

The Berkeley Crisis: Recollections, Overview, and Response to Professor Louisell

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If it is true that, as Jefferson said, "The natural progress of things is for liberty to yield and government to gain ground," then it is equally true, as Woodrow Wilson added, that "the history of liberty is a history of resistance."

Konvitz, *Bill of Rights Reader*¹

WHILE WRITING THE REMARKS that conclude this symposium I have noted these press reports: In Djakarta, "It was the students' rioting which . . . finally resulted in President Sukarno's downfall."² In the Congo, "Mobutu Bans 'Youth Politics.'"³ In Algeria, "Boumedienne's regime met its first serious challenge . . . by expelling the ten leaders of 8000 striking university students"⁴ In India, "[S]hutters were clamped across the storefronts . . . in silent protest against alleged police brutality during this week's student rice demonstration."⁵ In Belgium, "Police hurled tear gas . . . at about 1000 students who massed outside their police barracks and shouted 'murderers, murderers'"⁶ In Tokyo, "Some 2500 riot police . . . invaded Waseda University where students have been barricaded for a month . . . and dismantled the barricades."⁷

Items like that remind us that legal analyses of issues sometimes appear parochial, even when they concern matters of potentially worldwide import. Student protests still are of less significance than, say, the civil rights movement. Yet that movement and others of like consequence have gained marked strength from student participation.⁸

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¹ ix (3d ed. 1965).

² San Francisco Chronicle, March 14, 1966, p. 1, col. 8.

³ San Francisco Sunday Examiner & Chronicle, Feb. 13, 1966, p. 29, col. 1 (4 star ed.).

⁴ San Francisco Chronicle, Feb. 2, 1966, p. 6, col. 1.

⁵ *Id.*, Feb. 5, 1966, p. 8, col. 7.

⁶ *Id.*, Feb. 4, 1966, p. 12, col. 1.

⁷ *Id.*, Feb. 21, 1966, p. 41, col. 2. See also *Mexican Students Seize Law School*, *id.*, March 15, 1966, p. 10, col. 1; Editorial, *The Revolts of the Spanish Students*, *id.*, March 4, 1965, p. 38, col. 1; *id.*, May 22, 1965, p. 10, col. 1: "The students of today are 'no longer content with society's apathy—or its wrongs,' the Governor [of California] said at the Charter Day-Inauguration Banquet at UC's Riverside campus."

⁸ See Johnston, *University Government and the Teach-Ins*, Bull. of Atomic Scientists, Feb. 1966, p. 30; Watt, *European Students Strike for Academic Reforms*, The Reporter, Dec. 16, 1965, p. 42; Editorial, *Escalation in California*, Saturday Rev., Jan. 30, 1965, p. 20.

Legal analyses, too, rinse out from a crisis many facts that explain angers, frights, other passions of the participants. Professor Louisell retrieves some of that color with his deft description of a late afternoon in December 1964 when the muted shouts of three thousand concerned students pierced a closed-door meeting where one thousand professors parleyed the students' political rights.⁹ He does not describe the preceding day when, for "unusual convocation ceremonies," sixteen thousand of us had assembled in the Greek Theatre.¹⁰ President Kerr was introduced. Then,

At the conclusion of the President's address, Chairman Scalapino moved to the rostrum and announced the meeting's adjournment.

Simultaneously, [Mario] Savio moved rapidly across the front of the stage of the rostrum. . . . University police officers grabbed him Savio was dragged through the center rear stage entrance and into a small room at the south end of the backstage area used by performers.

Several of Savio's supporters attempted to assist Savio; they were pushed aside or knocked down and held in place. . . .

Scores of people—faculty and staff, newsmen, students and police—gathered in front of the building where Savio was being held. . . . Alex Hoffman, an attorney defending some of the arrested students [768 of whom had appeared that morning in the Municipal Court, for arraignment], shouted through the door: "Demand to see your lawyer, Mario."

Attorney Hoffman and several departmental chairmen eventually were admitted to the room

As Savio was being held at the south end of the Greek Theatre, Arthur Goldberg [*not* the U.N. Ambassador] pleaded with President Kerr to release him at the north end. Kerr agreed [I]t was announced Savio was not under arrest, that he would be allowed to speak.

Surrounded by well-wishers, Savio told the crowd he merely wanted to announce an FSM rally at noon in front of Sproul Hall (*President Kerr had personally given permission for this rally, so that the protestors could discuss the terms of the new agreement*). Then Savio said: "Please leave here. Clear this disastrous scene, and get down to discussing the issues."

