and speech do not interfere with

<sup>73</sup> *The Position of the Free Speech Movement on Speech and Political Activity*, California Monthly, Feb. 1965, p. 80. The same material appears in *THE BERKELEY STUDENT REVOLT: FACTS AND INTERPRETATIONS* 202-03 (Lipset and Wolin eds. 1965).

the formal educational functions of the University."<sup>74</sup> Regulation would presumably involve the creation of standards and the disciplining of violators.

Since the fall of 1964, many events have taken place which have sharpened the issue of the interaction of University and community rules relating to speech and political organization. Advocacy of off-campus action for a time gave way in the public spotlight to obscenity.<sup>75</sup> While few of the FSM leaders participated in the utterances which the University alleged to be obscene, most of them maintained their view that such questions ought to be subjected to the test of the criminal law and only to that test—that the University ought not to discipline the students independently.<sup>76</sup> Too, the public pressures for University reprisals against students and faculty involved in the events since September 1964 have continued.<sup>77</sup>

The relation between the University and the community in which it lives and works remains a vexing problem for administrators, students, faculties, voters, and politicians.

#### 4. *The Role of the Faculty*

In all colleges and universities, members of the faculty bear a special responsibility to instill respect for the academic values of intellectual honesty, tolerance for the views of others, and academic freedom. Large universities, such as the University of California, strive to ensure that students have access to faculty members outside the classroom, for purposes of discussion and debate.<sup>78</sup> Small universities are able to achieve faculty-student contact more easily. In addition, faculty members are sometimes said to influence the political views of their students.<sup>79</sup> It has been said that this is undesirable.<sup>80</sup> Whether or not it is desirable, certainly faculty members' views, whether in the classroom or out of it,

<sup>74</sup> *The Position of the Free Speech Movement on Speech and Political Activity*, *supra* note 73, at 80. The same material appears in *THE BERKELEY STUDENT REVOLT: FACTS AND INTERPRETATIONS*, *op. cit. supra* note 73, at 203.

<sup>75</sup> See *Chronology*, June 1965, pp. 52-56.

<sup>76</sup> *Ibid.*

<sup>77</sup> See, e.g., statements and stories in the *Oakland Tribune*, alluded to and quoted from *id.* at 53-54.

<sup>78</sup> See Hochschild, *San Francisco Chronicle*, Jan. 26, 1966, p. 1, col. 1; see generally Heyman, *Tumult and Shouting Subside at Berkeley as Restraints on Students Are Eased*, *N.Y. Times*, Jan. 12, 1966, p. 47, col. 4.

<sup>79</sup> E.g., Petersen, *What Is Left at Berkeley?*, in *THE BERKELEY STUDENT REVOLT: FACTS AND INTERPRETATIONS* 367, 367-68 (Lipset and Wolin eds. 1965).

<sup>80</sup> See SENATE FACT-FINDING SUBCOMM. ON UN-AMERICAN ACTIVITIES, CALIFORNIA LEGISLATURE, ELEVENTH REPORT 70 (1961), referring to and protesting "the practice of tolerating members of the faculty to leave the classroom, climb up on the nearest pinnacle and harangue students to their hearts content."

are heard by students and are no doubt influential. This extends to views on such diverse subjects as the current stage of learning on marginal cost theory, physical chemistry, and the state of American democracy. Finally, faculty members play a vital role in academic governance. At the University of California, Berkeley, this role is predominantly played through the Berkeley Division of the Academic Senate, of which most faculty members are members.<sup>81</sup>

The Academic Senate's most significant action was taken on December 8, 1964, in the wake of the sit-in and arrests of the morning of December 3. It passed two resolutions. The second of these set up an Emergency Executive Committee, empowered to act in emergency situations such as the one then pending.<sup>82</sup> The first, and more controversial, dealt with the substantive issues of the crisis, and is the subject of comment and criticism in the faculty contributions which follow.

In order to end the present crisis, to establish the confidence and trust essential to the restoration of normal University life, and to create a campus environment that encourages students to exercise free and responsible citizenship in the University and in the community at large, the Committee on Academic Freedom of the Berkeley Division of the Academic Senate moves the following propositions:

1. That there shall be no University disciplinary measures against members or organizations of the University community for activities prior to December 8 connected with the current controversy over political speech and activity.

2. That the time, place, and manner of conducting political activity on the campus shall be subject to reasonable regulations to prevent interference with the normal functions of the University; that the regulations now in effect for this purpose shall remain in effect provisionally pending a future report of the Committee on Academic Freedom concerning the minimal regulations necessary.

3. That the content of speech or advocacy should not be restricted by the University. Off-campus political activities shall not be subject to University regulation. On-campus advocacy or organization of such activities shall be subject only to such limitations as may be imposed under Section 2.

