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ACADEMIC FREEDOM AND THE CAMPUS REVOLUTION:

THE DISMISSAL OF H. BRUCE FRANKLIN

by

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PREFACE

The bulk of this paper is devoted to a discussion of the dismissal of H. Bruce Franklin from his tenured position as an associate professor of English at Stanford University in 1972. At the time of Franklin's dismissal, I was a freshman at Stanford and a reporter for *The Stanford Daily*, the campus's student newspaper. On January 11, 1972, the *Chicago Daily News* editorially endorsed Franklin's dismissal. In a letter to the editor of the *Daily News*, published on January 21, 1972, I summarized *The Stanford Daily* editorial which opposed the firing and concluded that the dismissal of Franklin was "most assuredly...severely repressive to academic freedom."

In writing this paper, I have done my best to set aside my prior conception of the Franklin case, so that my research and findings would be as unbiased as possible. I also have tried not to be influenced by my acquaintance with a number of the principals in the case, including Professor Franklin himself, as well as Stanford President Richard W. Lyman. I believe that I have been fair to all concerned.

Throughout the Twentieth Century, there has been a considerable degree of consensus in the academic community of the United States that a university or college faculty member ought to be free as a citizen to engage in most forms of political activity without fear of reprisal by his or her employer. The courts have, in large measure, endorsed this view. However, the more unorthodox a faculty member's political activity has become, and the more unsettled the political climate has been, the less stable this consensus has remained.

Faculty members who, at the turn of the century, challenged the prevailing economic forces of monopoly, anti-unionism and monomonetarism, found in many cases that they were no longer considered fit to teach.[1] A number of professors who opposed American involvement in World War I also suffered the loss of their livelihood because their statements were considered disloyal.[2] During the McCarthy era of the mid-Fifties, a faculty member who invoked his or her Fifth Amendment right against self-incrimination before a congressional or state legislative panel that was investigating alleged subversive activity on the nation's campuses frequently had to fight to retain his or her job when he or she came home.[3]

It was the campus revolution of the late Sixties and early Seventies, however, which often provided the most critical tests of how much a university or college was will-

ing to tolerate in the way of political activity by teachers and students alike. The tolerance of university administrators and trustees was pressed to the breaking point, and often beyond, because of the unprecedented revolutionary tone of campus political activity during this period. More than at any other time in history, the governors of America's institutions of higher learning perceived political activity by members of their communities as genuine threats to the institutions themselves. Naturally, this perception forced the university or college administrator to make an agonizing choice between continuing disruption and violence on the one hand, and the disciplining of a faculty member or student for political (some would say criminal) activity on the other.

Such was the situation at Stanford University on January 22, 1972, when the University's Board of Trustees voted 20-2 to dismiss an avowed Marxist revolutionary, H. Bruce Franklin, from his tenured position as an associate professor of English.[4] The dismissal had been recommended by a 5-2 vote of Stanford's Faculty Advisory Board, a panel of tenured professors charged with recommending personnel decisions to the University Administration. The Advisory Board had found Franklin guilty of "urging and inciting to the use of illegal coercion and violence" during disturbances on campus on February 10, 1971.[5] At the time Franklin was dismissed, Stanford's campus in many ways resembled "a scarred and charred battlefield."[6] Demonstra-

tions, sit-ins, mass street battles with police and arson fires were commonplace occurrences at Stanford from 1968 through 1971. Franklin was recognized as the leader of the revolutionary "movement" at and nearby Stanford, but he had never been arrested or criminally prosecuted for any illegal conduct on campus.[7] Nonetheless, if any one person threatened to destroy Stanford University during this period, it was Bruce Franklin.

This paper will explore the theoretical and legal bases for academic freedom as it relates to the extracurricular political speech and activity of university and college faculty members. Then, I will examine the Franklin case to determine how that case fits into the doctrinal and legal picture.

I

Traditionally, scholars defined academic freedom as

> the freedom of a teacher or researcher in higher institutions of learning to investigate and discuss the problems of his science and to express his conclusions, whether through publication or the instruction of students, without interference from political or ecclesiastical authority, or from the administrative officials of the institution in which he is employed, unless his methods are found by qualified bodies of his own profession to be clearly incompetent or contrary to professional ethics.[8]

The Germans called this Lehrfreiheit.[9] Lehrfreiheit had value, it was thought, because adherence to its principles would enable the university to function as "an intellectual experiment station, where new ideas may germinate and where their fruit, though still distasteful to the community as a whole, may be allowed to ripen until finally, perchance, it may become a part of the accepted intellectual food of the nation or of the world."[10] Similarly, historian Henry Steele Commager has written that without this traditional type of academic freedom - the freedom to teach or conduct research on unpopular or unorthodox theories - a scholar would be unable "to extend the boundaries of knowledge, to discover new truths and new ways of thinking about old truths," a task which Commager identifies as one of the "three historic functions" of the university.[11] When the American Association of University Professors (AAUP) drafted its 1940 "Statement of Principles on Academic Freedom and Tenure," it began by asserting the fundamental right of a scholar to full freedom in research and in the classroom.[12]

Faculty members soon recognized that their academic freedom could be protected adequately only when university administrators and trustees acknowledged that "[a]fter the expiration of a probationary period, teachers...should have permanent or continuous tenure, and their service should be terminated only for adequate cause."[13] A recent study reported that the first argument most commonly made in support of tenure is that it

> is an essential condition of academic freedom: it assures the teacher that his professional findings or utterances will not be circumscribed or directed by outside pressures, which could otherwise cost him his position; and it assures students and the public who support and rely upon the teacher's professional integrity, that the teacher's statements are influenced only by his best professional judgment and not by fear of losing his job.[14]

Tenure, then, is viewed by its adherents as a safeguard against the dismissal or discipline of a faculty member for teaching or conducting research on a topic, or in a fashion, which is regarded as heretical or even dangerous by the public, the trustees, or even by the professor's colleagues in his field. Dismissal or discipline under such circumstances would not only silence the accused heretic, but would most certainly cause other professors to think twice before challenging accepted scientific or social theory.[15]

Although those who support academic freedom (there appear to be few opponents in this country) generally agree that it includes the freedom of professors in their instruction and research "to question the teachings of authorities and to express freely and vigorously their dissenting views, however unpopular,"[16] there is much less agreement that a faculty member should also be free from institutional sanctions for so-called "extracurricular" or "aprofessional" remarks which he or she makes, regardless of how wrong-headed or intemperate the remark may seem to be. If

a university or college is to be viewed as a proving ground for new ideas, there would seem to be no reason to limit scholars to musings on topics which are, for the time being at least, of purely academic interest. Surely we also ought to encourage teachers to critically examine and challenge accepted political, religious and social beliefs, even when such a challenge is mounted by a speech or publication which, strictly speaking, is offered outside academia. It would seem that society stands to benefit as much from such heresy as it does from the exploration and expression of unpopular new scientific doctrines.[17]

There appear to be at least three distinct views on the degree to which a faculty member's political activity outside the classroom is protected by academic freedom. William W. Van Alstyne, professor of law at Duke University and a former president of the AAUP, argues quite forcefully that, in general, a professor may not be made to answer to his or her employer for political utterances, regardless of their content.[18] Sidney Hook, now a senior research fellow at the Hoover Institution on War, Revolution and Peace at Stanford, takes the opposite view that a faculty member, like any other individual in society, should not expect to be immune from the social costs of exercising his or her right to free speech. Thus, Hook contends, a professor's political activity (e.g., his

or her invocation of the Fifth Amendment in refusing to answer questions about his or her association with the Communist Party) may demonstrate that he or she is unfit to teach.[19] "The AAUP," according to its general counsel, "has taken something of a middle ground, leaning more toward the Van Alstyne view but not embracing it completely."[20] The Association's 1940 "Statement of Principles on Academic Freedom and Tenure" declares that when a professor "speaks or writes as a citizen, he should be free from institutional censorship or discipline," but warns that he or she "should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that he is not an institutional spokesman." In short, the AAUP states that the faculty member's "special position in the community imposes special obligations."[21]

Van Alstyne decries the fact that American scholars have "obscured the difference between academic freedom _simpliciter_, and freedom of speech as a universal civil right irrespective of one's vocation."[22] He complains that the phrase academic freedom has "slipped away from a close association with protection of the academic in his professional endeavors" - that is, it has developed beyond what the Germans called _Lehrfreiheit_ - to the point where "the protection of an academic in respect to the exercise of his aprofessional political liberties [has been] argued into position as a subset of academic freedom."[23] This

trend, Van Alstyne says, has actually resulted in faculty members receiving less protection for their political activity than that to which they are entitled.

> The wooden insistence that academic freedom is at the heart of an academic's right to engage in political activity has repeatedly drawn the sharp riposte that, given this rationale, the political liberties of academics must be correspondingly reviewed by a higher standard (i.e., a professional standard) than the like activities of others. It thus presumes to make professors subject to a greater degree of employment accountability than others generally owe in respect to their private freedom.[24]

According to Van Alstyne, the language of the AAUP's 1940 "Statement of Principles" which refers to a faculty member's "special obligations" when he or she resorts to aprofessional political activity, may actually inhibit claims that such activity is "not subject to institutional review by the same fiduciary responsibility for which [professors] may be asked to account through academic due process in respect to their academic freedom."[25] Van Alstyne advocates a narrowing of the definition of academic freedom, so that it includes only the traditional concept of Lehrfreiheit - the freedom to teach and conduct research[26] - thereby excluding the freedom to engage in aprofessional political activity.

> What needs to be done, however, is not merely to make clearer that a faculty member may not properly be held to answer to an institution for the inte-

> grity of his general utterances by the same professional standard by which he may have to account for his academic freedom, but to enlarge upon the implication of our position that his substantive accountability for such utterances will ordinarily not run to the institution at all. For an alleged abuse of one's ordinary freedom of speech, general provisions of law are available to provide for measures of redress and sanction as far as it has been thought safe and just to allow. As a consequence, society may not expect, nor should the standards of the AAUP contemplate, that recourse for alleged abuses of ordinary civil liberty may be compounded by the gratuitous use of institutional disciplinary processes.[27]

Other scholars agree that it is not for a university or college to punish a faculty member for political activity, no matter how outrageous it may be, and that such punishment, if it must be administered at all, is more properly within the purview of a governmental authority.[28]

Van Alstyne acknowledges that, under certain extraordinary circumstances,

> the personal conduct of a faculty member may so immediately involve the regular operation of the institution itself or otherwise provide firm ground for an institutional grievance that internal recourse, consistent with academic due process, is offensive neither to the general protection of civil liberty nor to the standards of the academic profession.[29]

However, he suggests that "[t]o the extent that universities should be exemplars of humaneness," they ought to strive to be more tolerant of outrageous political activity than our other institutions have been.[30]

Almost diametrically opposed to Van Alstyne are scholars such as Sidney Hook, who believe that university and college faculty members must be prepared to suffer the consequences if their aprofessional political speech or activity somehow demonstrates that they are not fit to teach. "On the face of it, the claim that the exercise of a constitutional right should in no circumstance be costly to an individual is absurd. The social <u>costs</u> of exercising one's constitutional rights are inescapable, and sometimes morally justifiable."[31]

Although Hook's comments were directed chiefly at professors who invoked their Fifth Amendment right against self-incrimination in refusing to answer questions posed by a legislative investigating committee regarding their association with the Communist Party, it seems likely that he would also have the same feelings about faculty members whose revolutionary political activity stirs up turmoil on the campus. Indeed, Hook viewed much of the turmoil on campuses in the late Sixties and early Seventies as "prejudicial to the exercise of academic freedom.

> When students prevent their fellows from attending class by blocking doorways, or prevent faculty members from gaining access to their offices and laboratories, or vandalize libraries by throwing books into heaps and scattering them in different alcoves, they are crippling the life of mind in the university just as much as episodic violence does.[32]

Those who adhere to this view or to similar views insist that a professor has an "obligation to live by the rule of reason and reasoned persuasion. As Chancellor Alexander Heard of Vanderbilt University put it..., the faculty member who foresakes his commitment to reason violates his primary obligation to the institution he serves."[33] Accordingly, it is argued, a professor who seeks "to use the campus as a staging area for the causes of the moment - to tyranize even for the best of purposes, 'pressure' through the use of physical violence or the semi-violence of building blockades and picket lines or the more tolerable, but nonetheless corrosive, violence of...endless threatening speeches" is not protected by the right to academic freedom.[34] The bottom line seems to be that "[w]hereas a man's right to speak out on this or that may be guaranteed and protected [under the First Amendment], he can have no imaginable human or constitutional right to remain a member of a university faculty."[35]

The arguments of Hook and his colleagues are similar to those of Van Alstyne only in that neither side considers a faculty member's freedom of political speech and activity to be a part of his or her academic freedom.[36] From this common ground, Hook proceeds to argue that a university or college ought to be expected to discipline a professor for "unprofessional" utterances and activities, whereas Van Alstyne contends that these institutions generally have no right to judge an academic for speech or conduct in the political arena.

The views of the AAUP lie somewhere in the wide chasm between the philosophies of Van Alstyne and Hook. The Association starts from the premise that academic freedom includes the right of a faculty member as citizen to engage in political activity. However, according to the AAUP's 1940 "Statement of Principles," this right carries with it the concomitant responsibility of speaking and otherwise behaving in an accurate and restrained fashion.[37] As late as 1963, an AAUP panel rejected the view that the 1940 "Statement's" requirement of accuracy and restraint was "exclusively an admonition addressed to the conscience of the faculty," and instead ruled that it "was intended to recognize the legitimacy of university authority to discipline faculty members for violating norms of accuracy, self-restraint, and courtesy even in respect to professionally unrelated extramural utterances."[38]

In 1964, the AAUP clarified and liberalized its stance on the aprofessional political activity of professors.

> The controlling principle is that a faculty member's expression of opinion as a citizen cannot constitute grounds for dismissal unless it clearly demonstrates the faculty member's unfitness for his position. Extramural utterances rarely bear upon the faculty member's fitness for his position. Moreover, a final decision should take into account the faculty member's entire record as a teacher and scholar. In the absence of weighty evidence of unfitness, the administration should not prefer charges; and if it is not clearly proved in the

> hearing that the faculty member is unfit for his position, the faculty committee should make a finding in favor of the faculty member concerned.[39]

This largely unqualified manifesto returned the AAUP to its founding credo, as expressed in the 1915 "Declaration of Principles", that academic freedom "comprises three elements: freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extramural utterance and activity."[40] The AAUP has recognized that "[i]t is important that the few potential troublemakers are encouraged to voice their dissent, because on such dissent, however unpopular, the advancement of material, social, or spiritual improvements may depend."[41]

The AAUP has made no formal statement defining what sort of extramural political speech or activity by a professor would clearly demonstrate his or her unfitness to continue on the faculty. However, the Commission on Academic Tenure in Higher Education recently formulated guidelines which the AAUP would doubtless subscribe to, given its past statements.[42] The Commission recommended that

> "adequate cause" in faculty dismissal proceedings should be restricted to (a) demonstrated incompetence or dishonesty in teaching or research; (b) substantial and manifest neglect of duty, and (c) personal conduct which substantially impairs the individual's fulfillment of his institutional responsibilities.[43]

Presumably if a professor's aprofessional political speech or activity is to be considered grounds for dismissal, it would be because his or her behavior was proscribed under the last of these three criteria.[44]

Although virtually every commentator agrees that faculty members must be free "to exercise their rights as citizens to engage in political action without jeopardizing or prejudicing their membership or standing in the professional community,"[45] and that this freedom is not unlimited, there is a considerable difference of opinion over where the line is between the permissible and the impermissible. Van Alstyne would have university administrators tolerate virtually any political speech or activity which does not immediately threaten the regular operation of the university as a whole. Hook seemingly would permit administrators to punish a faculty member if his political speech or activity strayed too far from the conventional give-and-take of political debate, and if it tended to resemble coercion more than reasoned persuasion. Lastly, the AAUP insists that a professor's aprofessional political activity, when balanced against his or her record as a teacher and scholar, must clearly demonstrate that he or she is unfit to remain on the faculty before the professor may be dismissed.

II

Academic freedom has not been recognized as a constitutional right: the Supreme Court has yet to grant it "the same independent constitutional status it awarded to privacy in Griswold v. Connecticut (1965). The Court talks about academic freedom, but when it comes to doing something about it, the constitutional justification is likely to be stated in more traditional language and values."[46] Nevertheless, "the Court has often made highly honorable mention of the phrase."[47]

As early as 1952, members of the Court noted the special "nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment" and said that "inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of these amendments vividly into operation."[48] Significantly, the justices offered this dictum in an opinion which, in general, concerned the political activity of faculty members at a state college and which specifically held that such teachers could not be dismissed for their refusal to swear to a loyalty oath declaring that they had not, in the previous five years, belonged to an organization identified by the Attorney General as "subversive" or "Communist-front."