. . . .

. . . Nearly 10,000 persons jammed the plaza between Sproul

⁹ Louisell, *Responding to the December 8th Resolution: Of Politics, Free Speech, and Due Process*, 54 CALIF. L. REV. 107 (1966) [hereinafter cited as Louisell]. Implications that a euphoric student might have blocked a disgruntled lady professor's path do, however, seem spurious. *Id.* at 113-14 n.28.

¹⁰ *Chronology of Events, Three Months of Crisis*, California Monthly, Feb. 1965, p. 67. The Chronology appeared in three issues, those of February, June, and July-August, 1965, and hereinafter is cited simply as *Chronology* with the month of issue and page.

Hall and the Student Union at noon. They rejected, by acclamation, the proposals announced by President Kerr less than an hour earlier.¹¹

Five days earlier (December 3), at 3:45 a.m., "635 uniformed police officers" executed orders of the Governor of California that they "arrest and take into custody all students and others who [by sit-in] may be in violation of the law at Sproul Hall. . . . It took 12 hours to clear the building. . . . As arrests continued . . . pickets attempted to block campus entrances, encouraging faculty members, teaching assistants, and students to stay away from classes in protest over the demonstrators' arrests. . . . Significant support for the movement was evident: the *Daily Californian* reported 50 per cent or more of the T.A.'s in anthropology, English, French, geography, German, history, Italian, molecular biology, philosophy, physics, political science, Slavic languages, social science, sociology and subject A would refuse to cross picket lines."¹²

The student strike continued through the day [on December 4] Labor unions, asked to support the FSM pickets, generally condemned the use of police and the "denial of free speech" on the campus, but would not officially endorse or recognize the student strike. "This is not a dispute between labor and management," a local Teamster official said, although several individual delivery truck drivers were reported to have refused to cross the students' picket lines.¹³

Two months earlier, on October 1 and 2,

45 minutes before the scheduled closing, campus and Berkeley police officers began closing the front doors of Sproul Hall. Angered, about 100 of the approximately 2000 students outside Sproul Hall charged the doors, packing them to prevent their closing. Two police officers were pulled to the floor; one lost his hat and shoes . . . and was bitten on the leg. . . .

. . . .
. . . At 1:30 a.m., as conflicts between demonstrators and anti-demonstration demonstrators threatened to erupt into a full-blown riot, Father James Fisher of Newman Hall mounted the police car. The crowd fell silent as he pleaded for peace—and got it.

. . . .
. . . At 4:45 p.m. police officers . . . began marching onto the campus Some 500 officers, including over 100 motorcycle police, were on hand by 5:30 p.m., some armed with long riot sticks.

As the police arrived, onlookers and protest sympathizers swelled the crowd between Sproul Hall and the Student Union to more than 7,000. . . .

¹¹ *Ibid.*

¹² *Id.* at 61-64.

¹³ *Id.* at 64.

. . . [P]rotestors were instructed on "how to be arrested" (remove sharp objects from pockets, remove valuable rings and watches, loosen clothing, pack closely together, do not link arms, go limp) and were counseled on their legal rights (give only your name and address, ask to see your lawyer, do not make any statements). All persons with small children, those under 18 years of age, non-citizens, and those on parole or probation, were advised to leave.¹⁴

Apart from graphic detail, other data missing from these legal comments concern the progress of higher education and the University of California generally. Without hesitating I can report that at Berkeley—already in effect and in the blueprint stage too—there are improvements relating to education that would have been inconceivable had we not learned lessons from the Free Speech Movement and the 1964-65 crisis. A law review is an inappropriate forum for such discussion; but those who may be intrigued can obtain documentation from the Office of the Academic Senate, from Chancellor Roger Heyns, from Dean Sanford Elberg of the Graduate Division. Legal principles and proposals never will assure excellent education. We have proof, though, that the projecting of legal principles and proposals into hard-hitting academic controversy is by no means inconsistent with excellent education.¹⁵

I

WHAT ABOUT RULE-MAKING?

How to regulate students is a central theme of this symposium. Our writers agree, I believe, that regulations, like statutes, should be promulgated with reasonable specificity and so published as to ensure that the law is known. A further aim, I fear, has been overlooked. That is the aim of encouraging people to participate in the process of rule-making. Countless interested persons in fact did participate in formulating University rules last year. Yet one wonders whether administrators (and lawyers, even) truly do acknowledge that the opportunity to participate should be recognized as a right—possibly a due process right.