4. That future disciplinary measures in the area of political activity shall be determined by a committee appointed by and responsible to the Academic Senate.

5. That the Division pledge unremitting effort to secure the adoption of the foregoing policies and call on all members of the University community to join with the faculty in its efforts to restore the University to its normal functions.<sup>83</sup>

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<sup>81</sup> See University of California, Manual of the Academic Senate 60, July 1965. Faculty members of less than two years' service may not vote. *Ibid.*

<sup>82</sup> *Chronology*, Feb. 1965, p. 69.

<sup>83</sup> Reprinted in *Chronology*, Feb. 1965, p. 68; *THE BERKELEY STUDENT REVOLT: FACTS AND INTERPRETATIONS* 180-81 (Lipset and Wolin eds. 1965).



Of course the faculty had been active in many capacities prior to December 8, and its activity has continued to this day. The December 8 resolution remains, however, a major point of controversy.

## II

### THE SPROUL SIT-IN: LEGAL PROBLEMS AND LEGAL THEORIES

#### A. *Mass Arrest and Problems*

The morning of December 3, beginning at 3:45 a.m., nearly 780 persons were arrested in the administration building—Sproul Hall—of the Berkeley campus.<sup>84</sup> The problems involved in arresting, booking, bailing, trying, and sentencing such a number of defendants—even after 101 pleaded *nolo contendere* and charges against five were dismissed—raise serious questions for scholars of criminal justice administration. Some problems of mass arrest and trial are discussed in the following letter from Malcolm Burnstein, one of the attorneys who participated in the trial:

As you know, almost 780 people were arrested in Sproul Hall between early morning and late afternoon of December 3, 1964. Three-fourths of them were charged with violations of Sections 602(o) [trespass in a public building of a public agency], 409 [unlawful assembly], and 148 [resisting arrest] of the California Penal Code. About one-quarter were not charged with the section 148 offense. The defense in the Berkeley Municipal Court lasted until the end of the summer of 1965. Almost all of the defendants were convicted of the trespass charge and those who went limp upon arrest were, additionally, convicted of resisting arrest. The convictions are now on appeal to the Appellate Division of the Alameda County Superior Court and what I have to say in this letter will, of course, be controlled by the ethical problems of discussion of a case still before the courts.

Within the limits allowed to me, however, I feel it might be interesting and useful to suggest some of the unusual problems which the defense, and the courts, faced in dealing with this mass political trial. It became apparent, rather early in the proceedings, that some of the traditional criminal procedures were somewhat less than adequate in dealing with 780 defendants, all accused of crimes arising out of a single transaction.

Let me first suggest that while the development of the right to bail, based upon the individual circumstances of the defendant and the likelihood of his appearing in court at the times and places directed is universally recognized as a progressive development in the criminal law, such individual treatment may become, in the context of a mass political arrest, a device for keeping people in jail long after they might otherwise be entitled to their release. Each of the 780 defendants, most of whom were students at the University of California with no

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<sup>84</sup> See *Chronology*, Feb. 1965, pp. 58-64. The details of trial and sentencing are summarized at 10 CIVIL LIBERTIES DOCKET 88-89, 133-34 (1965).

criminal background of any kind, would, if arrested individually for shoplifting (for example), have been OR'd [released on own recognizance] or released on minimal bail within a very short time after his arrest. With 780 defendants arrested at the same time, the normal practices and procedures would have resulted in delaying the release of many or most of the defendants for days, or perhaps weeks. Some concession to the mass nature of the situation was urgently required and, after almost a full day of discussion between defense, court and prosecution, bail for all defendants was uniformly reduced from the bail schedules set for the offenses listed above. Almost all of the defendants had to post more bail than they would have if arrested individually—bail totalled approximately \$80,000—yet they were all released much more rapidly than would have been the case if their situations had been individually examined. The court turned down a defense request for a mass OR order.

Along the same lines—the contrast between individual treatment and mass treatment—a curious paradox in the legal system became immediately apparent. Those who practice criminal law on a regular basis have frequently praised judges who have adopted an approach to criminal law tailored to the particular individual who stands before them, rather than an approach based merely upon the abstract nature of the crime. This is true whether the question is setting bail, granting or denying probation, or imposing sentence. The Berkeley Municipal Court was well known as a place where this progressive concept of criminal justice was dominant. In the context of the sit-in case, however, some of the defendants grew to feel that some traditionally progressive concepts of criminal justice stood in the way of a rational and fair appraisal and treatment of the event and the defendants. It should be remembered that the defendants conducted an avowedly mass action, in part due to a desire to protect some of their number who had been singled out for administrative discipline by the University. When juxtaposed to the desire on the part of the court to treat each person individually—and inferentially, potentially differently—the defendants' desires were frustrated and they became convinced that the judicial system could not but treat their kind of protest unfairly. I think I may ethically say that this problem never seemed to be adequately understood by the respective interests in this case. The defendants came to feel, for instance, that the court was unwilling to grant the mass political nature of their act when considering questions of disposition other than trial, jury versus nonjury trial, or bail, but that the court did recognize the mass political nature of the defendants' act when imposing sentence. This kind of problem will become increasingly important to courts and lawyers as the number of mass political arrests and trials will, undoubtedly, continue to increase in this country.