Five years later, a Supreme Court plurality declared that "[t]o impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation"[49] and that faculty members "must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."[50] Again, it is significant to note that the tribute to academic freedom was penned in the context of a prominent Marxist scholar's appeal of a contempt conviction for his refusal to answer questions posed by a state legislative committee investigating his association with the Progressive Party and a lecture which he had delivered at the University of New Hampshire.[51]

In 1967, the Court considered the challenge of certain state university faculty members to a state statute requiring that a professor be dismissed for "the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts."[52] In striking down the statute, the Court said: "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cost a pall of orthodoxy over the classroom."[53]

Perhaps the high water mark of the Supreme Court's treatment of a faculty member's right of free political speech and activity came in Pickering v. Board of Education.[54] There, the Court

> recognized that a teacher would be so unequally inhibited vis-a-vis other citizens were he constrained by a strictly professional standard of care, accuracy and courtesy in the rough-and-tumble of ordinary political discussion, that the First Amendment will protect his employment from jeopardy where his departure from that standard relates only to his aprofessional political utterances as a citizen and is not a function of his teaching, research, scholarly publication, or any similar institutional responsibility of a professional character.[55]

Pickering had been dismissed from his position as a public school teacher because the Board of Education had concluded that a letter which he had written to a local newspaper commenting critically on the Board's handling of school finances was "'detrimental to the efficient operation and administration of the schools of the district.'"[56] In holding that the dismissal was violative of Pickering's constitutional rights, the Court rejected the suggestion "that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work."[57] The Court concluded that unless a teacher's public statements or conduct could be shown or presumed "to

have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally," then it would be impermissible for the school administration to discipline him for such speech or conduct.[58] The Court also intimated that, under certain circumstances, dismissal might be appropriate 1) if the teacher's working relationship with school administrators or other teachers has been seriously undermined (e.g., by a personal attack on an administrator or teacher), or 2) if the teacher's public utterances breach a substantial admistration interest in maintaining the confidentiality of certain information.[59]

One year later, in evaluating the First Amendment rights of students in school, the Supreme Court reaffirmed its conclusions in Pickering and stated that discipline by school authorities would be inappropriate absent "a showing that the students' activities would materially and substantially disrupt the work and discipline of the school."[60] However, the Court also cautioned that "conduct by the student, in class or out of it, which for any reason - whether it stems from time, place, or type of behavior - materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech."[61]

These standards have subsequently been applied by lower federal courts to political speech and activity by teachers -- even when such conduct occurs in the classroom. The Court of Appeals for the Second Circuit said in James v. Board of Education[62] that

> we cannot countenance school authorities arbitrarily censoring a teacher's speech merely because they do not agree with the teacher's political philosophies or leanings. This is particularly so when that speech does not interfere in any way with the teacher's obligations to teach, is not coercive and does not arbitrarily inculcate doctrinaire views in the minds of the students.[63]

If teachers are to be punished because their political activity violates school rules, then the Court said such rules must "be reasonably related to the needs of the educational process and...any disciplinary action taken pursuant to those rules [must] have a basis in fact."[64] The courts would doubtless be even more protective of political expression or activity outside the classroom, where there is less danger that students will feel coerced or that the educational process will be disrupted.

The Courts, then, respect academic freedom per se, as well as the right of a faculty member to freedom of aprofessional political expression and activity. "Judicial recognition has been accorded the principle that public employees [including professors and teachers] should not lose their jobs because of their exercise of substan-

tive constitutional rights such as free speech."[65] Professors at private universities and colleges, however, do not enjoy as much protection. The Supreme Court has recognized that certain private enclaves, including the so-called "company town" and the giant shopping center - may well stand "in the shoes of the State"[66] for First Amendment purposes, if the privately owned and operated enclave has been to a considerable extent dedicated to public use. However, among recent Supreme Court justices, only William Douglas has intimated that faculty members at private universities might be entitled to First Amendment protection against institutional reprisal for their political speech or activity, "if through the device of financing or other umbilical cords [private universities] become instrumentalities of the State."[67] In the judgment of at least one commentator, the present Supreme Court "might well require an umbilical cord made of piano wire before concluding that relationships between the state and any private institution were so extensive or pervasive as to make the institution's actions tantamount to those of the state."[68]

Given the present state of the law, a faculty member at a public university or college could be dismissed or otherwise punished by his employer for extramural political utterances or activity under either of two conditions. First, discipline may be appropriate if the professor's action has impeded the proper performance of his teaching

duties or has interfered with the operation of the university or college generally. Second, a faculty member may be disciplined if his action is simply unprotected by the First Amendment.[69] In the field of political expression, First Amendment protections disappear if the expression is defamatory[70] or if it constitutes advocacy which is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[71]

The Supreme Court has also insisted that certain procedural safeguards be maintained to insure that faculty members at public universities and colleges are not dismissed arbitrarily or for other than good cause. In Board of Regents of State Colleges v. Roth,[72] the employment of a non-tenured assistant professor of political science was terminated after one year. The Court concluded that even a non-tenured faculty member may, under certain circumstances, have a due process right to notice and an opportunity to be heard before being dismissed. Such a right could arise, the Court said, when the professor's "liberty" interest in his '"good name, reputation, honor, or integrity is at stake because of what the government is doing to him.'"[73] Such a liberty interest would be jeopardized, according to the Court, if in declining to rehire a faculty member, the university or college made "any charge against him that might seriously damage his standing and associations in his community,"[74] or if it "imposed on him

a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities."[75] In addition, a non-tenured faculty member may have a due process right to hearing if his non-retention deprives him of a "property interest." The Court said that for a professor to have a property interest in keeping his job, he "clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must instead have a legitimate claim of entitlement to it" - a claim which may be "created and defined by the terms of his appointment".[76] The Court in Roth offered no guidance as to the specific procedural safeguards which a professor should have in the event that his or her dismissal would implicate a liberty or property interest.

In the companion case to Roth, Perry v. Sindermann,[77] the employment of a professor of government and social sciences was terminated after a series of successive one-year contracts.[78] The Supreme Court reversed the district court's decision to grant the college summary judgment on Sindermann's claim that he had been terminated because of his public criticism of the policies of the college administration. The Supreme Court also reversed the district court's summary judgment against Sindermann on his allegation that the college's failure to provide him with a pre-termination hearing violated his right to due process. Essentially, the Court ruled that "[c]onstitutional procedural protection is available to a non-tenured faculty member

contesting nonrenewal of a contract if he can show initially that nonrenewal was due to his exercise of a constitutional right."[79] The case was remanded to the district court for trial on Sindermann's First Amendment and due process claims, but he apparently lacked the wherewithal to press his suit any further. Cases such as Sindermann's demonstrate "that vindicating [faculty members'] First and Fourteenth Amendment rights through the judicial process remains costly, complex, and uncertain."[80]

III

The Faculty Advisory Board which recommended the dismissal of H. Bruce Franklin from his tenured position as an associate professor of English at Stanford University recognized that "the impoverished state of 'case law' for academic proceedings of this sort gives great weight to the outcome of the present case." The Board characterized its decision as "ground-breaking."[81] In response to the decision by Stanford's Board of Trustees to dismiss Franklin, the University's President, Richard W. Lyman predicted

> that in future years, what will turn out to have been most influential about this decision will be the text of the Advisory Board decision itself....The relationships between civil law and university regulations; the nature of a faculty member's responsibilities, and the extent to which his responsibilities extend to his behavior outside the classroom - on these and other matters the Stanford Faculty Advisory Board has said things that people will be reading and from which they will be benefiting long after the particular details of this case have been forgotten.[82]

Franklin himself recognized the potentially sweeping impact which the Advisory Board's landmark decision might have. Several months after the decision, he wrote that "it is clear that my case will open the floodgates for [a] wave of repression now sweeping the country. If a tenured professor at Stanford cannot speak without risk of dismissal, obviously no teacher is secure."[83]

All parties concerned agree that the Advisory Board's decision in the Franklin case may well serve as nationwide model for future university or college disciplinary proceedings against faculty members for allegedly improper political speech or conduct. The importance of the Franklin case should not be ignored simply because of the apparent tranquility on American campuses today. History demonstrates that serious challenges to political freedom on campus tend to run in cycles. Moreover, it is during periods of relative calm when the holders of extreme political views seem even more out of place - and are therefore susceptible to both internal and external pressures to remain silent, or at least to tone down their rhetoric. For these reasons, the Franklin case is of lasting importance, and must be critically evaluated in light of the theoretical and legal bases for academic freedom as it relates to the aprofessional speech and activity of university and college faculty members.

Born on February 28, 1934 in Brooklyn, New York, Howard Bruce Franklin graduated _summa cum laude_ from Amherst College

in 1955. Later that year, he volunteered to serve in the U.S. Air Force and was assigned to the Strategic Air Command as a navigator and squadron intelligence officer. After mustering out in 1959, Franklin enrolled at Stanford University, where, in 1961, he earned a Ph.D. in English and was promptly hired as an assistant professor.[84] Three years later, he was hired away from Stanford by Johns Hopkins University, "which was attracted by his growing reputation as a...scholar" on the works of Herman Melville.[85] In 1965, "Stanford hired him back as an associate professor with tenure."[86]

Franklin was respected by his colleagues as "a gifted scholar and teacher,"[87] but he was probably better known after 1961 as a leader of a series of revolutionary groups in the San Francisco Bay Area. Franklin and his wife, Jane, spent the 1966-1967 academic year at a Stanford overseas campus in Tours, France. "'Jane and I became Marxist-Leninists while we were in France,'" Franklin later recounted.[88] He said that their intensive exposure to Communist ideology during their stay in France, and their acquaintance with a number of Vietnamese Communists living in Paris were part of an experience that "changed my life."[89] Soon after returning to the United States, Franklin was a co-founder of the Peninsula Red Guards, a Maoist revolutionary group headquartered in Palo Alto, California, near Stanford. In late 1968, Franklin and others organized the Revolutionary Union (RU), a Marxist-Leninist-Maoist group

whose "Statement of Principles" advocated "the necessity for violent revolution and the political rule of the working class."[90] Based on information supplied to it by informants for the Federal Bureau of Investigation, a congressional committee reported in 1972 that

> At demonstrations engineered by the RU, the national leaders, with the exception of Bruce Franklin, seldom led or conducted operations. The actual leading of demonstrations was handled by RU members with abilities as rabble rousers. Franklin considered himself a tactician and often led or directed the activities of RU groups at demonstrations.[91]

Following a fierce internal dispute over tactics, the Revolutionary Union split in two late in 1970. Franklin led the more militant of the two factions, which "was convinced that the revolutionary consciousness of the proletariat was already sufficiently raised to allow guerilla activity and armed revolution to begin."[92] Franklin's faction merged with a predominantly chicano revolutionary group known as Venceremos, Spanish for "We will win."[93] Franklin became a member of the group's central committee. The Venceremos organization's "Principles of Unity" called for participation in a "world revolution against a common enemy: U.S. imperialism," and condoned "any and all forms of struggle against the enemy," reminding its members of Mao Tse-tung's admonition that "Political power grows out of the barrel of a gun."[94] Shortly after his dismissal from Stanford, Franklin wrote that "we make no attempt to

hide our belief in the need for revolutionary violence." He opined that "[u]nder certain circumstances it might be correct to assassinate or kidnap members of the U.S. ruling class, to burn down Stanford's computer, to ambush the police or to physically attack right-wing organizations."[95] Venceremos was described as "strongly weapons oriented" and some of its members were reported to have possessed "large supplies of firearms and ammunition" and were "observed practicing with various types of firearms including automatic military rifles in clandestine conditions."[96] According to one news account, Franklin kept "a Remington 12-gauge automatic shotgun 'very available' in his house and [had] carried it when meeting policemen at the front door."[97] He had been arrested off campus twice prior to the events leading to his dismissal.[98]

"Through his teaching and his charismatic speaking Franklin supplied Stanford students as recruits for Venceremos."[99] With Franklin often in the vanguard, radicals protested in succession against classified war research at Stanford, the University's Reserve Officer Training Corps (ROTC) program, the American invasion of Cambodia, the American-supported invasion of Laos and this nation's general involvement in the war in Southeast Asia. One Franklin critic later wrote:

> The period can be characterized as a reign of terror. 'Trashing' or window-breaking cost the university about a

> quarter of a million dollars. There were at least five sit-ins during the period [1967-1972], which disrupted the lives of the community. There were numerous incidents of arson, including destructive fires in which scholars lost irreplaceable papers. A staff member had his house fire-bombed. Another was shot at through the front window of his living room.[100]

Although Franklin himself was never tied directly to any of this violence, many faculty members believed he was responsible for it. Certainly it would be no understatement to say that a significant number of Franklin's colleagues on the faculty feared him and even despised him.[101] Some alumni urged that Franklin be silenced; even the F.B.I. attempted to stir up a campaign against Franklin.[102] According to Franklin, the Stanford Administration sought in 1968 to discipline or remove him for his role in a campus sit-in, but was rebuffed by the Faculty Advisory Board.[103]

It was in this setting that the final confrontation between Franklin and the Stanford Administration began. To commemorate the twenty-fifth anniversary of the founding of the United Nations, the conservatively oriented Hoover Institution on War, Revolution and Peace sponsored a United Nations Conference at Stanford from January 11 to 13, 1971. The Institution invited Henry Cabot Lodge, U.S. ambassador to the U.N. from 1953 to 1961, and to South Vietnam from 1963 to 1964 and again from 1965 to 1967, to speak at Stanford's Dinkelspiel Auditorium on January 11. From the moment he was

introduced, Lodge encountered loud and sustained heckling from the audience. Protesters clapped rhythmically and shouted "pig" and "fascist" at the former ambassador.[104] "It is incontestable," the Faculty Advisory Board later found, "that at least part of the 'audience was often unable to hear the words of the speakers.'" The Board said that the disruption "was sufficiently sustained and intense to cause the cancellation of the meeting some five minutes" after Lodge took the podium.[105]

One week after the so-called "Lodge incident," University President Richard W. Lyman wrote to Franklin, informing him of charges that "you deliberately contributed to the disturbance which forced the cancellation" of the ambassador's speech. "If this is true," Lyman wrote, "then you should be subject to disciplinary action."[106] On January 26, 1971, Lyman informed Franklin that he would ask the Faculty Advisory Board to suspend Franklin without pay for one academic quarter for his alleged participation in the Lodge incident.[107] Before the Advisory Board had an opportunity to formally respond to Lyman's charges, events occurred which, in the University Administration's view, cemented Franklin's fate.

The invasion of Laos by South Vietnamese troops with American air support was officially announced on the night of February 7, 1971. The Stanford campus was already in an unsettled mood that night: within the past

36 hours, arson had been attempted at the headquarters of the Free Campus Movement, an ultra-conservative student organization, and Molotov cocktails had been thrown into a first-floor office in the ROTC building. Some 600 persons were attending a program sponsored by the Stanford Committee Against War and Fascism when news of the Laotian invasion reached the campus. A noon rally was called for the following day, and leaflets were distributed which alleged that a Stanford Research Institute computer program known as Gamut-H was then being run at the University's Computation Center. According to the flyer, the program simulated "the logistics of deployment of helicopters and ships and the leaflet asserted that the 'work is directly applicable in Indochina.'"[108] Later that night, about 200 demonstrators roamed the campus, breaking an estimated 100 windows in at least nine buildings. "Fights broke out between demonstrators and members of the Free Campus Movement who were attempting to halt the trashing. The University Computation Center was evacuated...after a telephoned bomb threat was received, but after a search people re-entered the faculty."[109]

The noon rally on February 8 was attended by about 800 persons. A leaflet entitled "Do It!" was distributed. The leaflet "stated 'last night's action was the first in a series in response to the invasion of Laos.' It anticipated trouble with police and with 'right wing fascists,'

and gave suggestions for handling such trouble."[110] Later, about 150 demonstrators gathered at the Graduate School of Business and

> jammed into the ground level lobby, blocking entry to a room in which a [Board of Trustees] committee was meeting and holding the committee virtually under siege for 45 minutes. At 1:45 p.m., C.D. Marron of the Santa Clara County Sheriff's Department declared it was an unlawful assembly....The crowd dispersed when a squad of sheriff's deputies appeared. One plain-clothesman suffered a head laceration when hit by a thrown rock. At 2:30 p.m., about 24 police dispersed some 300 demonstrators who had reassembled outside the ground floor of the Graduate School of Business.[111]

Still later, some 20 Santa Clara County Sheriff's deputies swept about 40 demonstrators out of the lobby of the Old Union, the University's student services administration building. That night, "numerous squads of Santa Clara County and San Jose police patrolled the campus on foot as well as by car."[112]

On February 9, beginning at 8 p.m., as many as 800 persons crowded into Dinkelspiel Auditorium to attend a three-hour meeting to plan strategy for the continuing protest against the war. Franklin attended the rally and made a speech in which he said: '"We should take action right here on the University because the war is being waged by the Stanford Board of Trustees and the others of their same social class."'[113] The Advisory Board stated that Franklin "was referred to by several other speakers....His leadership

position may reasonably be inferred from the tape [recording] of this meeting" made by campus radio station KZSU.[114] Speakers called for protest activities aimed at Stanford's alleged participation in the war effort, condemned the presence of police on campus and advocated harassment of the police. "There were many references to the Computation Center. It was clearly the object of intense interest, both for its alleged war complicity and for its vulnerability. It emerged as the prime target for protest activity," the Faculty Advisory Board later found.[115] Methods of shutting down the Center, or putting it out of service were discussed. "Acts such as seizing and occupying a building for long periods tended to be treated casually. Violent acts were sometimes spoken of explicitly, and sometimes merely hinted at. Audience response indicated that these hints evoked considerable interest."[116] Six speakers favored a "multiple-levels-of-action approach," in which a wide "spectrum of activities was included, some of which were clearly coercive and some even overtly violent....The general tendency of these speakers was to favor the more disruptive end of this range of activities."[117]

According to the Advisory Board,

> In the latter part of the Dinkelspiel rally, consensus grew on the 'mobile strike' or 'mobile strike force', as the meeting's chairman referred to it. The 'mobile strike' was intended to be a series of

> disruptive acts, hopefully leading to a total shutdown of the University. Occupation of the Computation Center was considered a good way to begin.[118]

The Hoover Institution was also mentioned as a possible target for protest activities.