Is it not strange that so many who govern still resist reforms like section 4 of the Federal Administrative Procedure Act¹⁶ and sections 11423-27 of the California Administrative Procedure Act?¹⁷ Two decades

¹⁴ *Id.* at 41-43.

¹⁵ See Heyman, *Tumult and Shouting Subside at Berkeley as Restraints on Students Are Eased*, N.Y. Times, Jan. 12, 1966, p. 47, col. 1. In my opinion, Paul Woodring of the *Saturday Review* was astonishingly misinformed when in his column of September 11, 1965, he stated that, "students, professors, and administrators seem unable to work together toward a common goal." Woodring, *The Editors Bookshelf*, *Saturday Rev.*, Sept. 11, 1965, p. 77.

¹⁶ 60 Stat. 238 (1946), 1 U.S.C. § 1003 (1964).

¹⁷ CAL. GOV'T CODE §§ 11423-27.

of experience with those statutes have demonstrated (I think conclusively) that governing is healthier when, "prior to the adoption, amendment, or repeal of a regulation, notice of the proposed action"¹⁸ is duly published, so that "on the date and at the time and place designated . . . any interested person [has] . . . the opportunity to present statements, arguments, or contentions in writing, with or without opportunity to present the same orally."¹⁹ How conceivably would that procedure—duly modified for emergencies²⁰—impair higher education?

II

WHAT ABOUT FREE SPEECH?

Some of my co-authors tend to equate free speech with constitutionally free speech. My view—given due regulation of time, place, and manner—is that a great university should affirm guarantees that are more encompassing than is the first amendment to the United States Constitution. The Civic Center Act of California exemplifies such a guarantee.²¹ For years I thought it humiliating that students and staff received less from the University of California, with respect to its buildings, than the ordinary public receive from that statute with respect to school buildings generally. A great university should not have to be dragged, kicking and screaming, into the decade of newly honed freedoms.²² The Boalt Hall Student Association (that is, moderately con-

¹⁸ CAL. GOV'T CODE § 11423.

¹⁹ CAL. GOV'T CODE § 11425.

²⁰ See CAL. GOV'T CODE §§ 11421(b), 11422(c), 11422.1.

²¹ CAL. EDUC. CODE §§ 16556-66.

²² Cf. President Kerr's statement in University Bulletin, University of California, Dec. 3, 1964, p. 85: "The Regents at their November meeting . . . changed a general University policy of many years standing to permit on-campus planning, recruiting and fund raising for lawful off-campus action. They did this in response to student requests and faculty proposals, and also in the light of changing court decisions." (Emphasis added.) Of interest in connection with the President's May 10, 1959 statement ("There aren't going to be riots." *The Clouded Crystal Ball*, *The New Yorker*, Oct. 23, 1965, p. 129) is the November 23, 1959, report of the Academic Freedom Committee, University of California Academic Senate Record, Nov. 23, 1959, p. iii. I was draftsman of a letter dated July 28, 1960, addressed to Chancellor Seaborg and forwarded by him to President Kerr, that reads in part as follows:

Your Special Committee on the Administration of the Regulations on Student Government, Student Organizations, and Use of University Facilities held its initial meeting on March 22 and then met regularly during April, May, and June. Vice Chancellor Sheriffs and Dean Shepard participated in the Committee's deliberations. . . . Our discussions have led us to unanimous agreement that the following modifications of the directives and related rules would be desirable.

....

2. *Political Activity*. Paragraph IIIA of the Regulation on Use of University Facilities restricts the soliciting of political party membership and the supporting or opposing of particular candidates to meetings where candidates or their representatives speak. We believe that restriction is unjustified. We see no reason why

servative law students) never should have felt obliged to issue this proclamation (vote: 402 to 170):

[A] free society can tolerate no less than an unrestricted opportunity for the exchange of views on the political and social questions of the day . . . we believe that the University's restrictions raise serious constitutional questions.