Let me point out one other problem which arose out of the conflict between the mass nature of the proceedings and progressive, though now traditional, legal principles. The right to have a jury decide questions of fact in a criminal case has always been thought of as a hard-won right of defendants. Examine, however, the concept of the right to a jury trial in connection with the arrest of 780 defendants.

Are they each entitled to a separate jury trial, given the possibility that evidence relating to the conduct of certain defendants might prejudice the jury against other defendants being tried at the same time? Are they entitled to a single jury trial on the ground that all defendants performed a single act and there should be only one decision by a trier of fact as to the legality or illegality of their conduct? A series of jury trials might well have resulted in exactly the same facts being adjudged both legal and illegal depending upon the particular jury sitting. The defendants involved in the University of California sit-in had, as background evidence, the facts surrounding the 1964 San Francisco civil rights sit-ins and resulting trials. In those cases husbands and wives, brothers and sisters, who performed the very same act were tried before different juries with varying results on the question of guilt, and were sentenced by different judges with greatly varying sentences. And, with a limited number of courts, some defendants awaited trial for many months.

Faced with this problem, the University of California defendants argued that only a single jury would provide them with both their right to a jury trial and due process of law. The prosecution argued that a single jury trial involving so many defendants was unwieldy and impossible. The defense offered to discuss the possibility of stipulations of fact so as to minimize the problems raised by the prosecution but the prosecution stated that they felt that under no circumstances could a trial that size be workable. The court denied the defense motion for a single jury trial. The defense then attempted to explore possibilities of a representative jury trial, under which only a limited number of defendants would be tried before a jury, while the balance would submit their cases on the result of the single jury trial. The prosecution objected, and the court would not allow such a procedure. A procedure was finally worked out whereby 155 people went on trial before a judge sitting without a jury. The other defendants were given the option of, and it was understood that they would (and they did), submit their cases to the same trial judge on the record to be made at that trial with, perhaps, some additional factual stipulations. The defendants are, however, raising as a point on appeal the denial of their right to trial by jury, claiming that due process entitled them to either a single or a representative jury trial.

I hope the foregoing gives you some idea of some of the difficulties and problems which we faced in the criminal proceedings in conjunction with the free speech dispute on the U.C. campus. These problems all, in my opinion, merit serious consideration by law students and legal scholars, as well as practicing lawyers.<sup>85</sup>

### *B. The Charges Against the Defendants*

The defendants were charged with violations of California Penal Code sections 409, 602(o), and, in most cases, 148. They were acquitted

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<sup>85</sup> Letter to Michael E. Tigar from Malcolm Burnstein, Feb. 3, 1966, on file in office of *California Law Review*.

of the section 409 charge, and convicted under sections 602(o) and 148.<sup>86</sup>

### 1. *Unlawful Assembly*

Section 409 makes it a misdemeanor to remain at the scene of "any riot, rout, or unlawful assembly, after the same has been lawfully warned to disperse . . ." Unlawful assembly, riot, and rout are defined elsewhere in the Penal Code and the mode of notice and warning is also prescribed by statute. The defendants' argument on statutory construction<sup>87</sup> and constitutional<sup>88</sup> grounds succeeded.

### 2. *Trespass*

California Penal Code section 602(o) was enacted in 1963:<sup>89</sup>

Every person who commits a trespass by either:

. . . .

(o) Refusing or failing to leave a public building of a public agency during those hours of the day or night when the building is regularly closed to the public upon being requested to do so by a regularly employed guard, watchman, or custodian of the public agency owning or maintaining the building or property, if the surrounding circumstances are such as to indicate to a reasonable man that such person has no apparent lawful business to pursue; is guilty of a misdemeanor.

As most defendants were convicted under section 602(o), serious questions as to its validity and scope will be raised on appeal. These questions include those of statutory construction:<sup>90</sup> Are the Regents, a

<sup>86</sup> 10 CIVIL LIBERTIES DOCKET 133-34 (1965).