A noon-hour rally at the University's White Plaza on February 10, 1971 was attended by roughly 700 persons. "The Computation Center was referred to often throughout the meeting. Its suitability as a protest target was cited."[119] Numerous themes from the previous night's meeting at Dinkelspiel Auditorium were repeated, including the desirability of shutting down the University, "the concept of different people taking protest action on different levels, each doing his own thing," and the need for a "mobile strike."[120]

"Professor Franklin gave the closing and longest speech of the rally." As he concluded, his "delivery shifted to a higher intensity." He called for "a strike...a voluntary boycott - a shutdown of some of the activities of the University." Franklin concluded as follows:

> See, now what we're asking is for people to make that tiny little gesture to show that we're willing to inconvenience ourselves a little bit and to begin to shut down the most obvious machinery of the war, such as, and I think it is a good target, that Computation Center.[121]

Immediately after the speech, the chairman of the rally called for a vote to choose either the Computation Center or the Hoover Institution as a protest target. The vote

favored the former. At about this time, University Provost William F. Miller instructed officials at the Computation Center to close the building. This was done, before protesters arrived, but the computer itself was kept running.

At approximately 1:15 p.m., 15 minutes after a crowd of between 100 and 200 protesters arrived at the Computation Center, forcible entry was made into the Center

> About 50 demonstrators then entered through the back door. As they moved through the building, they opened other entrances and admitted other demonstrators. Power to the building and to the computer was shut off at 1:20 by pulling a master switch located near the back door. Some 100-200 more persons entered and milled about inside the Computation Center.[122]

Franklin never entered the Center.

Over the course of the next three hours, representatives of the Stanford Department of Public Safety and the Santa Clara County Sheriff's office requested several times that the demonstrators leave the Computation Center. The occupation ended, however, only when about 100 sheriff's deputies arrived outside. There was an estimated $800 of damage to the Center although the computer itself suffered no substantial damage. Shortly before the deputies arrived, C.D. Marron, the field enforcement supervisor of the sheriff's office, used a bullhorn to make "a formal statement declaring the occupation of the Center and its immediately adja-

cent territory unlawful and ordering the demonstrators to disperse, also stating that they were subject to arrest if they did not do so."[123] He made the announcement three times, including twice in the direction of persons outside the Center. After deputies had secured the Center, Marron walked around the building, repeating his order to disperse. "A double line of police had been formed in front of the Center. Marron repeated his complete order at least three or four times [after he had returned to] the front of the Computation Center."[124]

Those demonstrators near the double police line largely ignored Marron's order, but some others who were further away began to withdraw. Then, both before and after attempting to persuade Lincoln Moses, then dean of the University's graduate division, to remain on the scene as a faculty observer, Franklin engaged in "[a] heated verbal exchange" with Sheriff's Sergeant Don Tamm, who was standing next to Marron.[125] Franklin loudly contended that the assembly outside the Computation Center was lawful, that Marron's order to disperse was unlawful, and that people shouldn't have to leave the area. As Franklin argued with Tamm, two uniformed deputies stepped forward and attempted to grab Franklin, who was pulled away by his associates. Simultaneously, the remaining deputies in the double line made a quick charge into the crowd, dispersing it and arresting four persons (a professor and three students).[126]

At approximately 8 p.m., about 350 persons gathered in the Old Union Courtyard for a rally which had been announced early that afternoon as demonstrators marched toward the Computation Center. Those attending the rally were divided as to both goals and tactics. Some, mainly the so-called "Roble contingent," favored a single demand, the withdrawal of the United States from Southeast Asia, and supported strict adherence to non-violent tactics. Others favored a broader set of demands, including the cessation of war-related work at Stanford, and supported a more diverse range of tactics," including coercive and violent ones, depending on circumstances."[127] Numerous speakers angrily and resentfully referred to the police presence on campus. "Parallels were drawn between the police on campus and imperialist armies in Asia. The all-one-war theme was emphasized by urging resistance to the police as analogous to resistance to occupying forces in Vietnam."[128]

Franklin spoke twice at the Old Union Courtyard rally. In his first speech, he began by attempting to persuade the "Roble contingent" that they should adopt the broader set of demands favored by others at the rally. Then, in what the Board later described as "an intense delivery," Franklin stated that "we get very upset when we find our beautiful campus crawling with pigs who stop and harass people and rip off [arrest] and beat half the

people."[129] He noted the presence on campus of San Jose city police officers, saying "that's those San Jose pigs [who] have just murdered a black brother in San Jose."[130]

Franklin's second speech came at the end of the rally. Unlike his White Plaza speech that afternoon and his remarks earlier that evening in the Courtyard, this speech was not recorded by KZSU. No complete or partial transcript of the speech exists. However, it is agreed that Franklin called for those attending the rally to respond with "the methods of people's war" to the presence of an "occupation army" of police on campus. Franklin urged that people engage in different levels of action as late at night as possible. However, the only tactic which he specifically suggested was that people should organize roving touch football games - presumably to confuse and harass the police.[131]

After Franklin's two-minute speech, the rally broke up. Almost immediately, a brawl ensued between persons leaving the rally and members of the Free Campus Movement, who had been observing the rally and whose presence had been angrily noted by several speakers. Also that night, two persons were slightly wounded, apparently by gunfire, a number of windows were broken and eight false fire alarms were turned in.[132]

President Lyman wrote to Franklin on February 12, 1971, informing him that "because of the important role which you

played in the tragic events of Wednesday, February 10, I am suspending you immediately [with pay] , as I regard your continuance in your regular duties to constitute a threat of immediate harm to others."[133] The President's action and reasons were pursuant to Section 17 of the "Statement of Policy on Appointment and Tenure at Stanford University." Lyman also wrote that he would add charges of misconduct on February 10 to those "to be preferred arising from your conduct during the Lodge incident and [I will] propose that you be dismissed from your position on the Stanford faculty."[134] Also on February 12, the University obtained a temporary restraining order in Santa Clara County Superior Court which barred Franklin and others, including all members of the Venceremos organization, from committing destructive or disruptive acts on campus.[135] The court then scheduled a hearing at which Franklin and the others would be given an opportunity to show cause why a preliminary injunction should not issue barring Venceremos members, including Franklin, from coming onto campus.

Franklin complained to Lyman on February 25 that

> On the one hand, you have made no specific charges against me, but merely thrown out the broadest and vaguest possible general accusation. On the other hand, you have gone into court armed with twenty-one affidavits concerning nine separate series of events [which, Franklin's] counter-affidavit claimed, made no "distinction between lawful acts and unlawful

> acts"]. In order not to be fired by injunction, I have to present a very detailed defense in that court. You then can read my defense before you have to make any specific charges! This is a wonderful inventive addition to Catch-22 and Through the Looking Glass. First the sentence, then the defense, and finally the charges.[136]

One day later, a seven-page copy of Lyman's "proposed formal charges" was hand-delivered to Franklin. The show-cause hearing was held three days later still and on March 10, 1971, the Superior Court enjoined Franklin from coming onto the Stanford campus during the period of his suspension.[137] Lyman later agreed that Franklin could come on campus "to gather evidence relevant to the charges to be filed against you at the Advisory Board on any days which you propose between the hours of 1:00 p.m. and 6:00 p.m."[138]

Lyman formally filed charges against Franklin before the Faculty Advisory Board on March 22, 1971. The charges were substantially the same as those which he had outlined in his February 26 letter to Franklin. Lyman specified four charges which he said

> constituted a substantial and manifest neglect of duty and a substantial impairment of his [Franklin's] performance of his appropriate functions within this University community, all in violation of Paragraph 3(a) of the "Statement of Policy on Appointment and Tenure at Stanford University," adopted by the Board of Trustees, September 21, 1967.[139]

Lyman also alleged that Franklin had violated the "Stanford Policy on Campus Disruption", adopted by the Senate of the Academic Council on October 10, 1968. The Policy prohibits faculty, staff or students from preventing or disrupting "the effective carrying out of a University function or approved activity, such as lectures meetings... [and] the conduct of University business in a University office."[140]

Lyman alleged that Franklin: 1) "knowingly and intentionally participated in the disruptive conduct" at the January 11, 1971 Hoover Institution program on the United Nations, "significantly contributing thereby to the disruption which prevented Ambassador Lodge from speaking and which forced the cancellation of the program"; 2) "intentionally urged and incited students and other persons present at the rally [at White Plaza on February 10, 1971]...to shut down a university computer facility known as the Computation Center"; 3) "significantly interfered with orderly dispersal [outside the Computation Center on February 10] by intentionally urging and inciting students and other persons present...to disregard or disobey...orders to disperse"; and 4) "intentionally urged and incited students and other persons present [at the night-time rally in Old Union Courtyard on February 10] to engage in conduct calculated to disrupt University functions and business and which threatened injury to individuals and property."[141]

Pursuant to Stanford's "Statement of Policy on Appointment and Tenure", Franklin demanded and received a hearing before the Faculty Advisory Board on Lyman's charges. The Board is "an elected body of seven [tenured] faculty members responsible for the review of professional appointments and promotions",[142] as well as disciplinary actions involving faculty members.[143] Although the Administration requested that the hearings be held during the summer of 1971, Franklin moved on May 5 that they be postponed until the fall, when his witnesses (particularly students) would be more readily available. After a pre-hearing meeting with the Administration and Franklin to settle upon a schedule, the Board decided to begin the hearings on September 28.

"As provided for in Paragraph 15a of the Statement of Policy on Appointment and Tenure, both parties were entitled to representation by legal counsel."[144] The University retained Raymond C. Fisher, William A. Norris and Charles B. Rosenberg of the Los Angeles law firm of Tuttle & Taylor. Prior to the hearing, Franklin was represented by three attorneys from the San Francisco firm of Kennedy and Rhine. However, after the Board rejected Franklin's motion that his legal expenses be paid by the University, he chose to appear *in propria persona*. Assisting him with his defense were Joel Klein, a June 1971 graduate of Harvard Law School; English graduate student Merle Rabine; economics graduate

student Yale Braunstein; law student Peter Goldscheider; Franklin's wife, Jane; and campus activist Enid Hunkeler, the wife of a law student. Law Professor Jan Vetter of the University of California at Berkeley (Boalt Hall) served as counsel to the Advisory Board. A group of Stanford faculty members requested to intervene through direct oral participation in the hearings, but was instead invited by the Board to be represented at the hearings and to submit a written brief expressing its views of the matter.[145]

The Board "adopted as a standard of proof that 'strongly persuasive' evidence of culpability be provided"[146] to sustain the University Administration's charges. Franklin had proposed that "proof beyond a reasonable doubt" be the standard. The Board met every afternoon, six days a week, beginning on September 28, 1971. "In the thirty-three days of hearings, the Advisory Board met for a total of 160 hours and heard testimony from 111 witnesses representing the University Administration and Professor Franklin. The resulting transcript contains about one million words."[147] The parties also offered 371 exhibits into evidence.[148]

The University presented four witnesses who testified about Franklin's alleged involvement in the Lodge incident. One, an elderly alumna of the University, "said of Franklin, that 'when the noise subsided he yelled and I thought got things started again.'"[149] Although she could not identify

Franklin in photographs taken that night in Dinkelspiel Auditorium, "she confirmed to presiding officer Donald Kennedy that Franklin, who was in the hearing room, was the same man seated behind her at the Lodge speech yelling at the former ambassador."[150] Another elderly alumna testified that a man identified to her as Franklin on the night of the Lodge incident had yelled constantly while Lodge was at the podium. However, she told the Board that she "did not see him [Franklin] 'today'. Only moments before, Franklin had been standing next to her as she tried to pick him out in a photograph."[151] She said that she had seen Franklin "stand up and 'call out'" while Lodge was at the podium,[152] but the previous witness had recalled that Franklin was seated '"holding a child that looked just like Mrs. Franklin'" in his lap.[153]

The associate director of the University's overseas studies program testified that "Franklin was in one of several areas where 'chants appeared to be organized.'" and said he saw Franklin shout, clap and chant.[154] A student testified that "a man she later identified as Franklin had waved his arms and shouted during much of the assembly. 'In my opinion he was trying to shout the speaker down,' she said."[155]

Franklin's witnesses testified that, with only a few exceptions, he had been quiet throughout the Lodge incident. One student, who "said he watched Franklin during about a

third of the incident" told the professor that '"I was a little surprised that you didn't seem to be saying anything.'"[156] Another witness said "Franklin was smiling but not joining in the heckling "and that "he saw Franklin 'ten or fifteen times' during the incident."[157] This witness testified that he did not see Franklin stand up.[158] Another witness, a member of Venceremos, "said she watched Franklin and saw him yell only twice." Under cross-examination, she acknowledged that "she would lie 'to the pigs' to protect Franklin. But she insisted she was telling the truth at the hearing to provide the truth 'to the people.'"[159] Franklin's wife, Jane, told the Board '"I was noisy that day but Bruce wasn't.'"[160] A student who said he was sitting directly in front of Franklin during the Lodge incident said he "heard Franklin speak only three times, during the speeches preceding Lodge's."[161]

Franklin, who took the stand in his own defense, testified that "he was quietly 'sitting there like a goddam professor.'"[162] He said '"I know I didn't stand up, I'm just about positive that I didn't participate in any rhythmic clapping, and I don't think I engaged in any chanting'" during Lodge's attempts to speak.[163] He acknowledged that he had shouted "Napalm" and "Tell us about politeness at My Lai" prior to the time Lodge was introduced.[164] Franklin explained that he had decided to

remain silent while Lodge was at the podium because '"it would have been very foolish to play into the hands of those who have made it clear over the years that they were trying to get rid of me.'"[165] Franklin said "he was following the decision of the central committee of the revolutionary organization Venceremos, of which he is a member, to do nothing which might lead to his being fired as a tenured member of the faculty."[166] Venceremos valued Franklin's place on the Stanford faculty, he said, because '"a professor is in a very powerful position....That's a tremendously responsible position you have to influence the opinions of so many people....Having a person in a tenured position in a University is comparable to having a person in Congress.'"[167]

With regard to Franklin's White Plaza speech prior to the march on the Computation Center on February 10, several witnesses for the University testified that the speech had "moved" the crowd, although "[n]o evidence or testimony was presented that Franklin specifically urged rally participants to enter the computer building."[168] A fund-raiser employed by the University said '"I personally felt that Prof. Franklin acted as a catalyst to get the group moving in the direction of the Computation Center.'"[169] The associate director of the University News Service testified that "he thought Franklin's speech was a 'major cause of the occupation of the Computation Center,'"[170] although he acknowledged that "those at the rally later 'headed in many directions.'"[171] The Board also listened to a recording of the campus radio station's broadcast of the rally, which

had been recorded off the air by the campus police dispatcher.[172]

Franklin's witnesses, of course, did not ascribe as malevolent a motive to his speech. One testified that he thought the speech "was an effort to 'conciliate' advocates of a 'localized sit-in' with Franklin's own preference for a campus-wide strike."[173] This witness, a long-time campus activist, told Franklin that the "'Computation Center was already chosen as a target...and you were trying to tell people that if they were going to the Computation Center don't just go to the Computation Center but go there as the first part of a strike.'"[174] Another witness "said Franklin was 'not at all' a catalyst that sent members of [the] noontime rally...to the Computation Center."[175] A professor of statistics who was flown back at the Board's expense from Cornell University, where he was on sabbatical leave, testified that Franklin's speech "was 'largely analytical'. He said, 'It was support for a strike. It was also support for action at the Computation Center' which 'had been discussed by three other speakers and was decided the night before'" at the rally in Dinkelspiel Auditorium.[176] (Another witness also stated her belief that '"A large group of people had committed themselves that evening to go to the Computation Center'").[177] The statistics professor said he thought "Franklin was talking about 'a student strike', not a break-in,

when he mentioned the...Computation Center" in his speech.[178] '"If you hadn't been there,'" he told Franklin, '"we probably would have done the same thing'" - that is, gone to the Computation Center.[179] Another witness, who worked as an assistant programmer at the Center, said that before the White Plaza rally,

> "There was every expectation" that the center would be occupied. She said special locks were put on the doors. When workers arrived that morning they were told "it would be prudent to move our cars from the parking lot." And later, "Things that were important to us were removed from the building."[180]

Franklin again took the stand in his own defense. He said that "a 'mobile strike' beginning at the Computation Center had already been 'resolved and decided' when he spoke,"[181] and that

> the main purpose of his speech...had been to explain the campus war movement in Marxian dialectic terms.... Franklin said his...speech was expressing the view that a student strike on campus could mobilize the workers in the area, without whose help the goal of ending the war could not be achieved.[182]

However, Franklin said that '"I don't mean to suggest now in any way that I didn't want people to go to the camputation center, or would discourage people from doing that.'"[183]

The witnesses for the University and Franklin also differed over the nature and effect of his activity outside the Computation Center after demonstrations had been

cleared from the building. One University witness testified that "he saw no illegal acts outside the Computation Center before the sweep [of the area by sheriff's deputies] but added that the atmosphere was tense and 'anybody could see or feel that there could be violence.'"[184] Lincoln Moses, dean of the University's graduate division at the time, was an official faculty observer at the Computation Center that day. He called the police order to disperse '"thoroughly reasonable'"[185] and said that the '"likelihood of violence was clear and present.'"[186] Moses "said he was leaving the area when [Franklin] stopped him and convinced him to remain."[187] At the time, Moses estimated that he and Franklin were about 50 feet away from Sergeant Tamm and Captain Marron. Moses testified that as he and Franklin walked back toward Tamm and Marron, Franklin was '" talking loudly and...waving his arms or gesticulating.'"[188] '"The general run of his comments was that this was not an illegal assembly and people should be over there (by the police line),' Moses recalled."[189] '"And as he went, a group of people formed about him and went with him.'"[190] On cross-examination, Moses said Franklin '"appeared to me to be encouraging as many people to come as would come. And that is what turned me around....I felt that I was just being recruited to be one more person present.'"[191] Marron testified that as Franklin walked back toward him, "his stride had been one of 'aggressive determination.'"[192]