We believe that the spirit and perhaps the letter of our Constitution command that these restrictions be withdrawn. Where the choice is between expediency and freedom of speech, a nation of free men can have no choice.²³

Does Professor Louisell correctly conclude that "speech generally was free and fearless among students and teachers"?²⁴ Unhappily, No. To illustrate: Let it not be forgotten that during 1964 the Academic Senate, after months of controversy, felt obliged to formalize this question: "Does the enforcement of the Regents' rule against employment of members of the Communist Party require investigation and interrogation of present or prospective members of the faculty beyond signature to the Levering Oath?"²⁵ The Academic Freedom Committee finally answered No,²⁶ but the question came up because the Administration's answer seemed to be Yes.²⁷ The Privilege and Tenure Committee, earlier, had found that "notwithstanding recommendation of his department for his appointment to Assistant Professor, the normal academic review was not initiated because of the Chancellor's belief that there was an apparent discrepancy between the applicant's execution of the Levering oath in 1958 and 1961 and his alleged Communist activities prior to 1958, as reported in an HUAC report, and because of the applicant's refusal upon

audiences limited to the campus community should be denied the full range of political discussion—whether or not there are accompanying speeches by "candidates for public office (or their designated representatives)."

3. *Funds Raising*. Paragraph IVA of the Regulation on Use of University Facilities also seems too restrictive. We believe that funds-raising rules are required only to preclude exploitation of captive audiences and University personnel. Why should political and other groups be denied the privilege of a "collection?"*

4. *Literature*. Paragraph IVD of the Regulation on Use of University Facilities implies censorship of literature. Entirely apart from questions of free speech, we believe that the administrative burden is not justified and that the University's only legitimate concern relates to littering and other custodial matters.*

....

*In general we believe that the campus community should have at least the privileges regarding University facilities that the Civic Center Act assures to citizens and others regarding public school facilities. (See Education Code, § 16556 et seq.).

²³ *Chronology*, Feb. 1965, p. 56.

²⁴ Louisell, 109; cf. note 22 *supra*.

²⁵ See Minutes of the Berkeley Division, Academic Senate, May 10, 13, 1965, p. 5.

²⁶ *Ibid*.

²⁷ *Id.*, Oct. 13, 15, 1964, p. 6.

request of the Chancellor to answer questions concerning such alleged activities."²⁸ Was free speech thus nurtured?

Was free speech guaranteed by this resolution of the Regents? "[C]ertain campus facilities, carefully selected and properly regulated, may be used by students and staff for planning, implementing or raising funds or recruiting participants" ²⁹ Observe the word "certain." I recall a note sneaked to me by the chairman of a potent committee during a crucial meeting, pronouncing, "I will not go for voice amplification in front of Sproul Hall under ANY circumstances." He was overruled, of course. The incident nonetheless portrays the censoriousness lying in the words, "certain campus facilities, carefully selected." Even now, fifteen months after promulgation, the resolution has not adequately been implemented for "staff."³⁰

What about this regulation?

Individual members or groups of members of the academic or non-academic staffs of the University should not initiate or seek to promote, through members of the Legislature or the Congress, or other State or Federal officers, any policies or legislation relating to the University . . . without specific authorization.³¹

Writing five years ago the Governor of California commented, "The reasons for that kind of prohibition are clear; but if the University were, for instance, to attempt to outlaw petitions by students on some such matter as compulsory ROTC, serious constitutional issues would arise."³²

Also in 1964, following years of controversy, the University-wide Senate passed this resolution: "Faculty members may use their University titles, including the name of the University, to identify themselves. . . ." ³³ But during debate the President "called attention to the fact that control over the University name lies with the Regents."³⁴ And the Regents still have not conceded the minimal right of identification thus demanded.

On May 27, 1965, this resolution was believed imperative:

[W]hereas, certain of the Regents have attacked members of the

²⁸ *Id.* at 25.

²⁹ *Chronology*, Feb. 1965, p. 57; see Louisell, 110.

³⁰ See *The University Employee*, March 1965, p. 3.

³¹ Handbook for Faculty Members of the University of California 68, Rev. Feb. 1963.

³² Brown, *The Right to Petition: Political or Legal Freedom?*, 8 U.C.L.A.L. Rev. 729, 734 (1961); see San Francisco Chronicle, May 3, 1965, p. 10, col. 5, regarding the California Republican Assembly and Chancellor Hinderaker: "What pleased the CRA officers was Hinderaker's recent insistence that the Associated Students rescind a resolution calling for Federal intervention in Selma, Ala."

³³ University of California, Academic Senate, Record of the Assembly, Nov. 2, 1964, pp. iv, 11.

³⁴ *Ibid.*

faculty on the basis of their alleged political and social views, have irresponsibly broadcast hearsay allegations damaging to them . . . ;

. . . .

Therefore, the Berkeley Division of the Academic Senate: . . .
Asks apologies from the Regents involved for their attacks and allegations.³⁵

Is speech free when the Chancellor, aiming at Vietnam discussions, equates a professor's "not using the classroom for political or partisan purposes" with restricting a professor's comments in the classroom to "the area of his competence"?³⁶ By no means would all agree that academic free speech thus should be confined.