<sup>87</sup> The defendants argued that § 409 should be construed together with § 407 (defining unlawful assembly), § 404 (defining riot), § 406 (defining rout), § 415 (disturbing the peace), and its common law predecessors (see Comment, 23 CALIF. L. REV. 180 (1935)). Thus the defendants argued that their conduct did not constitute a rout, riot, or unlawful assembly, and did not disturb the *public* peace. The defendants also claimed that they had not been "lawfully warned to disperse" within the meaning of § 409, citing *People v. Sklar*, 111 Cal. App. Supp. 776, 292 Pac. 1068 (1930) and Penal Code § 726 (warning to disperse). This summary of the defendants' argument is taken from Memorandum in Support of Motion for Pretrial Hearings and for Consolidation for Purposes of Pretrial Hearings, *People v. Savio*, Cr. Nos. 7468 through 7547, Municipal Court for the Berkeley-Albany Judicial District, 1965. Compare Memorandum of Points and Authorities in Opposition to Demurrer, filed by the prosecution in the same case.

<sup>88</sup> The defendants relied principally upon *Cox v. Louisiana*, 379 U.S. 536 (1965); *City of Rock Hill v. Henry*, 375 U.S. 6 (1963), 376 U.S. 776 (1964); *Fields v. South Carolina*, 374 U.S. 44 (1963); and *Edwards v. South Carolina*, 372 U.S. 229 (1963). See Memorandum in Support of Demurrer, *People v. Savio*, *supra* note 87.

<sup>89</sup> Cal. Stats. 1963, ch. 1299, p. 2826.

<sup>90</sup> See Memorandum in Support of Motion for Pretrial Hearings and for Consolidation

public corporation, a "public agency"; is Sproul Hall a "public building," given its use principally by students, faculty, and administrators; does the locking of the doors of the building at night mean that the building is "closed" to its public, the students; is the students' intention to protest, "lawful business"? There is the further question of whether the legislature intended in passing section 602(o) to punish conduct such as that engaged in in Sproul Hall.<sup>91</sup>

The constitutional questions raised in applying and interpreting section 602(o) are similar to those encountered in applying many trespass statutes. They are discussed in detail elsewhere in this issue of the *Review*.<sup>92</sup>

### 3. *Resisting Arrest*

The defendants' principal claim in challenging their conviction under Penal Code section 148 is that they did not "resist, delay or obstruct" their arrest within the meaning of the statute.<sup>93</sup> There is no California criminal case directly in point,<sup>94</sup> but a New York court of first instance has held that "going limp" on arrest is punishable resistance to the arresting officer.<sup>95</sup>

Because the "going limp" technique is popular in civil rights arrests, the issue will become of increasing importance.

for Purposes of Pretrial Hearings, *People v. Savio*, Cr. Nos. 7468 through 7547, Municipal Court for the Berkeley-Albany Judicial District, 1965. See also Memorandum in Support of Demurrer and Memorandum of Points and Authorities in Opposition to Demurrer filed in the same case.

<sup>91</sup> The bill to enact § 602(o) contained language proscribing a much broader range of conduct than is proscribed by the statute as it was finally passed. Assembly Bill 2411, Reg. Sess. 1963. The bill was amended and limited, according to some of those who participated in the legislative process, to make sure that it would not be applicable to a sit-in then going on in the State Capitol Building. Interview with Coleman A. Blease, lobbyist for American Civil Liberties Union, Feb. 6, 1966.

<sup>92</sup> See Comment, 54 CALIF. L. REV. 132 (1966), discussing new Penal Code § 602.7, which applies only to the University of California and California state colleges. See notes 5-6 *supra* and accompanying text.

<sup>93</sup> CALIF. PEN. CODE § 148: "Every person who willfully resists, delays, or obstructs . . ."

<sup>94</sup> The case of *People v. Wilson*, 224 Cal. App. 2d 738, 37 Cal. Rptr. 42 (1964), involved nonviolent resistance, but the defendant threatened the police with a rifle. *In re Bacon*, 240 A.C.A. 34 (1966), 49 Cal. Rptr. 322, *opinion modified and rehearing denied*, 240 A.C.A. 323 (1966), held that evidence that the defendant went limp upon arrest was sufficient to sustain a trial court finding that he violated Penal Code § 148. However, this was a juvenile case and the sole question was whether the evidence sustained a trial court finding that the defendant should be made a ward of the court under CAL. WELFARE & INST'NS CODE § 602.

<sup>95</sup> *People v. Martinez*, 43 Misc. 2d 94, 250 N.Y.S.2d 28 (Crim. Ct. 1964). The case of *People v. Knight*, 35 Misc. 2d 216, 228 N.Y.S.2d 981 (Magis. Ct. 1962), found that the defendant resisted arrest, but in addition to going limp, Knight had pulled the officer's hand away from his shoulder—a technical battery.

## CONCLUSION

There is a tension between thinking and doing, between explaining the world and changing it. One year after the crisis at Berkeley, the time for tendential bombast is passing and even the most ardent protagonists are seeking to draw lessons and conclusions in the spirit of rational inquiry. We think the articles which follow, written by law professors who participated in the months of crisis, are substantial contributions to a reasoned search for viable principles of freedom and fairness.

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