Another faculty member said that "the crowd began to leave the dispersal order" and that "he saw Franklin 'shouting to the crowd and telling them to come back and challenging the sheriff's order of unlawful assembly. 'People did start to move back,'" he said.[193]

Marron testified that after Franklin's encounter with Moses, the radical professor "'came striding forward directly at me. As he advanced the group seemed to fall in behind him and there was a buildup of people in the square again.'"[194] Marron told Franklin that "in a shouting 'discussion'" with Sergeant Tamm over the legality of the assembly and the propriety of the order to disperse, "'You were aggressive, belligerent, demanding....You were fomenting trouble....You were the center of a riotous situation.'"[195] Marron said that he had not recognized Franklin's claim that day that he was entitled to remain on the scene as a faculty observer because "Franklin had never before been identified to him as a faculty observer."[196] The Board listened to a tape recording of a live account of the action given on the scene by a reporter for the campus radio station. He "reported...first that 'the crowd was definitely moving back'" before Franklin's encounter with Moses "and then that Professor Franklin 'was haranguing the crowd to stay' and resist the order to disperse, and 'was berating the crowd for leaving.'"[197] Called as a rebuttal witness by the University, the reporter told Franklin "that, aside from Dean Moses, 'You never turned to the people leaving and told them to come back. No. Never.'"[198]

Franklin's witnesses denied that the radical professor encouraged persons other than official faculty observers to remain outside the Computation Center after Marron gave the order to disperse. Two witnesses, a part-time campus minister and an assistant professor of mathematics, "said they heard Franklin urging other faculty members to remain as observers." The professor "said he was leaving when he heard Franklin but returned to his part as an observer."[199] He said '"one-fourth to one-half of the people in the area started to leave after the orders to disperse. Not everyone appeared to be leaving.'"[200] An assistant professor of chemical engineering who was also outside the Computation Center as a faculty observer, testified "that he thought the orders to disperse were not to be taken quite seriously. 'There seemed to be no reason to declare that an illegal assembly.'"[201] One student, a Venceremos member, testified that "he felt personally that the dispersal order was 'invalid' and did not apply to him."[202] The same statistics professors who had characterized Franklin's White Plaza speech as "largely analytical," "said that he didn't see Franklin talking to anyone but faculty members before he began arguing" with Sergeant Tamm.[203] "He said that he and Dean Lincoln Moses...'should have gone with Bruce and joined in the discussion.' Then, [he] reasoned, 'it would have been very unlikely that the

police would have charged, at least at that time.'"[204] The statistics professor recalled that "most of the demonstrators did not disperse after the police order and the only way to avoid confrontation was to 'try to calm the police down.'"[205] He concluded, therefore, that "Franklin was trying to prevent violence" when he argued with Tamm.[206] Another witness, a Venceremos member, called the Franklin-Tamm '"confrontation...heated [but] eminently rational.'"[207]

An associate professor of statistics and geology who was another faculty observer outside the Computation Center, testified that "Franklin had 'absolutely no effect whatsoever on people's decision to stay after the police order to disperse.'"[208] A professional photographer, who described the crowd outside the Computation Center as '"very tranquil' before the police charge,"[209] testified that "he didn't see the crowd dispersing 'at any time while the police were giving the order to disperse.'"[210] The photographer "said he had Franklin 'pretty much under observation' from the time he urged...Moses...to remain... until Franklin confronted Tamm and didn't see him urge other people to stay."[211] A reporter for the campus newspaper testified that "newsmen and others 'moved up as I did when they realized some sort of confrontation was going on.'"[212] A reporter for the campus radio station confirmed that "many demonstrators came over because they

'wanted to hear the conversation'" between Tamm and Franklin.[213] The photographer and the two reporters "agreed that Franklin had not tried to incite the crowd, and that the crowd generally had been peaceful before the dispersal order. The order was largely ignored, they said."[214]

Franklin himself testified that when the dispersal order was given, "a little over half of the crowd started to move away, but a large number of demonstrators 'had no intention of leaving.'"[215] He identified most of those who were leaving as mere onlookers.[216]

> Franklin said he feared a police charge or mass arrest, since [in his opinion] one of the two always follow[ed] a declaration of illegal assembly.
>
> Thus he argued with...Moses...trying [Franklin said] to persuade Moses to stay as a faculty observer and help prevent violence...."I, at no point urged or incited anybody not to leave that area except for Lincoln Moses," Franklin said. He said he knew people in the crowd were defenseless and "clearly going to lose if there were any fight.
>
> "The only reasonable course of action that I could see was what I did," Franklin added. "I still can't see any alternatives."[217]

Testimony also differed sharply over the nature and effect of Franklin's second speech in the Old Union Courtyard on the night of February 10. The director of the university news service[218] testified that '"the nature of

[the] meeting'...'changed quite dramatically' after Franklin 'called for people's war against the occupation army' of police that had come on to the campus that day."[219] He explained that "the crowd initially had appeared to him to be fatigued and divided, but that Franklin 'had a clear catalytic effect' on them....'Had your last speech not been given, I don't think an awful lot would have happened,'" the news director told Franklin on cross-examination.[220] Although the witness acknowledged that he could not recall Franklin advocating any specific unlawful conduct such as breaking windows or attacking police officers, "'There was no question in my mind that there would be some incidents of an unidentified nature, but presumably illegal or disruptive.'"[221] He testified that Franklin "'called very specifically for opposition to the occupation army.' He said the professor suggested that people go to their dormitories, break in small groups, and then 'do things that would bring more of the occupation army' onto the campus."[222] The news director concluded "that he thought Franklin's speech...was intended 'to get people stirred up and do things.'"[223]

A business student associated with the ultra-conservative Free Campus Movement testified that, in his second speech that night, "Franklin worked himself up 'to a great pitch until he was speaking in a sustained rant.'"[224] He said that a number of demonstrators standing near Franklin

were brandishing long poles, some wrapped in red flags and that as Franklin spoke, "they 'got very excited, punctuated his speech with applause and shouts of "Right on!" and raised fists.'"[225] After the rally, the witness said he heard a group of people near him shout '"street fighter, street fighter.'" This group then followed a number of Free Campus Movement members who had been observing the rally and attacked them without provocation, according to the witness.[226] This witness also testified that another group had run from the rally shouting '"war cries.'"[227] A University fund-raiser and the chairman of the Free Campus Movement confirmed the business student's account of the attack on the FCM members, but neither recalled hearing "war cries" or shouts of "street fighter," or seeing persons at the rally brandishing clubs.[228] The FCM chairman said that a photographer in his group had been beaten unconscious in the attack, and that later that night, a group of demonstrators walked past the FCM headquarters '"picking up rocks as they came and then throwing them at us.'"[229]

Another student

> testified that Franklin's speech had surprised him. When later pressed for an explanation, [he] said, "Usually Prof. Franklin has never said anything which could be construed as illegal."
>
> "You felt these words could be construed as illegal," he was asked by Prof. Donald Kennedy, chairman of the hearing board.
>
> "By some people," the witness replied.[230]

The University concluded its presentation of evidence by reading into the record lengthy excerpts of a deposition taken from a student then attending the University's overseas campus in Great Britain. The student said of Franklin's speech, "I thought the statements he made were inflammatory.'"[231]

Testifying in behalf of Franklin, a member of the campus radio station crew covering the Old Union Courtyard rally said that the station's microphone at the speaker's stand was turned off throughout Franklin's second speech. "Those near the KZSU broadcasting spot, [he] said, 'couldn't hear more of the rally than is audible on the tape [recording of the rally]'. Franklin isn't audible on the KZSU tape, which has been played at the hearing."[232] According to the KZSU staff member, the two University witnesses who had respectively characterized Franklin's speech as "illegal" and "inflammatory" listened to the speech "from the second floor of the clubhouse where KZSU was broadcasting the rally."[233] As many as nine other witnesses for Franklin testified that he had not advocated violence in his speech.[234] One student "testified that 'the crowd had no particular response to Franklin's speech' and that in his opinion the Marxist was saying that 'people should do what they felt in their own conscience.'"[235] Another witness who attended the rally said that Franklin's speech was a '"conciliatory ef-

fort to point out the common goals of the rally.'"[236] Still another said that Franklin '"had been directing people away from violent and illegal acts.'"[237]

Testifying for the third time in his own behalf, Franklin

> said his final two-minute speech picked up ideas advanced by others, to go back to the dormitories, try to talk others into joining the demonstration against the invasion of Laos, or go out and play touch football or walk around in groups "as late into the night as possible."[238]

Franklin testified: '"I was consciously trying to synthesize and sum up on a lot of different levels' the ideas others had advanced at the rally."[239] He said "he was trying to provide 'a basis for unity'" between those at the rally who were new to the anti-war movement and those who were more experienced.[240]

> When Franklin urged use of the "methods of people's war," he said he was addressing the revolutionaries in the crowd, who would understand what he meant, but the rest of the crowd as well.
>
> What he meant, Franklin said, was a struggle relying on the broadest mass of people, as defined by Mao Tse-tung. Many people would have different ideas and would be doing what they thought best," he said.[241]

"The suspended Melville scholar added that he did not speak of violent tactics that night because of the 'saturation of pigs on campus....The only urging and inciting I did was for people to teach other people in order to build

a base for a strike.'"[242] Earlier in the hearings, Franklin had contended that the KZSU tape of the rally showed that it "had revolved around two proposals: 'whether to go on a mass militant trashing march or to block a freeway,' or 'to go back to the dorms and rap all night, as one girl suggested.'" Franklin said his speech endorsed the second proposal.[243]

Soon after Franklin began presenting his defense, the University Administration rejected his request that it grant his witnesses immunity from disciplinary action in connection with matters about which they would testify.[244] Franklin interpreted the Administration's refusal "as showing 'an intent to intimidate witnesses and keep them from testifying.'"[245] He said, "'We will have to knock out three-quarters of our witnesses,'"[246] because "'I'm not going to allow a worker [Stanford employee] to risk his or her job to save my job,' nor a student to risk suspension."[247] Franklin predicted that "'[e]very aspect of the defense would be hampered'" by the Administration's refusal to grant immunity.[248]

In summing up the Stanford Administration's case against Franklin, attorney Raymond Fisher said at one point: "'The issue for this board is whether a small group of self-appointed, self-styled revolutionaries led by Professor Franklin can bring this University to its knees to serve their particular brand of ideology.'"[249] At another point,

Fisher characterized Franklin as the leader of "'roving bands of vigilantes'" who sought to "'take over the University by tactics of force, coercion, and if necessary, by violence.'"[250] Fisher insisted that Franklin was "'not on trial for his beliefs....I don't think this board should be taken in by Professor Franklin's attempt to wrap himself in the Constitution.'" He also "said Franklin's action was 'the kind of hard core conduct that the First Amendment always said can be punished.'"[251] Fisher told the Board that "'If there's going to be freedom for everyone at this University then Professor Franklin's conduct on January 11 and February 10 must be punished.'"[252] Fisher later said this conduct was "'so serious that it merits dismissal'" of Franklin.[253]

> Fisher insisted the Board should judge "whether or not there is anything in Professor Franklin's testimony to indicate that he does have any concern for the rules or regulations of this university, whether there is any evidence that his behavior in the future would be any different, whether he really thinks he did anything wrong.
>
> "I submit that the answer is that he does not, and in so answering the question, dismissal is the proper result."[254]

The Administration's final brief filed with the Advisory Board called Franklin's alleged participation in the Lodge incident "'a blow at freedom on the campus'" and said that the radical professor's conduct on February 10 "'put students and others in a position of serious jeopardy. Professor

Franklin, of course, stayed away from the action....It is intolerable,'" the brief stated, '"for a faculty member to engage in behavior which intentionally thrusts students and others into positions of great risk, and which threatens forceful interference with the function of the University.'" The brief said Franklin approached these events with '"utter cynicism toward the fate of students caught up in these illegal activities.'"[255]

Franklin's own final brief argued that the professor was '"being tried because he is a communist revolutionary, not because of the isolated acts with which he is charged.'"[256] According to Franklin's brief,'"The First Amendment protects the transmission of ideas, unpopular ideas, revolutionary ideas and even unlawful ideas.'"[257] During the hearings, Franklin told the Advisory Board, '"Everything they said I've done is protected by the First Amendment.'"[258] Franklin's counsel, Joel Klein, said his client had conducted himself '"just inside the policy' which governs Stanford faculty conduct....'He calls himself a revolutionary but he decided to stay on this campus,' Klein said. 'He went to the limit. We all admit that, but he stayed within the limit.'"[259] Klein later called the University regulations under which Franklin was charged '"vague and overbroad.'"[260] Franklin concluded that '"It's clear to us there's nothing in our conduct that ought to be penalized, not by this board anyway.'"[261] He opined: '"Even saying the word "censure" would be a violation

not only of the rights of revolutionaries but also of rights and liberties that you yourselves supposedly hold precious.'"[262]

A group of politically active, liberal and radical professors intervened as an amicus curiae in the Franklin case and submitted a brief which urged the Advisory Board to conclude that "standards of conduct should be clear and well-defined prior to any expectation that a person hold himself to those standards."[263] The faculty intervenors contended that

> the charges brought against Professor Franklin and the standards invoked are ambiguous, vague, or overbroad, that they threaten our constitutional protections, and that if the prosecution succeeds in this case one major consequence will be a sense of intimidation - what often is referred to as the "chilling effect" - which will impede the performance of our responsibilities as teachers, scholars, and citizens.[264]

The faculty members argued that "[a]t the minimum," the Advisory Board "should hold itself to the same constitutional standards governing the punishment of a tenured member of the faculty that would be imposed upon a state university or college by the courts."[265] Moreover, the faculty intervenors' brief proposed that "only two findings by the Board be considered sufficient to warrant dismissal from a tenured position" pursuant to Paragraph 3(a) of the Statement of Policy on Appointment and Tenure: 1) "Failure

to perform the duties for which one was hired - teaching and/or research," that is "malfeasance as teacher, researcher, and scholar"; or

> 2) If the behavior in question is not this kind of malfeasance, it should constitute a reason for charges under Paragraph 3(a) only after the faculty member has been found guilty of some criminal act by a court of law...the Board may then find that such conviction substantially impaired the individual's performance of appropriate functions within the university community.[266]

The faculty intervenors also expressed concern over "the highly legalistic nature of the hearing," "the failure of the university to provide financial aid for the defense" and "the refusal of the administration to grant immunity to defense witnesses."[267]

The American Civil Liberties Union of Northern California (ACLUNC) also intervened as an *amicus curiae*. The ACLUNC brief argued for the principle of "fair warning," i.e., that "a reasonable person must have been able to anticipate - with relative certainty - that a given sanction would (or, at least, could) have been imposed on him for his conduct, before that sanction can properly be administered."[268] With regard to the Franklin case, the ACLUNC brief said

> In order to impose any discipline, then, the Board must apply a standard that plainly existed not only before the hearings began, but also before Professor

> Franklin engaged in the activities at issue. If the Board has any reasonable doubt about what the governing standards in fact were at that time (not what they should have been based on the experiences of this case), then it ought not to impose discipline. Not only must the Board be able to point to pre-existing standards, but those standards must be relatively precise and unambiguous.[269]

Particularly if these standards of conduct affected expressions, the ACLUNC brief said, "a calculating person has the right to go up to the line; and he must be told - in advance of his conduct - precisely where that line is."[270]

Examining the specific charges against Franklin, the ACLUNC brief argued that a person "has a constitutional right to heckle, to boo, and to express displeasure at the speaker or disagreement with his views," and that Franklin should not be disciplined if his behavior at the Lodge incident fit the description.[271] However, the brief said Franklin would have had an obligation to stop heckling "when it became apparent to him that his...activity might be contributing to the silencing of the speaker."[272] As for Franklin's activity outside the Computation Center on February 10, the ACLUNC brief declared that "One has... a clear constitutional right to argue with a policeman about his order to disperse" and that "urging, or even inciting, persons to remain where they are should be deemed protected speech (unless, perhaps, the very act of remaining where they are would create a very high likelihood of

immediate physical harm to persons)."[273] The ACLUNC brief concluded that, viewed "in isolation," Franklin's White Plaza speech prior to the occupation of the Computation Center, as well as his second speech at the night-time rally in the Old Union Courtyard, "are so clearly within the protection of the First Amendment that it would be highly improper to discipline anyone for delivering them. They are not even close to the line."[274] The ACLUNC acknowledged that the Advisory Board, after examining the contexts in which the speeches were delivered, could find "that because of a prearranged or otherwise widely shared understanding among the audience, Professor Franklin's speeches were delivered in a 'secret language' giving his listeners clearly understood cues to engage in immediate violent conduct."[275]

Two Stanford law professor submitted a statement to the Advisory Board responding to the ACLUNC brief. The professors criticized the brief "because it makes no effort at all to discuss what modifications of their customary position may be made"[276] given the "special needs of the University and the obligations of a faculty member."[277] As to the standard of proof suggested in the ACLUNC brief, the professors state: "There seems to be an effort to require a showing of intentional causation of unlawful conduct. The Board's own interim ruling seems to suggest that recklessness is an appropriate standard."[278] The

professors endorsed the application of this standard. "In developing the 'law'that may be applied on a private University campus," they argued, "it is entirely reasonable to require a faculty member to adhere to standards which would not be required for a man in the street."[279]