III

IS IT "PARADOXICAL" THAT A UNIVERSITY ACCLAIMED FOR
ACADEMIC FREEDOM IN SPRING '64 SHOULD BE
CONDEMNED IN FALL '64?³⁷

Obviously it is paradoxical. No one acquainted with academic politics should infer, though, that an AAUP award to a university's regents and president means that adequately informed analysts reached solid conclusions as to the institution's purity. Emphatically I too affirm that Berkeley reflects "an atmosphere of academic freedom from partisan political pressure perhaps unmatched among American public universities"³⁸ (and I would even include "private universities"). But that is no pronouncement that freedoms at Berkeley have been inviolate. Unfortunately, too many AAUP professors still cling to ideas of privilege and tenure that ignore rights of the average trade unionist, to ideas of

³⁵ Minutes of the Berkeley Division, Academic Senate, May 27, 1965, p. vi.

³⁶ The Daily Californian, Feb. 8, 1966, p. 12, col. 3; see *id.*, p. 1, col. 2 ("Genuine Nudist Film' Banned by University"); San Francisco Chronicle, Feb. 5, 1965, p. 6, col. 7 ("Bio-Chemistry and the FSM"). Whatever punitive action may be justified regarding a drama entitled "for unlawful carnal knowledge," could we not demonstrate that the Administration's censorship of the magazine *Spider* violated the first amendment? See *Chronology*, May 1965, p. 12. In regard to problems of earlier years see the report on the "Freedom of Discussion in the Classroom" resolution, University of California, Academic Senate Record, May 25, 1959, p. 30, discussed in PACKARD, *THE NAKED SOCIETY* 133 (1964); *cf.* the printed briefs in *Lessin v. The Regents*, 4 Civil No. 7162, Cal. Dist. Ct. App. (1963). On December 18, 1964, "The Regents reaffirmed devotion to the 1st and 14th Amendments . . ." *Chronology*, Feb. 1965, p. 73. Yet months later their General Counsel stated, "You certainly can control the content of speech on campus . . . as long as it pertains to the welfare and functions of the university' . . ." Oakland Tribune, Mar. 26, 1965, p. 7, col. 3; *cf.* the Louisell opinion in the Minutes of the Berkeley Division, Academic Senate, Jan. 12, 1965, p. iii: "[B]y reason of the nature of a University community it can have some restrictions even in the area of speech that would be invalid if applied by the government to people generally."

³⁷ See Louisell, 109-10 n.8.

³⁸ *Id.* at 110-11.

freedom that ignore privileges of the average citizen which in recent years we have learned do inhere in the Bill of Rights. "Academic freedom" needs much updating.

IV

WHAT ABOUT CIVIL DISOBEDIENCE?

For enlightenment on civil disobedience "from the viewpoint of the protest movement," Professor Louisell asks us to ponder the solemn words of an ex-official of the United States Department of Justice.³⁹ I confess a nagging doubt whether lawyers in general are reliable advisors as to disobedience, and particularly do I query those lawyers who are intimate with The Establishment.⁴⁰ Basic inquiries, I believe, should be: How would we be counseled by men and women who for their cause suffered imprisonment, like Prime Ministers Nehru, Shastri, and Gandhi of India, or by those who, for instance, awarded the Nobel Peace Prize to Martin Luther King?

V

"WOULD I WRITE AND ACT NOW AS I WROTE AND ACTED ON DECEMBER 8TH?"

Professor Louisell's answer to that question seems to be Yes.⁴¹ My answer is Yes. Thus though "time broadens perspective and narrows passion," neither of us basically has changed his views.⁴²

For me that implies no agreement with all words of the Academic Senate's December 8th resolution. (For example, I disliked Clause 4, which unwisely questioned administrators' jurisdiction over "disciplinary measures in the areas of political activity" and assumed that political misdeeds easily could be segregated from other misdeeds.) Yet it is noteworthy that hardly anyone decried the whole document. (For example,

³⁹ *Id.* at 116-17 n.31.

⁴⁰ Cf. Blake, *The Right to Break Unjust Laws*, San Francisco Chronicle, Feb. 19, 1966, p. 31, col. 1; Heyman, *Civil Rights 1964 Term: Responses to Direct Action*, in *THE SUPREME COURT REV.* 1965, at 159 (Kurland ed. 1965); Waskow, "Creative Disorder" in the Racial Struggle, *The Correspondent*, Autumn 1964, p. 61.

⁴¹ See Louisell, 107.

⁴² As to whether and when a participant can be scholar enough to justify writing (Louisell, 107 n.1), compare Commager, *Should Historians Write Contemporary History?*, *Saturday Rev.*, Feb. 12, 1966, p. 18.

A note to law teachers: I was an organizer of the AALS panel described in Louisell, 107-08 n.2. No one should infer that I wanted to keep him from that panel. The five hundred-or-so teachers who attended will be astonished, I think, to learn of a view that "the adversary system" had no chance to operate. There were no set speeches; the format was question-from-floor, answer-from-panel; and many of our interrogators (for example, the Dean of the Harvard Law School) were markedly uninhibited in articulating like Professor Louisell's views.

consider Clause 1, demanding a much needed abatement of disciplinary action aimed at students' *past* misdeeds.)

Readers must not assume that in the Senate there was what Professor Louisell calls "the minority."⁴³ As is usual in a legislative body there were several minorities, and words that bother him mirror many draftsmen's compromises. The resolution was not "prepared at a private meeting of some two hundred faculty members."⁴⁴ It was a product of hard-driving negotiating that involved, among others, the President of the University, members of the Senate's Academic Freedom Committee, and a loose-knit but at that time consequential organization of all department chairmen.⁴⁵

Professor Louisell refers to "an emotion-fraught atmosphere"⁴⁶ and argues that the resolution was too hastily considered, that it was an "excited utterance of a moment,"⁴⁷ that "reason . . . [had no] hearing."⁴⁸ He recounts the Senate's one-and-a-half-hour debate on December 8 and cites use of the motion for the previous question, which closed that debate.⁴⁹ He charges that the famous Feuer Amendment, rejected by vote of 737 to 284, in fact was rejected "because of the majority's unwillingness in the excitement of the moment to face up to the hard task of thinking and writing precisely in the area of free speech."⁵⁰ That charge, I submit, is more passionate than defensible.

Our readers should know that the faculty's thinking and writing *re* free speech predated both the December 8th meeting and the hard-

⁴³ *Id.* at 107.

⁴⁴ *Id.* at 112.

⁴⁵ See, e.g., excerpts from the letter of December 17, 1964, addressed to President Kerr by members of the "working committee of the chairmen of Departments at Berkeley": "The chairmen [on December 7] then considered two questions: First, did anything in the text or in the context of the 'President-Chairmen Agreement' preclude support for the Academic Freedom Committee's proposal [*i.e.*, the December 8th resolution]? After discussion the chairmen voted overwhelmingly that there was no incompatibility between the 'President-Chairmen Agreement' and the Academic Freedom Committee's proposal and that chairmen were morally free to support the Academic Freedom Committee's proposal. The second question was, did the chairmen favor the Academic Freedom Committee's proposal. A very strong majority expressed themselves as favoring the proposal in its essence." At a meeting that lasted till midnight on December 6, six of us (the Dean of Students, the Dean of the College of Letters and Science, the Deans of Engineering and of Law, the Chairman of the Chancellor's Committee on Student Affairs, and the Chairman of the Study Committee on Campus Political Activity) worked for hours to articulate the exact meaning of one phrase of the resolution. For additional history see Searle, *The Faculty Resolution*, in *REVOLUTION AT BERKELEY* 92, 99-104 (Miller & Gilmore eds. 1965).

⁴⁶ Louisell, 115.

⁴⁷ *Id.* at 117.

⁴⁸ *Ibid.*

⁴⁹ *Id.* at 113. When one thousand members of a lay body are cogitating, it scarcely seems surprising that some need instruction on just what it means to "move the previous question." Those voting thus to close debate numbered 812; those opposed, 141.