The Faculty Advisory Board released its decision on January 5, 1972. In the first portion of the decision, the Board unanimously announced the fundamental standards by which it had judged the case. It declared that, in advance of the hearing, it had committed itself to providing Franklin '"no less protection of his Constitutional rights at Stanford than that to which he would be entitled as a member of the faculty of a state university.'"[280] In response to charges by Franklin and the faculty intervenors that the "substantial and manifest negelect of duty" standard contained in Stanford's Statement on Appointment and Tenure was vague and overbroad, the Advisory Board found that such a standard was adequate in the context of university disciplinary proceedings, although it would be "[p]lainly...intolerable" in the context of the criminal law.[281]

> The situation is different, we believe, when the public to which similar regulations are addressed is the faculty of a university. In the more restricted setting, the regulation invokes a web of largely unwritten rules as tough and living as the British Constitution. Powerful traditions, modified by contemporary practice, furnish a reliable guide to faculty conduct, and entrust review procedures to faculty peers.[282]

Thus, the conduct of faculty members is to be guided by a campus common law, which, according to the Advisory Board, is preferable to a more fully-developed code which would result in "lost faculty autonomy and initiative, and in over-bureaucratization."[283]

The Advisory Board emphasized the "positive benefit in having on the faculty active representatives of political views that, while they may be considered extreme or dissenting here, are held by large numbers of people in the world and comprise a dominant form of political organization in many places."[284] However, the Board also stated that the unwritten code of the campus demands that free political expression should be permitted only "so long as its exercise does not infringe upon the free choice of others."[285] The dissident professor must "stay behind the line of inciting or physically causing the impairment of the institution's functions, especially its function as a forum in which various other points of view can also be heard."[286]

The Advisory Board said that the University's Policy on Campus Disruption codified much of Stanford's unwritten law about appropriate conduct in the context of dissent and demonstration on campus. The Policy makes it a violation of University law "to prevent or disrupt effective carrying out of a University function or approved activity."[287] The Board emphasized its view that inciting

violations of the campus law is "an abuse of power. Such an abuse is a serious matter in a university, especially when faculty members are addressing students."[288]

The Board stated that in ruling on Franklin's White Plaza speech prior to the occupation of the Computation Center and on his second nighttime speech in the Old Union Courtyard, it would apply the test for incitement required by the Supreme Court in Brandenburg v. Ohio.[289] In Brandenburg, the Court "held that to be punishable, advocacy must be "directed to inciting and producing imminent lawless action, and...likely to produce such action.'"[290] The Board said that "[s]ubsequent illegal acts are not...required for incitement to be punishable under the standard."[291] Such acts are, however "useful in determining the level and character of risk that obtained at the time of the alleged incitement."[292] For action to be "lawless" in this context, the Board said it must violate "the law of the campus."[293]

The Advisory Board applied a different standard to the charge that Franklin urged and incited students and others to disobey police orders to disperse outside the Computation Center.

> If, knowing the risk, he increased the risk of personal injury to other persons, some of whom were unaware of the risk, then his conduct is punishable. Incitement need not be directed to increasing the likelihood of illegal conduct; it may also be punishable if it places persons at

> heightened physical risk, as with the cry of 'fire' in a crowded theatre. Such speech is clearly not Constitutionally protected.[294]

The Board concluded that incitement is inappropriate when it "threatens two central university interests: (1) protection of members of the university community and university facilities against risks of serious injury or damage; (2) protection against coercive intrusion on the intellectual transactions which the university seeks to foster."[295] The Advisory Board rejected the faculty intervenors' suggestion that a tenured professor be dismissed only for failure to perform the duties of teaching and/or research, or for previous conviction of a criminal offense. "A criminal proceeding may require several years to resolve, and may terminate favorably to the accused for reasons which may have nothing to do with a faculty member's fitness to retain his position."[296] In addition, the Board warned that a criminal proceeding would be "unlikely to reflect any sensitive judgment of university interests as a central concern."[297]

Applying these standards, the Board unanimously acquitted Franklin of the charges arising out of the Lodge incident. Although the Board condemned Franklin for "questionable behavior", it found no "strongly persuasive evidence that Professor Franklin's shouts triggered the demonstration or that he was personally guilty of 'significantly contributing' to the disruption that finally forced the cancellation of the meeting."[298]

The Board found that the Computation Center had "emerged as the prime target for protest activity" the night before

Franklin's White Plaza speech[299] so that "lawless action" was imminent at the time he spoke. The Board concluded, again unanimously, that "Franklin must reasonably have expected that his speech...would increase the likelihood of illegal occupation of the Computation Center immediately following his speech, and that there was risk of serious damage to the computer and its users."[300] The Board found the evidence "strongly persuasive that Professor Franklin urged and incited his audience...towards disruption of University functions and shutdown of the Computation Center."[301]

The Board, by a 5-2 vote, found that Franklin's conduct outside the Computation Center "did significantly interfere with orderly dispersal."[302] The Board said that "the police order to disperse was clearly reasonable"; that "a substantial portion of the crowd was moving back"; that Franklin "played a central role in reversing the movement of the crowd to disperse and his shouts and behavior significantly increased the likelihood that a substantial number of those present would stay"; and that he intended to influence the crowd to remain, or at least "must reasonably have expected that a result of his shouts would be to incite members of the crowd to disobey the dispersal order, increasing the risk to themselves."[303]

The two dissenters concluded that "there is not in our view strongly persuasive evidence that his words or

actions constituted an incitement."[304] Instead, they found it plausible that Franklin "tried to get other faculty members to remain on the scene in order to reduce the likelihood of a police charge," and "that his continuing argument about the order to disperse was an attempt to protest a police decision he felt to be illegal, and one which as a citizen he had a right to protest, at least briefly."[305] Finally, the dissenters said Franklin's "loud and angry shouting" was "clearly directed at Moses and Tamm, and possibly though not so clearly directed at others" and had centered "on the need for faculty observers to stay, and the right of others to stay."[306]

Again by a 5-2 vote, the Advisory Board found that Franklin's second Old Union Courtyard speech "intentionally urged and incited his audience to engage in conduct which would disrupt activities of the University and of members of the University Community and threaten injury to individuals and property."[307] The Board said that the situation was "risky" and that Franklin had "provided justification for coercive and violent behavior toward [the police and the University], without specifying precisely what the nature of such acts might be, leaving that to the judgment and imagination of each individual or small group.

"The urging of immediate retaliatory action towards the police was clear. A great sense of urgency was conveyed by both the tone and the content of his remarks," the Board said.[308] The dissenters said they were "not strongly persuaded by the impressions of the speech given by various witnesses - as opposed to actual reconstructions of wordings. Such impressions were especially subject to the bias of expectations."[309] Overall, the dissenters found "no convincing evidence that any substantial number of the audience would have translated his speech into an invitation to commit violent acts."[310]

So the Advisory Board acquitted Franklin of charges that he had significantly contributed to the disruption of Henry Cabot Lodge's speech on January 11, 1971. The vote was 7-0. The Board also voted 7-0 that Franklin's White Plaza speech on February 10, 1971 had incited the occupation of the Computation Center. By identical 5-2 votes, the Board found that Franklin had incited disobedience to a police dispersal order outside the Computation Center and had incited violence during a nighttime speech in the Old Union Courtyard, also on February 10.

The Advisory Board split again 5-2 on the appropriate sanctions for Franklin. However, there was unanimous agreement on the appropriate guidelines to follow in setting the sanction. The Board stated three basic premises upon which it based its discussion. First, the Board said that

Franklin had pursued "a pattern of conduct that directly involves attacks upon the values of the university as now constituted, and also includes encouragement of violent or coercive tactics against the members of the University and the society of which it is a part."[311] The Board acknowledged Franklin's avowed purpose not to compromise his tenured position on the faculty by actively participating in illegal conduct, but said that when a person such as Franklin "wishes to encourage violence against the university but also wishes to fall short of actual incitement to or participation in such violence," he inevitably tends to offer "covert or ambiguous recommendations."[312] The Board concluded that Franklin would continue to adhere to his "stated intention of 'going right up to the line,'" and that such "continuous probing of the university's will to enforce its rules might lead to a high likelihood of future transgressions, quite apart from the Board's findings of fact on the current charges."[313]

Second, in addition to this pattern of conduct, the Advisory Board concluded that Franklin "bases his actions upon a different set of perceptions about the university and society from those of the majority of Stanford faculty members, including members of the Board."[314] According to the Board, "The outcome of this perception of reality is a conviction that the situation must be radically changed - by persuasion if that is possible and by violence if persuasion is unavailing. The university becomes the

most immediate and obvious target for such action."[315]

Third, the Advisory Board decided that "the rights of the university's entire membership not to be disrupted by unbridled exercise of self-proclaimed moral conviction must be balanced against Professor Franklin's right of political expression and action."[316] The Board struck the balance as follows: "We cannot simultaneously rededicate the university to a specific political goal - by using force or violence if necessary - and at the same time preserve it as an institution in which independent initiative from many quarters can have the widest possible play. A choice must be made and we choose the latter."[317]

The Advisory Board noted that the "purpose of sanction can be to retaliate, to rehabilitate, or to deter further violations."[318] Only the latter two purposes, the Board concluded, deserved consideration in a university setting. The Board rejected rehabilitation as a viable purpose in the Franklin case.

> We are highly dubious whether rehabilitation is a useful concept in this case. Professor Franklin's announced convictions about the guilt of the University appear deeply held, and his opposition to the institution in its present form seems implacable....Barring a dramatic change in perception he is unlikely to change his conduct; thus "rehabilitation" is likely to fail, whatever the sanction.[319]

By process of elimination, this left deterrence as the one remaining purpose for sanction in the Franklin case. "By

setting a price on proscribed conduct," the Board concluded, "the university can make its members consider carefully the line that separates forbidden from permitted speech and action, and avoid crossing that line."[320]

In discussing the range of possible sanctions, the Advisory Board rejected probation as unworkable. "Where such a right as tenure is involved," the Board said, "probation merely challenges its authenticity; and probation is too often an excuse for the removal of due process."[321] The Board concluded that only suspension without pay or dismissal would have the necessary deterrent effect.

Applying these criteria, a five-member majority of the Advisory Board concluded that Professor Franklin should be dismissed from the Stanford faculty.

> Giving the fullest weight to Professor Franklin's personal rights to advocate vigorously his political views, we are unable to escape the conclusion that by his conduct he repeatedly and seriously infringed the rights of others in the University, and significantly increased the risk of injury to them and to University property. He did so by urging and inciting to the use of illegal coercion and violence, methods intolerable in a university devoted to free exchange and exploration of ideas.[322]

The majority concluded that "a lesser penalty would fail to recognize the fundamental nature and severity of Professor Franklin's attacks on the University of which he is a member."[323]

In dissent, two members of the Advisory Board concluded that dismissal was too severe a penalty, and that suspension was instead the appropriate sanction. The dissenters cited a number of reasons for their position:

> First, suspension is itself a severe penalty....Second, Professor Franklin has stated his intention to be a nonparticipant in any action he supposes to be punishable. If he has correctly represented his feeling that in his case the line between permitted and proscribed conduct was vague to him, then surely the Board's emphasis on its position with respect to incitement will be informative....Third, while it is true that Professor Franklin's present ideological position will encourage further coercive acts against the University and that some of these will be unlawful, we cannot assume his position to be static.[324]

Finally, the dissenters saw "substantial costs in Professor Franklin's loss to the institution; they are measured externally in the form of corrosive effects on academic freedom and internally in terms of lost challenge and the subtle inhibition of dissent."[325] Franklin, the dissenters said, was "a prominent symbol" of diversity and challenge at Stanford, whose loss would deprive the University not only of "the substance of the challenge, but also the external perception that we can take it in stride." The dissenters warned that the University "has a special responsibility" to shield controversial faculty members from "increasing public pressures to curb dissident speech and action....We should therefore be scrupulous in protecting violators of University rules against excessive penalties imposed by

collective judgment, especially when those violators espouse uncomfortably heterodox views."[326]

In an addendum to the minority decision, one dissenting member of the Advisory Board wrote:

> I believe very strongly that, however much I and many of my colleagues may disagree with what Professor Franklin says or how he says it, Stanford University will be less a true university without him and more of a true university with him. I fear that we may do untold harm to ourselves and to the cause of higher education unless, by imposing a penalty short of dismissal, we seek to keep him as a very uncomfortable but very important part of what this University, or any university, is meant to be.[327]

President Richard Lyman wrote to the president of the University's Board of Trustees on January 8, 1972 to "accept the decision of the majority of the Advisory Board that Professor Franklin be dismissed from the faculty immediately." Lyman wrote that the Board's findings were "wholly persuasive." He said he was "convinced that no fair and careful reading of the record of this case will provide comfort for any who may be tempted to use it as precedent for an attack on the freedoms essential to an academic institution."[328] The Board of Trustees voted 20-2 on January 22, 1972 to dismiss Franklin immediately, and to pay him a sum equal to his salary until August 31, 1972.[329]

The reaction to the Advisory Board's decision was as intense as it was mixed. The Stanford Daily, the student newspaper on campus, condemned the Advisory Board's decision

as "outrageous."[330] The Daily editorial opined that

> the evidence cited by the majority of the Board in reaching their decision does not prove that Franklin's speech fell outside the vital protected area of acceptable speech....The evidence cited in the decision does not seem to justify the penalty, so we are forced to conclude that narrow political perceptions entered into the Board's deliberations.[331]

The Daily concluded that the Board's discussion of Franklin's different "perception of reality" indicated that "the rehabilitation the Board seeks is political. To expect such a 'rehabilitation' is a dangerous and chilling precedent."[332]

Similarly, Stanford's Law School Journal, also student newspaper, said that "the Board reached the wrong result....Bruce Franklin should not have been fired."[333] The Journal said, "We agree at the outset that the Board stated the proper constitutional incitement standard. But in the application of that standard to the facts, and in the fact-finding itself, it appears the Board unconsciously allowed its prior perceptions of Franklin to blur its thinking processes."[334] The Journal noted the "seriously conflicting evidence" before the Board and stated, "When such uncertainty exists, it is hard to see how the evidence can meet the Board's own standard of 'strongly persuasive.'"[335]

The officers of the Law Association, a student organization at the School of Law, wrote that there had been

> simple bias in the evaluation of conflicting testimony. The majority of the Board obstinately clung to the ability to be 'strongly persuaded' on the basis of totally ambiguous data. They did this, unconsciously, we hope, by systematically believing the prosecution witnesses where credible testimony conflicted, and by consistently using questionable logical inferences to resolve uncertainties resolving them against Franklin.[336]

The Association officers charged that the unwritten "law of the campus" which the Advisory Board said governed faculty conduct constituted "vagueness and overbreadth raised to perfection."[337] In addition, the officers attacked the Board's failure to require proof that Franklin intended to incite violence. Instead, they complained, the Board "contents itself, on each charge, with finding that Franklin must 'reasonably have expected' that he was increasing the risk of the occurrence of the events he is charged with inciting." According to the Association officers, this "creates a new crime of 'negligent incitement' that no honest court in the country would uphold against a First-Amendment challenge."[338] Finally, the Law Association officers charged that "the majority of the Board succumbed to the temptation to determine a political defendant's punishment according to the dangerousness of his beliefs, rather than his actions."[339]

Editorial comment off campus universally endorsed the decision to dismiss Franklin. The New York Times character-

ized the Advisory Board's decision as "a painful but necessary attempt to protect [academic] freedom against coercion and disruption from within the academy."[340] The Dallas Morning News editorialized that, "The Stanford faculty board has ruled against the argument that academic status confers a license for savagery."[341] The Chicago Daily News said, "A university whose campus already has become a scarred and charred battlefield surely has no obligation to go on paying the salary of a man actively dedicated to its total destruction."[342] The Concord, N.H. Monitor and Patriot said that Stanford had found "the narrow path between enforced orthodoxy on one side, and flaming chaos on the other. In doing so it has helped to keep this country on the high road of Western civilization."[343]

Stanford faculty members continued to debate the merits of Franklin's dismissal for months. Harvard Law Professor Alan Dershowitz, who was a visiting fellow at the Center for Advanced Study of the Behavorial Sciences at Stanford during the Franklin hearings, wrote that Franklin's White Plaza speech prior to the occupation of the Computation Center and his nighttime speech in the Old Union Courtyard "were speeches of advocacy; they contained ideas, pernicious ones perhaps - but ideas nonetheless, offered for acceptance or rejection."[344] They were not "communicated directly to the gut, without any opportunity for reflection and consideration,"[345] and therefore fell outside the concept of

incitement defined in Brandenburg v. Ohio. "Turning to the vagueness issue," Dershowitz said, "I have read the [Advisory Board's] opinion with great care; yet I could not - as an attorney - intelligently advise a faculty member concerning what kinds of speech are now permitted or prohibited on the Stanford campus."[346]

Stanford Law Professor Gerald Gunther responded that "the Faculty Advisory Board's decision is entirely consistent with constitutional and libertarian principles of free speech and academic freedom."[347] Gunther contends that "Professor Dershowitz's basic objection is that the Board did not apply his view of incitement. I agree that the Board did not, and I think it was right in not doing so."[348] According to Gunther, the Advisory Board adhered strictly to the requirements of Brandenburg: '"Intent, risk and imminence' were all essential criteria in a finding of incitement, the Board made clear."[349] As for Dershowitz's charge that the Advisory Board's decision did not clearly define the line between protected and unprotected speech, Gunther wrote