⁵⁰ Louisell, 111-12.

driving negotiating I referred to above. Formal meetings of the Senate had been held on October 13, October 15, and November 24 (and were of course preceded by scores of related and rump meetings, many thoughtful indeed). A resolution adopted at the first of the October meetings is as follows:

Whereas, an atmosphere of free inquiry and free exchange of opinion is essential to university teaching; and

Whereas, the Academic Senate has noted with pleasure the general improvement in recent years in the atmosphere of free inquiry and free exchange of opinion within the University; and

Whereas, the Senate favors maximum freedom for student political activity;

We therefore direct the Committee on Academic Freedom to inquire immediately into the recent University rulings on student political activity in the Bancroft-Telegraph area, the student's protest against these rulings, and the larger problem of students' rights to the expression of political opinion on campus and in the living and dining halls, and to report to the Senate as quickly as possible what action on the part of the faculty may be advisable.⁵¹

At the second meeting, since earlier action "has been widely misunderstood as condoning lawlessness, Now therefore, this body reaffirms its conviction that force and violence have no place on this campus."⁵² At the November meeting the Administration proudly proclaimed, "[S]tudents now do have maximum political freedom."⁵³ That a motion containing the following words was defeated by vote of only 274 to 261 may suggest, however, that many senators were not persuaded that known facts adequately supported the proclamation:

Since campus political activity is intimately connected with the educational process, the Senate has an inescapable and continuing obligation to express its views on this complex problem. The Senate reaffirms its support for maximum freedom for students' political activity and its declaration that force and violence have no place on the Berkeley campus. We believe that current issues of campus political activity are amenable to solution through continued discussion and debate. The regulations issued by Chancellor Strong today represent substantial progress. While important questions remain to be settled, we are confident that additional measures will be taken in the near future to insure maximum freedom of expression."⁵⁴

⁵¹ Minutes of the Berkeley Division, Academic Senate, Oct. 13, 15, 1964, p. ii. (Emphasis added.)

⁵² *Id.* at v.

⁵³ *Id.*, Nov. 24, 1964, p. i.

⁵⁴ *Id.* at iii. Those words had been adopted as a partial substitute for these: "It is the sense of the Berkeley Division of the Academic Senate that a great university, dedicated to freedom of thought and responsible citizenship, cannot deny to its students the full exercise

Thus on December 8 the participants hardly were uninformed or unprepared. Moreover, Professor Louisell mentions none of the post-December meetings which (1) illuminated the resolution's intent, (2) revised it, and (3) protected its bases from vigorous and persistent attack, led partly by him.⁵⁵ On May 10 for instance, the principle that "the content of political speech and advocacy is not subject to University restriction" was reaffirmed.⁵⁶ Also, the immunity earlier proposed for off-campus activity was restated as follows: "The off-campus conduct of students is not properly a matter of University concern unless such conduct clearly demonstrates unfitness for membership in the University community."⁵⁷ By that date professors had reacquired confidence in the ability of the Administration to treat fairly allegations of such unfitness. But on January 5 the Senate had commended and thanked Emergency Executive Committee members "for the progress they have made toward achieving the objectives of the December 8th resolution."⁵⁸ And that vote followed presentation of a report by the Committee in which each clause of the resolution was quoted and discussed.⁵⁹ On March 12 the Senate pro-

on campus of the rights guaranteed to citizens generally under the First and Fourteenth Amendments. The University's regulation of such activities should extend no further than is necessary to prevent undue interference with other University activities. Such regulations must be carefully drawn so that they cannot be used as an excuse for encroaching on the constitutionally protected scope of speech and political and social activity. In enforcing such minimal and essential regulations by disciplinary action, the standards of due process must be maintained and penalties imposed solely and finally by an impartial body chosen by and responsible to the Academic Senate. The only alternative to such regulation by the University would be to leave all regulation to the courts."

⁵⁵ See the remarks cited in Louisell, 108 n.3 (reprinted also in the Oakland Tribune, March 14, 1965, p. 2, col. 3), and Minutes of the Berkeley Division, Academic Senate, March 12, 18, 1965, p. iii ("Professor D. W. Louisell began the discussion by voicing his misgivings concerning possible student strikes or sit-ins in the future."); cf. mimeographed statements distributed by Louisell, Davis, and Waldo on January 2, 1965, and by Brown, Moyer, Glazer, and Seabury on February 2, 1965 ("An 'Open Letter to Professor J. tenBroek' by Professor David Louisell").

⁵⁶ Minutes of the Berkeley Division, Academic Senate, May 10, 13, 1965, p. vi.

⁵⁷ *Ibid.*

⁵⁸ *Id.*, Jan. 5, 1965, p. i.

⁵⁹ *Id.*, Feb. 8, 1965, pp. iii-vii. For reasons I never understood this report was omitted from the *Chronology* cited in Louisell 110 n.9. The most significant statements, perhaps, were these: "[T]he purposes of Point 3 of the Resolution of December 8 will have been satisfied if one further stipulation can be made with equal clarity and simplicity: that violations of law will be handled by civil authorities; that violations of University rules concerning time, place and manner of conducting political activity will be handled by the University; and that if laws and University rules concerning political activity should be simultaneously violated by the same act, the University will normally accept the court's judgment as the full disposition for the offence [I]t is apparent that a final decision on the principle [thus] set forth . . . cannot be expected prior to January 4. We consider the point *fundamental*, however. If any issue involving this principle should arise during the period of the Regents' study, we will reaffirm with the greatest vigor that the principle must be adhered to on the Berkeley campus." *Id.* at v.

nounced that one of the "fundamental issues" was "the preservation of freedom of speech and political advocacy in an environment of academic order and in accord with the principles of the resolution of December 8."⁶⁰

Of critical relevance to the charge that "reason . . . [had no] hearing" is this statement of the Academic Freedom Committee, submitted on December 15 and distributed to all Senate members on January 5 for discussion at the January 12th meeting:

In its discussion of the dispute over student political action which the Division asked the Committee to investigate in its resolution of October 13th, it became clear that a substantial question existed as to the constitutional status of student activity of this nature. At its meeting of October 23rd the Committee decided to secure legal advice on the problem. Dean Frank Newman of the School of Law was asked to nominate a committee to serve as advisors to the Committee on Academic Freedom on the constitutional implications of University control of this form of student behavior. On November 3, Dean Newman proposed a committee to be made up of Professors Robert O'Neil, Hans Linde and Robert Cole, all members of the staff of the School of Law. Professor O'Neil agreed to act as chairman.

The Committee met with the legal advisory committee and discussed at considerable length the major issues involved in the constitutional status of political action by students in their capacity as citizens and the right of the University to limit the use of its property. In addition to this survey of the principles involved, the legal committee agreed to comment on specific questions that might arise in the course of the Committee's study and to provide us with a written report. A series of questions was later proposed to the Committee.

Unfortunately, events did not wait on this deliberate approach to the study of the problem. In the situation in which the University found itself immediately prior to the December 8th meeting . . . the Committee on Academic Freedom felt that its charge from the Division created an obligation to try to contribute to a resolution of the immediate problem. *The discussions within the Committee, including the discussions with the members of the legal advisory group, had produced a consensus on the general principle that the University ought to adopt a broad, permissive approach with regard to allowable activity while concentrating its attention on the legally justified and administratively practical policy of imposing reasonable regulation as to the location, scheduling and manner of carrying on political action. It was decided to present this position on the major principles involved in the dispute to the Division [on Dec. 8] as the "substance of our report" with an auxiliary report covering proposals for "reasonable regulation" to follow at a later date.*⁶¹

⁶⁰ *Id.*, March 12, 18, 1965, p. ii.

⁶¹ *Id.*, Jan. 12, 1965, p. 2. (Emphasis added.) The introduction to the O'Neil Committee's December 14th report states, "What the present memorandum seeks to do is to summarize the views we expressed on November 13 and which subsequent consideration has confirmed." *Id.* at 2.

In sum, like Professor O'Neil I do not regard the Declaration of December 8th as "an aberration." My hunch is that prior to this symposium no one ever imagined that the declaration would "[any] more destroy our University's independence than the House's preposterous impeachment of President Andrew Johnson destroyed the American Constitutional plan of checks and balances."⁶²

To those who enjoy constitutional analogy I put these questions: Would the founding fathers assembled grandly as they were in constitutional convention imaginably have approved the words of the Declaration of Independence? Is it not illuminating that with their "deliberate orderliness"⁶³ and their "devotion to reason and its methods"⁶⁴ they could not even persuade themselves to adopt a Bill of Rights?⁶⁵ Would Professor Louisell and his allies wish that the first amendment in that Bill of Rights had been written "so that none but a fool would have invoked it as justification for hard-core affronts to public decency"?⁶⁶ Documents that critically and constructively respond to crisis, particularly when they stress *freedom*, are not always framed with the precision that as legal draftsmen we find comforting.

⁶² Louisell, 117.

⁶³ *Id.* at 113.

⁶⁴ *Id.* at 117.

⁶⁵ See BRANT, *THE BILL OF RIGHTS* 38 (1965): "The delegates at Philadelphia could indeed have prepared a nonmandatory Bill of Rights within a few hours. They could have adopted Mason's own Virginia Declaration of Rights, and it would have been a noble expression of the principles of free government. But they could not in a few hours convert those principles into binding commands enforceable in the courts. That would be a work of days or even weeks, if the commands were to be both safe and comprehensive."

⁶⁶ Louisell, 112.