> To speculate about chilling effects is a risky business: prophecy is not an empirical science. I believe that vigorous dissent has not been and will not be chilled by the Franklin decision. But I must confess that my confidence rests on the hope that the impact of the case will truly turn on the text of the Advisory Board decision. The real risk of "chill" from this controversy, I am convinced, lies not in what the Advisory Board itself

> said and did but, it lies, I fear in the exaggerated, inaccurate characterizations that some others have propagated.[350]

The late Herbert L. Packer, then professor of law at Stanford, wrote "I think that the faculty tribunal did the right thing and that the cause of free speech on campus, of academic freedom, and of civil liberties was advanced by their action and by the quality of their concern for the values of constitutionally-protected speech."[351]

In a panel discussion following the dismissal of Franklin, Stanford Assistant (now Associate) Professor of Law Thomas C. Grey proposed a constitutional standard of incitement, differing somewhat from the Brandenburg test, under which speech should "not be found to be an incitement if it is ambiguous between a call for lawful and a call for unlawful action....And I think under that standard, Franklin wins under all three charges, especially the two that were clear incitement charges."[352]

Not surprisingly, the Franklin case has been the subject of litigation. Franklin filed suit in Santa Clara County Superior Court in California seeking reinstatement and back pay. He alleged that his dismissal violated both the First Amendment and certain sections of the California Labor Code which forbid an employer to discipline an employee in retaliation for the employee's political activities or affiliations. In response to Stanford's motion for partial summary judgment in the case, the Superior Court

limited itself to a review of the record before the Advisory Board -- rejecting Franklin's contention that he was entitled to trial de novo. The parties then filed cross motions for summary judgment. In a memorandum decision filed on January 4, 1978, the Superior Court denied Franklin's motion for summary judgment as to his White Plaza speech prior to the occupation of the Computation Center and as to his conduct in response to the police dispersal order outside the Center. The court denied Stanford's motion for summary judgment as to Franklin's nighttime speech in the Old Union Courtyard.[353]

Preliminarily, the court rejected Franklin's contention that the standards under which he was tried were vague and overbroad. "The Court believes that a different standard should apply in the instant case than would apply in criminal proceeding brought by the state."[354] Essentially, the court sustained Stanford's contention that "the traditions of the University modified by contemporary practice furnish common understandings of appropriate faculty conduct."[355] However, the court rejected the University's contention that it should affirm the dismissal of Franklin if it found that the Advisory Board's decision was supported by "substantial evidence."[356] Instead, the court agreed with Franklin "that as part and parcel of the guarantee of the First Amendment, he is entitled to an independent review of the record by the trial court."[357]

After reviewing the record, the court concluded that Franklin's White Plaza speech on February 10, 1971 "was a call to action, framed at the end of the speech specifically as a call to shut down the Computation Center. At that point, Franklin was urging the crowd in a manner directed to inciting or producing imminent lawless action and likely to produce such action."[358]

However, "The Old Union speech is an entirely different matter. Here the Court believes the Brandenburg test was not correctly applied."[359] The court concluded that "although the speech may have used 'warlike phrases'... the speech simply did not meet the Brandenburg standard," because it was "more concerned with building the size of the campus anti-war movement than inciting lawless action or disruptive conduct."[360]

Finally, the court found that "it is a close question" whether the evidence in the record supports the Advisory Board's decision regarding Franklin's conduct outside the Computation Center. At the outset, the court said, "Considering the confusion and tumult that existed, the fact that a University building had already been unlawfully occupied and the potential for more unlawful conduct that existed, the Court cannot say that the police order to disperse was either unreasonable or unlawful."[361] Then, mindful that even under an independent standard of review, "the findings of the Advisory Board are entitled to 'great

weight' and also mindful of the fact that the board saw and heard the evidence firsthand and was in a far better position than the Court to determine the credibility of the witnesses that appeared before it," the Court found that there was sufficient evidence to support the Board's findings regarding the Computation Center incident.[362]

Another legal perspective on the case is provided by the decision of the federal district court for the District of Colorado and the Court of Appeals for the Tenth Circuit in Franklin v. Atkins.[363] In Atkins, Franklin sued the Regents of the University of Colorado for their April 1974 veto of his appointment to the English Department faculty at the university.[364] During the course of the litigation, it became clear that the regents had relied heavily upon the decision of the Stanford Advisory Board in determining that Franklin should not be hired. The district court did not review the transcript of the Advisory Board hearings,[365] but stated that it was "convinced by 'clear and convincing evidence'" that Franklin's "actions materially and substantially interfered with University activities and discipline" at Stanford.[366] As a result, the court said it was permissible for the regents to refuse to hire Franklin if their refusal was based upon his actions at Stanford. The court found that

> the primary motivation of each defendant in disapproving the appointment was either that Professor Franklin had en-

> gaged in disruptive conduct at Stanford directed at that University, or that there was a substantial threat, based on the pattern of his past conduct, that he would engage in such activity at the University of Colorado, or both.[367]

Significantly, however, the district court in Atkins also noted that

> it must in all fairness be pointed out that, while ostensibly applying the Brandenburg criminal standard of liability for incitement, the Board at various times referred to the fact that Franklin could "reasonably have expected that his speech would have contributed to the likelihood of the occupation" and that he "could reasonably have expected" that it would "increase the likelihood of illegal occupation of the Computation Center immediately following his speech, and that there was risk of serious damage to the computer and its users." Both references appear to incorporate a lesser standard of liability than the Brandenburg test. It is not clear whether the members of the Board realized this difference, or whether the findings of culpability were based on one of these references or a conclusion that the Brandenburg standard has been met.[368]

Responding to a similar criticism by Professor Dershowitz, Professor Gunther insisted that the Board's discussion of Franklin's "reasonable expectations" "came in the course of its consideration of one of Professor Franklin's defenses; it obviously did not purport to be a full statement of the relevant criteria" applied by the Board in assessing Franklin's White Plaza speech.[369]

In affirming the district court's decision in _Atkins_, the Court of Appeals for the Tenth Circuit found

> no reason why the Regents should not have put the emphasis they did on the Report [of the Stanford Faculty Advisory Board]....The Regents were entitled, under the circumstances, to rely on the facts detailed in the Report, and to rely on the ultimate discharge of the plaintiff Franklin to whatever extent they considered proper. The Report was not shown to be erroneous as to the constitutional matters. The plaintiff did not demonstrate that the Report as so considered was in whole or in part a description of constitutionally protected conduct, nor was it anything else.[370]

In addition, the Circuit Court agreed with the district court's conclusion that Franklin had failed to prove that any constitutionally protected conduct by him was "a substantial or motivating factor in the decision [of the Regents] not to hire" him.[371] Accordingly, the Circuit Court said that the Regents' veto of Franklin's appointment to the Colorado faculty satisfied the standards enunciated by the Supreme Court in _Mt. Healthy City School District Board of Education v. Doyle_.[372]

Franklin was not entirely unsuccessful in obtaining employment, despite the decision of the University of Colorado Board of Regents. In February 1974, more than two years after his dismissal by Stanford and two months before the decision of the Colorado regents, the Wesleyan University Center for the Humanities selected Franklin as

a visiting fellow for the autumn 1974 term. The director of the center said officials there were aware of the reasons for Franklin's dismissal by Stanford. '"We all knew of Franklin's problem,'" he told The Stanford Daily, "but his record indicates that 'he's first-rate and that's the reason we want him.'"[373]

Later, Wesleyan hired Franklin as a visiting associate professor of English for the spring 1975 term. During the same period, Franklin was a visiting lecturer in American studies at Yale University. In the fall of 1975, he became a full professor of English and American literature at the Newark campus of Rutgers University, and received tenure there on April 7, 1977.

IV

The propriety of Franklin's dismissal is open to considerable question. First, there is at least some doubt that the offenses of which he was accused should indeed be punishable by a university or college. Although the courts have recognized that "the specialized needs of the academic environment" must be kept in mind when the boundaries of professors' and students' First Amendment protections are marked out,[374] they have also cautioned that professors and students may be punished only when their political activity "materially and substantially disrupt[s] the work and discipline of the school."[375] Sanctions, then, are inap-

propriate unless the professor's conduct has "interfered with the regular operation" of the college or university,[376] and unless the sanctions are "reasonably related to the needs of the education process."[377] The "Statement of Charges" against Franklin accused him of "significantly interfering with orderly dispersal" outside the Computation Center on the afternoon of February 10, 1971[378] There was no indication in the charge that the crowd's failure to disperse caused, or even threatened to cause, a material or substantial disruption of the work of Stanford University. There was no allegation of any threat to the regular operation of the University, or of a breakdown in the educational process. Certainly, the charge indicated that a breakdown in discipline had occurred, or at least was imminent, but such a breakdown had little if any relation to "the specialized needs of the academic environment," and therefore may have been an inappropriate target for university -- as opposed to criminal -- sanctions.

Significantly, the charge that Franklin had incited violence during his second speech in the Old Union Courtyard on the night of February 10, 1971 specifically alleged that the violence was "calculated to disrupt University functions and business."[379] This allegation practically parrots the court language defining proper grounds for discipline on campus. However, the charge (and the evidence presented to support it before the Advisory Board) failed

to explain how University functions and business would be disrupted if violence broke out on the campus after 9 p.m., when offices are closed and classes are not in session. Again, it is difficult to discern the relationship between this charge and "the needs of the education process."[380]

Only the charges that Franklin significantly contributed to the disruption of Ambassador Lodge's speech and "intentionally urged and incited students and other persons...to shut down a University computer facility known as the Computation Center"[381] truly identified conduct which is punishable because it materially and substantially interfers with the work of the University. Although actual in-class instruction is the most obvious (and the most important) work of an institution of higher learning, certainly academic conferences and computer research and instruction are also significant aspects of the educational process. To interfere with either function - or to incite such interference - undermines the regular operation of the University, and such conduct ought to be punished by the University.

Only the members of the Advisory Board, and those spectators who attended each of the 33 days of hearings in the Franklin case, can truly say whether or not "strongly persuasive" evidence supported the three charges which the Board sustained. The importance of actually hearing

and observing the demeanor of witnesses cannot be overemphasized. Nevertheless, the testimony recounted above reveals substantial disagreement over the nature and effect of Franklin's words and conduct on the three occasions when he was accused of inciting violations of the law of the campus. The Advisory Board found the University's witnesses to be "credible," but gave no reasons why it could not credit Franklin's witnesses. Whether this phenomenon demonstrates "simple bias" on the part of Advisory Board members, as some observers contended,[382] is certainly not clear. However, the presence of conflicting testimony should have caused the Advisory Board to tread more carefully than it did, particularly because the offenses charged involve speech, where the line between what is protected and what is unprotected is so indistinct. Perhaps there should have been more of a consensus among the witnesses as to the nature and effect of Franklin's words before the Board concluded that they were "directed to inciting or producing imminent lawless action and [were] likely to incite produce such action."[383] Especially given the vague wording of Franklin's second speech in the Old Union Courtyard, it would seem difficult to conclude that, regardless of the witnesses' impressions, his words had a natural tendency to produce violations of "the law of the campus". Indeed, one court concluded that the speech could more plausibly be interpreted as a call for a broader anti-

war movement than as a call for violence.[384] At the least, Franklin's Old Union Courtyard speech was what Professor Grey called "ambiguous between a call for lawful and a call for unlawful action."[385] Accordingly, it would seem inaccurate to characterize the speech as inciting by "preparing the group addressed for imminent [illegal] action and steeling it to such action."[386]

Another court noted that, if the Advisory Board had relied upon its conclusion that Franklin should have "reasonably expected" that his speech at the White Plaza rally on February 10 "would have contributed to the likelihood" of the occupation of the Computation Center, then its finding of incitement would fall short of satisfying the Brandenburg test.[387] The Advisory Board used some variation of the phrase "reasonably expected" four times in its discussion of Franklin's noonhour speech, and emphasized this phrase in its conclusion about the speech. This indicates that the Board may indeed have relied upon Franklin's "reasonable expectations" in deciding to condemn him, thereby failing to find the intent required for incitement. Significantly, the Board made no mention of Franklin's intent, purpose or motive in delivering the White Plaza speech. Indeed, the Board's conclusion that Franklin's words "meant" that he was "calling for forceful disruption of the operation of the [Computation] Center" -- perhaps a veiled reference to his motive -- seems to have

been tacked on as an afterthought to the discussion of what "he must reasonably have expected."[388] It is useful to recall that in a civil court of law, a party's reasonable expectations are relevant, not to whether he intended a particular result, but to whether he was negligent in allowing that result to occur.

The Advisory Board's findings with regard to Franklin's conduct outside the Computation Center again depended in part upon the Board's judgment as to Franklin's reasonable expectations of what would occur. The Board phrased this judgment as an alternative to its conclusion that "Franklin intended his shouts...to be heard by, and to influence the crowd to remain at the scene in defiance of the police order to disperse."[389] If the Advisory Board was "strongly persuaded" that Franklin intended to increase the risk of violence outside the Computation Center, why did it feel compelled to also conclude that his conduct had at least been negligent? Again, Franklin's words outside the Center are clearly susceptible to the characterization of being "ambiguous between a call for legal and a call for illegal action." If, as two members of the Advisory Board concluded, Franklin sincerely believed that the dispersal order was illegal, then he surely ought to have had the right to press that claim, even if he did so in heated terms. Furthermore, if persons within earshot of Franklin were persuaded by his contention

that the dispersal order was illegal, it would seem unfair to punish him because they returned to what they believed was a lawful assembly. Perhaps Franklin would have overstepped the bounds of his constitutional protection if he had continued to press his claim after it was clearly futile to do so, but the intervention of the two sheriff's deputies who attempted to take Franklin into custody ensured that he would not reach this point.

Reasonable persons may differ as to whether the Stanford Administration's charges against Franklin were appropriate subject matter for a university disciplinary proceeding instead of a criminal trial. Even more so, they may differ as to whether the Administration proved its case before the Advisory Board. But, with several significant exceptions, there should be no argument that Franklin received the benefit of a panoply of procedural protections during the course of the disciplinary proceedings against him.

Most importantly, the University afforded Franklin the right of notice and an opportunity to be heard before he was dismissed. As a tenured professor charged with inciting violence on campus, he had a clear liberty interest at stake because of the potential for serious damage to his reputation and professional standing. In addition, Franklin's tenured status also gave him a true property interest in his job at Stanford: he had "a legitimate claim of entitlement to it." Of course Stanford,

as a private employer, was not constitutionally compelled to afford Franklin a hearing -- although he had a right to demand one under the terms of Stanford's Statement of Policy on Appointment and Tenure, an implicit part of Franklin's contract. Commendably, the Statement also guaranteed Franklin the right to be represented by counsel at the hearings. However, the decision of the University not to pay Franklin's legal expenses -- while understandable -- did nothing to enhance the appearance of fairness in the hearings, and in fact probably made the hearings more unfair. A university is in an awkward position when it assumes the roles of both "prosecutor" and ultimate employer of the judges of the case. As prosecuter, it has no interest in assisting the "defendant" by financing his defense; but given the danger that a defendant such as Franklin will be overwhelmed by the resources at the disposal of the University as prosecutor, equity would seem to demand that such assistance be provided in reasonable amounts. This is especially true when the university hires special counsel of its own to fulfill the role of prosecutor. Joel Klein, who had graduated from Harvard Law School less than three months before he joined Franklin's defense team, now argues compellingly that "once the University spent $60,000 to assure the presentation of one side of the case...it should have insured that Franklin received the same treatment."[390] To paraphrase arguments heard by the Supreme Court in Gideon v. Wainwright,[391] it is time that the educational community stood up and said:

"We know a professor cannot get a fair hearing when he represents himself against an attorney acting as prosecutor for the university." It is enough of a fiction to claim that an ordinary lawyer can present a case as well as the prosecutor with all his experience in court. But when you take a layman, a professor, and put him at odds, you can't have a fair hearing except by accident.[392]

Both Franklin and Klein contend that the absence of an experienced, paid attorney on the Franklin defense team was a genuine handicap. "It was of course an extreme disadvantage that we labored under there without having counsel....We were all amateurs and we were up against a very high-powered legal firm from Los Angeles," Franklin now recounts.[393] Klein writes that

> while it is hard to say now whether effective fulltime counsel...would have made a difference, I think the right lawyer could have helped Franklin. I say this for two reasons. First, although Franklin did an excellent job in presenting his case, he was too visible I believe. A good lawyer knows how to shelter his client. Franklin by contrast, was always center-stage, grating away at the professors on the Board with continual espousal of his Maoist ideology. Second, that very ideology made it almost impossible for Franklin to focus the case as a First Amendment case. To Franklin the "First Amendment" is a false bourgeoise dichotomy between mind and body. Handled by a lawyer, the Amendment could have been given the kind of life that wins First

> Amendment cases -- *i.e.*, that preservation of the principle is more important than destruction of the pernicious force that seeks to invoke it.[394]

The University was probably justified in declining to grant Franklin's witnesses immunity from disciplinary action in connection with matters about which they would testify. It seems unreasonable to expect that Stanford should forfeit its legitimate interest in punishing employees, faculty members or students for conduct such as disrupting a University-sponsored lecture or illegally occupying a University facility. Surely the University need not immunize every participant in conduct which materially and substantially interferes with the work of the University, just so that it can prosecute an alleged ringleader.

In addition, the Advisory Board is to be commended for paying the travel expenses of a witness whom Franklin considered crucial to his case. The witness, a professor of statistics, was on sabbatical leave at Cornell University at the time of the hearings, and returned to Stanford to testify. An important safeguard which was absent in the Franklin case was the requirement of unanimity in the body which recommends dismissal. The Franklin case involved alleged violations of the "law of the campus." As such, it more closely resembled a criminal trial than a civil proceeding. Although a Supreme Court plurality in *Apodaca*

v. Oregon[395] "could not discern that the requirement of unanimity [in criminal trials] materially affected the role of the jury as a barrier against oppression and as a guarantee of a commonsense judgment of laymen on the facts of the preferred charges,"[396] one commentator has noted that the failure to require a unanimous verdict is very "effective in nullifying the potency of minority viewpoints" on the panel.[397] It is particularly important to give effect to such viewpoints in a case like Franklin's because the free speech rights of the accused are at stake. As the Faculty Advisory Board observed in the Franklin case, "it is the University's responsibility to *enhance* the exercise of rights of speech which the First Amendment merely protects against governmental interference."[398] Or, as Van Alstyne put it, "To the extent that universities should be exemplars of humaneness...they may well, on that account, appropriately strive to do better...than other institutions have done" in protecting civil liberties "from the abuses of relational leverage."[399] If the university is to do better than other institutions in enhancing the exercise of free speech, it ought to afford the procedural protection of a unanimity requirement.

Unanimity is especially desirable in cases such as Franklin's, where there is a high risk of prejudice against the defendant on the part of the triers of fact. A faculty member accused of any violation of campus law, and particu-

larly one accused of a speech crime, is likely to be held in relatively low esteem by his or her judges.[400] If we are to ensure that the triers of fact in a faculty disciplinary proceeding do not condemn the accused because of their preconceptions about the accused or his or her beliefs, then requiring a unanimous verdict both as to guilt or innocence and as to sanction seems to be a desirable step. A requirement of unanimity could be viewed under such circumstances as a reasonable substitute for voir dire of the triers of fact. If bias is indeed present on the fact-finding and penalty-assessing panel, then a requirement of unanimity would permit any single untainted member of the panel to prevent a dismissal based at least in part on invalid considerations. The Supreme Court, however, has insisted that

> [w]e cannot assume that the majority of the jury will refuse to weigh the evidence and reach a decision upon rational grounds, just as it must do now in order to obtain unanimous verdicts, or that a majority will deprive a man of his liberty on the basis of prejudice when a minority is presenting a reasonable argument in favor of acquittal.[401]

Of course, the Court's notion that a majority verdict will be as fair to the accused as a unanimous verdict is probably founded upon the assumption that voir dire will weed out most prejudiced jurors. The members of the Advisory Board declined to submit to voir dire in the Franklin case, and in the absence of a pool from which other members could

have been drawn, their refusal was a pragmatic one. An alternative to either *voir dire* or a requirement of unanimity is suggested by Joel Klein:

> If the University truly wanted to afford fairness (rather than the appearance of fairness) they should have secured a panel of professors (3 would have been enough) from schools that were far away from Stanford. If possible, they should have found people who had never heard of Bruce Franklin. (And I believe that such people would have been available.) Had such a body been assembled, I, for one, would have been more convinced by the fairness of the ultimate judgment.[402]

The standard of proof applied by the Faculty Advisory Board is another troubling aspect of the Franklin case. Prior to the hearings, the Board declared that the University must prove its charges against Franklin by "strongly persuasive" evidence. It is difficult to understand what quantum of proof would satisfy that standard. Certainly the "strongly persuasive" evidence requirement is a higher standard of proof than that which is applied in most civil court proceedings in this country, the preponderance of the evidence standard. For a party to prevail under this standard, he or she merely must have the greater weight of evidence on his or her side, or present evidence which is more credible and convincing to the mind than the evidence of the opposing party.[403] On the other hand, "strongly persuasive" is certainly a lesser standard of proof than the "beyond a reasonable doubt" standard which is applied

in Anglo-American criminal proceedings.[404]

> Proof "beyond a reasonable doubt" is not beyond all possible or imaginary doubt, but such proof as precludes every reasonable hypothesis except that which it tends to support. It is...such proof as satisfies the judgment and consciences of the jury, as reasonable men, and applying their reason to the evidence before them, that the crime charged was committed by the defendant, and so satisfies them as to leave no other reasonable conclusion possible.[405]

One commentator has observed that we insist upon this higher standard of proof in criminal prosecutions because we believe that the "disutility" of convicting an innocent person outweighs the disutility of acquitting a guilty person.[406] This commentator further contends that these disutilities "will vary..., not only with the seriousness of the offense, but with the danger of its repetition."[407] For example, in the view of the Faculty Advisory Board, the offenses of which Franklin was accused were quite serious, and, given the Board's conclusion that Franklin intended to continuously probe "the university's will to enforce its rules," there was "a high likelihood of future transgressions." Accordingly, if the Board were to have applied the "disutility" theory to the Franklin case, it probably would have found a high disutility in acquitting Franklin if he was guilty. However, according to the commentator, this judgment would have to be balanced against the disutility of convicting an innocent person which arises from, and "increases with the severity of the sentence he will

receive, [so that] the likely sentence would be a matter greatly affecting the decision of a rational trier of fact."[408] In the Franklin case, the Stanford Administration was seeking dismissal, the most severe "sentence" which the Advisory Board could recommend. This, then, would increase the disutility of convicting Franklin if he were innocent.

The Supreme Court has identified certain specific disutilities, or social costs, which are associated with the conviction of an innocent man. "The accused," the Court wrote in In re Winship,[409] "has at stake interests of tremendous importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction."[410] Of course, the Advisory Board had no power to recommend the incarceration of Franklin, so his liberty was not at stake in that sense. Nevertheless, the Supreme Court has recognized that liberty means more than being free to walk the streets. In the Roth case, discussed supra, the Court concluded that a professor has a liberty interest in his "'good name, reputation, honor, or integrity,'" an interest which can be jeopardized if, through dismissal, his or her employer imposes on him or her "a stigma or other disability that foreclose[s] his freedom to take advantage of other employment opportunities."[411] By recommending Franklin's dismissal, the Faculty Advisory Board clearly stigmatized him in such a fashion.[412]

Despite these considerations, it would seem inappropriate to insist upon the application of the "beyond a reasonable doubt" standard of proof in faculty discipline cases. The "specialized needs of the academic environment"[413] are sufficiently significant to permit the conclusion that a lesser standard of proof is permissible. To require proof beyond a reasonable doubt in such cases could result in considerable social costs to the university in terms of continued disruption of the academic environment by a faculty member (or student) who is acquitted in a disciplinary proceeding because the university administration could not meet its heavy burden of proof.

Nevertheless, it is clear that faculty members merit more protection in disciplinary proceedings than is afforded by a preponderance of the evidence standard of proof. The Faculty Advisory Board recognized this, and therefore applied the "strongly persuasive" evidence standard. A higher, "clear and convincing evidence" standard probably would have been more appropriate. In holding such a standard applicable to Securities and Exchange Commission (SEC) administrative proceedings in fraud cases, the Court of Appeals for the District of Columbia Circuit emphasized "the type of proof involved in an alleged fraud type case and...the extremely serious consequences to the petitioners of the sanctions imposed by the SEC in this case."[414] The court noted that "the SEC most often must rely" on circum-

stantial evidence in fraud cases;[415] similarly, the Faculty Advisory Board had to rely exclusively on circumstantial evidence to reach its conclusions about the requisite unlawful intent of Franklin's speeches. In Collins, the SEC had barred the petitioner "from association with any broker or dealer, provided that 'after two years, he may apply to the Commission to become so associated in a position which is not directly or indirectly connected with the making of markets in securities.'"[416] The court perhaps understated the case when it described this deprivation of livelihood as a "heavy sanction."[417] Taking these factors into account, and recognizing that "[t]he standard of proof to which the agency is held must in some substantial measure be commensurate with both the nature of the proof and the arsenal of sanctions available to the agency,"[418] the court concluded "that the 'clear and convincing evidence' standard is the proper standard here."[419] The court also noted that "[d]isbarment or suspension [of a lawyer] is equivalent to the penalty imposed on Collins by the SEC here" and that a long line of cases had held the "clear and convincing evidence" standard of proof applicable where such penalties were imposed.[420] The deprivation which Franklin suffered is equally as severe as that suffered by Collins, or by an attorney who is disbarred. The Franklin case therefore satisfies both of the criteria which the Collins court said required application of the "clear and convincing evidence" standard. Such a

standard "will require the [administrative agency] to reach a degree of persuasion much higher than 'mere preponderance of the evidence,' but still somewhat less than...'beyond a reasonable doubt.'"[421] Thus, this standard is much closer to that demanded in criminal prosecutions than it is to the standard permitted for most civil proceedings. This is appropriate because of the quasi-criminal nature of faculty disciplinary proceedings which involve alleged violations of the common law of the campus. In addition, where such proceedings involve "speech crimes," it would seem evident that the disutility of an erroneous judgement against a professor exercising his First Amendment freedom would heavily outweigh the disutility of acquitting the professor and permitting him or her to instigate further disruption. As a result, we should demand that the university administration "prove [its] case to a higher probability - clear-and-convincing evidence."[422]

Obviously, it is difficult for lawyers, not to mention laymen, to comprehend the subtle distinctions between the various standards of proof which courts and administrative agencies apply. As Justice Harlan noted, "the labels used for alternative standards of proof are vague and not a very sure guide to decisionmaking."[423] The Franklin case may indicate that this vagueness is a particular handicap to laymen triers of fact such as the members of the

Faculty Advisory Board.

> Frankly I doubt in general that standards of proof have much pragmatic relevance, and I am confident that the concept was meaningless in Franklin's case. The Board members were not people versed in legal standards; they could not, nor did they, make any real effort to titrate the evidence. My guess is that they reached their conclusion, believed it strongly, and had the correct legal words supplied by their lawyer.[424]

Despite these inherent difficulties, the triers of fact in faculty disciplinary proceedings should enunciate a standard of proof and adhere to it as best they can. These steps will facilitate judicial review of a judgment against the accused faculty member. Although the reviewing judges will be neither omniscient nor infallable, their experience in applying or evaluating alternative standards of proof will leave them well equipped to determine whether the professor has received the protection to which he is entitled under the standard chosen by the triers of fact. In such a context, insisting upon "clear and convincing evidence" as opposed to "strongly persuasive" evidence may well have some pragmatic relevance.

V

Stanford University endeavored mightily to give Bruce Franklin what appeared to be a fair hearing. In large measure, it succeeded. The American Association of Uni-

versity Professors found that the hearings were satisfactory from a procedural standpoint.[425] Nevertheless, the earnest efforts of the members of the Faculty Advisory Board to make the hearings fair in fact fell somewhat short. The dismissal of Franklin was inconsistent with the most enlightened principles of academic freedom. Under Van Alstyne's theory of a faculty member's aprofessional political liberties, the charges against Franklin probably constituted a "gratuitous use of institutional disciplinary processes" because "general provisions of law [were] available to provide for measures of redress and sanction" for every charge, except perhaps for those arising out of the Lodge incident.[426] If Franklin's White Plaza speech, his activity outside the Computation Center and his speech in the Old Union Courtyard did indeed constitute incitement as that offense is defined in Brandenburg, then Franklin surely violated the California Penal Code[427] by his "abuses of ordinary civil liberty."[428] But if Franklin's activities on February 10, 1971 were not illegal, then, according to Commager, the university had no business trying "to do what civil authorities [were] unable to do," that is, punish Franklin for speech or conduct that "merely outrage[d] public opinion."[429] There is, of course, room for argument that the offenses of which the Advisory Board found Franklin guilty "so immediately involve[d] the regular operation of the institution itself" that "internal

recourse" by the University would not offend Van Alstyne.[430] However, given both the genuine ambiguity of the evidence before the Board and Van Alstyne's preference that universities err on the side of "humaneness" in faculty disciplinary proceedings,[431] the conclusion is apparent that the dismissal of Franklin was contrary to Van Alstyne's liberal notion of a professor's freedom of speech.

For different reasons, the dismissal of Franklin also ran afoul of the AAUP's "Statement of Principles on Academic Freedom and Tenure," and subsequent interpretations of that Statement. Franklin on February 10, 1971 did not exercise what the AAUP would recognize as "appropriate restraint;" nevertheless, "he should [have been] free from institutional censorship or discipline" for what he said and did on that day.[432] Did Franklin's expressions as a citizen clearly demonstrate his "unfitness for his position" on the faculty, as the AAUP demands before sanctions are imposed?[433] Probably not. First of all, the ambiguity of the record before the Advisory Board certainly does not support the conclusion that there was "weighty evidence [which]...clearly proved...that the faculty member is unfit."[434] Second, and perhaps more importantly to the AAUP, the Advisory Board expressly refused to heed the 1964 Committee admonition that "a final decision [on unfitness] should take into account the faculty member's entire record as a teacher and scholar."[435] The

Board prefaced its decision on the appropriate sanctions in the Franklin case by stating that "Professor Franklin's performance as a scholar and teacher has not been questioned in these proceedings."[436] Midway through the hearings, the Board had ruled that it required '"no testimony supporting Professor Franklin's exceptional competence as a scholar and teacher. His competence is not in question in this hearing.'"[437] The Board, then, was willing to take the functional equivalent of judicial notice that Franklin was indeed a highly regarded teacher and writer. He had been unanimously recommended by the English Department faculty for promotion to full professor in 1970; the recommendation was rejected by the Stanford Administration because Franklin had been an associate professor for only five years, and therefore did not have the seniority required for promotion.[438] Even among Franklin's critics, very few disputed his academic credentials.[439] Nevertheless, the Advisory Board's discussion of what sanction to impose upon Franklin made no mention of these credentials. The decision to dismiss him was therefore inconsistent with the AAUP's 1964 Committee A Statement on Extramural Utterances. Franklin's "freedom of extra-mural utterance and activity"[440] was abridged.

Only Hook and his colleagues would probably regard the dismissal of Franklin as appropriate. In their view, Franklin's failure "to live by the rule of reason and reasoned persuasion,"[441] his use of the Stanford campus

to '"pressure' through the use of physical violence or the semi-violence of building blockades"[442] and his abuse of his "very special responsibility" as a professor to the students who listened to him,[443] made it "inescapable and [perhaps even] morally justifiable" that Stanford would punish him.[444] Even assuming that Franklin's behavior was constitutionally protected, Hook and his colleagues would still probably contend that the conduct was of such a nature that Franklin could "have no imaginable human or constitutional right to remain a member" of the Stanford faculty.[445]

The Santa Clara County Superior Court has held that Franklin's speech in the Old Union Courtyard was constitutionally protected.[446] Therefore, the Faculty Advisory Board's decision was based at least in part on an invalid consideration -- and the sanction which the Board imposed must be viewed in that unfavorable light.

Apart from the merits of the case, there were also three major procedural deficiencies in the Advisory Board's handling of the Franklin case. First, the Board should have requested that the University pay for Franklin's legal representation during the hearings. With paid counsel, Franklin would probably have been able to defend himself more adequately against the advocacy of Stanford's special prosecutors. Second, the Board should have committed itself to reaching a unanimous verdict, in order both to sus-

tain the various charges against Franklin and to recommend his dismissal. Particularly in the absence of voir dire, a requirement of unanimity was a necessary safeguard against the possible pre-hearing bias of the Board members. Third, the Board should have adopted and endeavored to apply the "clear and convincing evidence" standard of proof to the Franklin case. The social costs of erroneously punishing a person for the legitimate exercise of his or her First Amendment freedoms are sufficiently great to warrant application of this high standard.

The campus revolution of the late Sixties and the early Seventies produced a "law and order" backlash, not only on the campuses, but in the nation as a whole. S.I. Hayakawa, an obscure 62-year-old semantacist from California, became an instant hero because he was filmed ripping the wires from the speaker of a radical group's sound truck.[447] Spiro Agnew won ringing applause for denouncing '"effete...hand-wringing, sniveling' permissiveness toward student rebels".[448] Agnew said that the United States could "'separate'" these rebels '"from our society with no more regret than we should feel over discarding rotten apples from a barrel.'"[449] The Faculty Advisory Board's sober, carefully worded opinion in the Franklin case bears no resemblance whatsoever to Hayakawa's bravado or to Agnew's bombast. Nevertheless, it may well have been a product of the same sort of fear and hostility

to which the Hayakawas and the Agnews appealed. The members of the Advisory Board were not operating in a vacuum, free to dispassionately evaluate Franklin's conduct against the backdrop of academic and political freedom. Instead, the Board was forced to decide a rebel's fate as the rebellion continued around them. However, it is during such times of trouble that the political and academic freedoms of faculty members and students alike are most in need of protection. For this reason, the decision of the Faculty Advisory Board of Stanford University recommending the dismissal of Bruce Franklin is both an important and an unfortunate precedent.

FOOTNOTES

[1] *See* the discussion of the cases of Richard T. Ely at the University of Wisconsin, Edward W. Bemis at the University of Chicago and at Kansas State Agricultural College, James Allen Smith at Marietta College, President E. Benjamin Andrews at Brown University, Frank Parsons at Kansas State Agricultural College and Edward A. Ross at Stanford University, in R. Hofstadter and W. Metzger, *The Development of Academic Freedom in the United States* 420-445 (1955).

[2] *See* the discussion of the cases of Leon R. Whipple of the University of Virginia, William A. Schaper of the University of Minnesota and J. McKeen Cattell of Columbia University, and of the report of the American Association of University Professors Committee on Academic Freedom in Wartime, in R. Hofstadter and W. Metzger, *supra* note 1, at 495-506.

[3] *See* the discussions of the dismissal or resignation of those faculty members at Rutgers University in 42 *AAUP Bull*. at 77-78 (1956); the dismissal of a faculty member at Temple University, *id*. at 79-80; the dismissal of a faculty member at Ohio State University, *id*. at 81-83; the dismissal of two faculty members at Wayne University, *id*. at 87-89; and the suspension and non-reappointment of Andres Deinum at the University of Southern California, 44 *AAUP Bull*. at 151-157 (1958).

[4] *Chicago Sun-Times*, Jan. 23, 1972.

[5] *The Stanford Daily*, Jan. 6, 1972, at 1, col.5.

[6] *Chicago Daily News*, Jan. 11, 1972.

[7] Although Franklin was never criminally prosecuted for conduct on the Stanford campus, the University Administration did obtain a preliminary injunction against him in Santa Clara County (Calif.) Superior Court in early 1971. At the time, Franklin had been indefinitely suspended from his teaching duties, and the injunction barred him from going onto the principal academic campus until such time as his suspension was ended. In addition, the injunction barred six suspended Stanford students and seven non-students from going onto the campus. *The Stanford Daily*, March 29, 1971, at 1, col.1. In the complaint which they filed in Superior Court, the University's attorneys had alleged that Franklin and the others had "'incited, counselled, advised and urged' those present at rallies to do such acts as throwing rocks at windows and occupying buildings." *The Stanford Daily*, Feb. 16, 1971, at 1, col.3.

[8] A. Lovejoy, *Encyclopedia of the Social Sciences* 384 (1930).

[9] "American professors familiar with the tradition and values of *Lehrfreiheit* in German universities, began to domesticate it and to profound the concept of 'academic freedom' as a principle worthy of general respect to fill the void of the positive law in this country." Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberty*, in *The Concept of Academic Freedom* 62 (E. Pincoffs ed. 1975).

[10] American Association of University Professors, *A Declaration of Principles* (1915), quoted in *Academic Freedom and Tenure: A Handbook* of *The American Association of University Professors* 167-168 (L. Joughin ed. 1967).

[11] H. Commager, *Is Freedom An Academic Question?*, in *The Commonwealth of Learning* 215 (1968).

[12] The academic freedom section of the AAUP's 1940 "Statement of Principles on Academic Freedom and Tenure" follows:

> (a) The teacher is entitled to full freedom in research and in the publication of the results, subject to the adequate performance of his other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.

(b) The teacher is entitled to freedom in the classroom in discussing his subject, but he should be careful not to introduce into his teaching controversial matter which has no relation to his subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.

(c) The college or university teacher is a citizen, a member of a learned profession, and an officer of an educational institution. When he speaks or writes as a citizen, he should be free from institutional censorship or discipline, but his special position in the community imposes special obligations. As a man of learning and an educational officer, he should remember that the public may judge his profession and his institution by his utterances. Hence, he should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that he is not an institutional spokesman.

13
Id.

14
Commission on Academic Tenure in Higher Education, Faculty Tenure: A Report and Recommendations by the Commission on Academic Tenure in Higher Education 15 (1973).

15
"The dismissal of a professor from his post not only prevents him from performing his function in society, but, by intimidating thousands of others and causing them to be satisfied with 'safe' subjects and 'safe' opinions, it also prevents the entire profession from effectively performing its function." Joughin, On Some Misconceptions

Concerning Academic Freedom, in Academic Freedom and Tenure: A Handbook of The American Association of University Professors 180 (L. Jouglin ed. 1957).

[16] Id. at 190.

[17]

> The distinction of academic freedom from the general protection of free speech is precisely located in its immediate and indissoluble nexus with the cardinal social expectation laid upon the particular profession with which it is identified - that there shall be a vocation to examine received learning and values critically, a vocation expected to do so and to make itself useful by the fact of disseminating its work. In this sense, the element of academic freedom specifically identifies the profession, it is simply contradictory to lay that expectation upon the profession and then to prevent its accomplishment by deterring its fulfillment through rules that punish its exercise.

Van Alstyne, supra note 9, at 77.

[18] Id. at 84-85.

[19] Hook, Academic Freedom and the Supreme Court: The Court in Another Wilderness, in On Academic Freedom 34 (V. Earle ed. 1971).

[20] Letter from Matthew W. Finkin to James D. Wascher (November 4, 1977).

[21] See text of "Statement," supra note 12.

[22] Van Alstyne, *supra* note 9, at 60.

[23] *Id.* at 63.

[24] *Id.* at 69.

[25] *Id.* at 81.

[26]

> Insofar as it pertains to faculty members in institutions of higher learning, "academic freedom" is characterized by personal liberty to pursue the investigation, research, teaching, and publication of any subject as a matter of professional interest without vocational jeopardy or threat of other sanction, save only upon adequate demonstration of inexcusable breach of professional ethics in the exercise of that freedom.

Id. at 71.

[27] *Id.* at 84.

[28]

> What shall we say of university teachers and scholars who outrage public opinion by advocacy of doctrines that seem to the great majority to be erroneous? What shall we say of teachers who persistently flout the public will as expressed by resounding majorities? Once again the underlying principle is simple enough. If scholars, or students, violate the law, the law should deal with them as it deals with any other member of society who violates the law. No scholar may claim that academic freedom gives him some special immunity from the law. But if what a scholar does or says does not violate any law, but merely outrages public opinion, then it is not the business of the university to do what civil authorities are unable to do.

H. Commager, *The Nature of Academic Freedom*, in *The Commonwealth of Learning* 222 (1968).

[29] Van Alstyne, _supra_ note 9, at 84-85.

[30] Van Alstyne, _Reply to Comments_, in _The Concept of Academic Freedom_ 128-129 (E. Pincoffs ed. 1975).

[31] Hook, _supra_ note 19, at 34.

[32] S. Hook, _Academic Freedom and Academic Anarchy_ 85 (1969).

[33] Earle, _Academic Freedom - The Price Is Eternal Vigilance by Professors_ (II), in _On Academic Freedom_ 29 (V. Earle ed. 1971).

[34] _Id_. at 29.

[35] Herberg, _On the Meaning of Academic Freedom_, in _On Academic Freedom_ 2 (V. Earle ed. 1971).

[36] An apparent ideological partner of Hook, President John R. Silber of Boston University, complained recently that, after the Free Speech Movement arose at Berkeley in 1964,

> the concept of academic freedom was transformed. Once, it entailed an immunity for what is said and done by dedicated, thoughtful conscientious scholars in pursuit of truth or the truest account. Now it came

> to entail, rather, an immunity for whatever is said and done, responsibly or carelessly, within or without academia, by persons unconcerned for truth; who, reckless and incompetent, frivolous or even malevolent, promulgate ideas for which they claim no expertise or even commit deeds for which they can claim no sanction of law.

J. Silber, Encounter, August 1974, at 32.

[37] See full text of "Statement," *supra* note 12.

[38] Van Alstyne, *supra* note 9, at 82, citing Academic Freedom and Tenure: The University of Illinois, 49 AAUP Bull at 40-41 (1963).

[39] Committee A Statement on External Utterances (1964), reprinted in *AAUP Policy Documents and Reports* 14 (1971).

[40] American Association of University Professors, *supra* note 10.

[41] Machlup, *supra* note 15, at 181-182.

[42] In 1956, a special AAUP committee wrote: "Any rule which bases dismissal upon the mere fact of exercise of constitutional rights violates principles of both academic freedom and academic tenure. This principle...applies, *a fortiori*, to alleged involvement in Communist-inspired activities or views, and to refusal to take a trustee-imposed disclaimer

oath." The committee declared that only "conscious participation in conspiracy against the government" would constitute adequate grounds for adverse action. Academic Freedom and Tenure in the Quest for National Security, Report of a Special Committee of the American Association of University Professors, 42 _AAUP Bull._ 57-58 (1956).

[43] Commission on Academic Tenure in Higher Education, _supra_ note 14, at 75.

[44] Nevertheless, the Stanford Administration's "Statement of Charges" against Franklin alleged that his political activity constituted "substantial and manifest neglect of duty" _in addition_ to "a substantial impairment of his performance of his appropriate function within this University community." _In the Matter of Associate Professor Howard Bruce Franklin, Statement of Charges_ 1 (March 22, 1971).

[45] S. Hook, _supra_ note 32, at 157.

[46] Pritchett, _Academic Freedom and the Supreme Court: Is Academic Freedom A Constitutional Right?_, in _On Academic Freedom_ 5-6 (V. Earle ed. 1971).

[47] Van Alstyne, _supra_ note 9, at 65, citing _Pickering v. Board of Education_, 391 U.S. 563, 574-575 (1968); _White-_

hill v. Elkins, 389 U.S. 54, 59-60 (1967); Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967); Griswold v. Connecticut, 381 U.S. 479, 482 (1965); Barenblatt v. United States, 360 U.S. 109, 112 (1959); Sweezy v. New Hampshire, 354 U.S. 234, 250-251, 261-264 (1957); and Wieman v. Updegraff, 344 U.S. 183, 195-198 (1952).

[48] Wieman v. Updegraff, 344 U.S. 183, 195 (1952) (Frankfurter, Douglas, J.J., concurring).

[49] Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

[50] Id. at 250.

[51] R. McCloskey, The Modern Supreme Court 174 (1972)

[52] Keyishian v. Board of Regents, 385 U.S. 589, 612 (1967).

[53] Id. at 603.

[54] 391 U.S. 563 (1968).

[55] Van Alstyne, supra note 9, at 68-69.

[56] Pickering v. Board of Education, 391 U.S. 563, 564 (1968).

57
Id. at 568.

58
Id. at 572-573.

59
Id. at 570 n.3.

60
Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 513 (1969). In Tinker, three public school students had been suspended for wearing black armbands to protest American involvement in the Vietnam War. This was conduct "closely akin to 'pure speech'...entitled to comprehensive protection under the First Amendment," the Court ruled. Id. at 505-506.

61
Id. at 513. In 1972, the Court repeated its belief that students' "[a]ssociational activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education. Healy v. James, 408 U.S. 169, 189 (1972).

62
461 F.2d 566 (2d Cir. 1972), cert. denied, 409 U.S. 1042 (1972).

63
James v. Board of Education, 461 F.2d 566, 573 (2d Cir. 1972), cert. denied, 409 U.S. 1042 (1972).

64
Id. at 574.

65
Rosenblum, Legal Dimensions of Tenure, in Faculty Tenure: A Report and Recommendations by the Commission on Academic Tenure in Higher Education 162 (1973).

66
Lloyd Corp. v. Tanner, 407 U.S. 551, 569 (1972).

67
Board of Regents of State Colleges v. Roth, 408 U.S. 564, 581 (1972)(Douglas, J., dissenting).

68
Rosenblum, supra note 65, at 180.

69
"we are bound to acknowledge that, when no claim of professional academic endeavor is present, neither can one lever himself into a preferred First Amendment position by invoking the claim of academic freedom." Van Alstyne, supra note 9, at 79.

70
But see Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) and New York Times v. Sullivan, 376 U.S. 254 (1964).

71
Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)(per curiam).

72
408 U.S. 564 (1972).

[73] Board of Regents of State Colleges v. Roth, 408 U.S. 564, 573 (1972), quoting Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).

[74] Id. at 573

[75] Id. at 573.

[76] Id at 577, 578.

[77] 408 U.S. 598 (1972).

[78] "A long employment relationship continued through renewals of short-term contracts, has been sufficient to invest a nontenured teacher with an objective expectancy of reemployment, entitling the teacher to a pretermination hearing." N. Dorsen, P. Bender and B. Neuborne, Political and Civil Rights in the United States 657 (1976), citing Johnson v. Farley, 470 F.2d 179 (4th Cir. 1972) and Lucas v. Chapman, 430 F.2d 945 (5th Cir. 1970).

[79] Rosenblum, supra note 65, at 162. Accord, Van Alstyne, supra note 9, at 68.

[80] Id. at 191.

81
Decision, Advisory Board, Stanford University, In the Matter of Professor H. Bruce Franklin 12 (1972). [hereinafter cited as Decision].

82
Statement of Richard W. Lyman, quoted in Stanford University News Service release (January 23, 1972).

83
H. Franklin, The Real Issues in My Case, Change, June 1972, at 39.

84
K. Lamott, In the Matter of H. Bruce Franklin, The New York Times Magazine, January 23, 1972, at 17-18.

85
H. Packer, Academic Freedom in the Franklin Case, Commentary, April 1972, at 78.

86
Id. at 78.

87
Stanford University News Service release (February 16, 1971), quoting Professor Ian Watt, then chairman of the Department of English at Stanford.

88
K. Lamott, supra note 84, at 20.

89
The Stanford Daily, October 9, 1970, at 1, col. 1.

90 House Comm. on Internal Security, _America's Maoists- The Revolutionary Union - The Venceremos Organization_, H.R. Report No. 92-1166, 92[d] Cong., 2d Sess. 8 (1972).

91 _Id_. at 45.

92 _Id_. at 28.

93 _The Stanford Daily_, Nov. 10, 1971, at 1, col. 1.

94 Venceremos, _Principles of Unity_ 7, 22 (1971), reprinted in House Comm. on Internal Security, _supra_ note 90, at 101, 105.

95 H. Franklin, _supra_ note 83, at 32-33.

96 House Comm. on Internal Security, _supra_ note 90, at 106. In 1971, a Stanford student and radical who had turned informant for the FBI told a U.S. Senate subcommittee that Franklin himself was a source of C-4 plastic explosives for the Black Panther Party. _Hearings before the Subcomm. to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Comm. on the Judiciary_, 92d Cong., 1st Sess. 136-139 (1971) (testimony of Thomas Edward Mosher).

97
K. Lamott, *supra* note 84, at 22.

98
Id. at 24.

99
H. Packer, *supra* note 85, at 79.

100
Id. at 78.

101
In his autobiography, Franklin claims that at a meeting of the faculty in 1969, he began to speak in opposition to a resolution praising the president of the University for the way he had handled a disturbance on campus.'"

> I managed to get out half a sentence - to the effect that violence on campus was not caused by a handful of troublemakers. Suddenly the faces of the professors...writhed with snarls and reddened as they booed, hooted, and rhythmically stamped their feet....After a minute or so, the president raised his arms [and] asked them to be quiet.

H. Franklin, *Back Where You Came From* 28-29 (1975).

One observer, a visiting scholar from Harvard who later became a leading critic of the decision to dismiss Franklin, said '"there's a sense in the Stanford community that Franklin's a very, very bad person indeed, that he's armed Chicanos, that he's advocated the use of violence and guns against the police, and that he's possibly been involved in the bombing of a house on the Stanford campus." K. Lamott, *supra* note 84, at 25.

102 In 1976, documents released pursuant to the Freedom of Information Act revealed that the Federal Bureau of Investigation (FBI) had participated in a campaign aimed at having Franklin dismissed from the Stanford faculty. In recommending this campaign to the FBI's special agent in charge in San Francisco, Bureau Director J. Edgar Hoover characterized Franklin as "one of the most militant radical extremists on American campuses." Hoover directed agents at the San Francisco office to prepare an anonymous leaflet detailing Franklin's "extensive public record of current affiliation and participation in subversive causes and activities." The leaflet was to be mailed "to all members of the Board of Trustees of Stanford, to selected alumnus [sic], and other appropriate individuals." Cable from J. Edgar Hoover to the FBI's Special Agent in Charge in San Francisco (May 14, 1969).

Less than a week after receiving Hoover's cable, the special agent in charge in San Francisco replied that an anti-Franklin leaflet had been prepared and "is being distributed in the Palo Alto-Stanford area." The agent suggested to Hoover that the leaflet should be mailed "to parents of Stanford students, selected Alumni, [and the] Board of Trustees at Stanford, etc., encouraging them to take some positive action" against Franklin and to "insist that FRANKLIN be removed from his position at Stanford." Cable from the FBI's Special Agent in Charge in San Fran-

cisco to J. Edgar Hoover (May 20, 1969). A subsequent cable to Hoover suggested that such mailings were, in fact, sent out from the FBI's San Francisco bureau.

Other FBI documents released in 1974 indicated that Franklin was probably the target of a so-called "disruptive technique" applied pursuant to the Bureau's "counterintelligence program" (COINTELPRO), which was an "effort to 'expose, disrupt, misdirect, discredit, or otherwise neutralize' radical political groups." The Stanford Daily, April 30, 1974, at 1, col. 1. The memorandum which called off the apparent harassment of Franklin in December 1970 referred to "'the expanding complexities of the proposed technique'" as one reason for its cancellation. Id.

Franklin and other radicals at Stanford were also subjected to monitoring by personnel of the Central Intelligence Agency (CIA). Recently released CIA documents reveal that from 1967 to 1973, the Agency conducted a domestic surveillance program known as "Project Resistance," the purpose of which was to obtain information about groups planning to protest against CIA job recruiters. Project Resistance involved Stanford and at least 57 other colleges and universities. CIA's charter bars such domestic activities. The Stanford Daily, April 13, 1978, at 1, col. 5.

Stanford's Vice President for Public Affairs today says that the University Administration was "not aware of the FBI campaign" while it was in progress. He adds that neither the FBI campaign nor any other "outside pressures affected the decision to bring charges" against Franklin. "The decisions leading up to, during, and following the Advisory Board hearing were strictly internal university decisions in which no agency of the government was involved in any way." Letter from Robert M. Rosenzweig to James D. Wascher (March 3, 1978).

[103] H. Franklin, supra note 83, at 29. Stanford's Vice President for Public Affairs today acknowledges that then-President Wallace Sterling made an inquiry to the Advisory Board regarding Franklin's involvement in the sit-in. "The Board said in substance that it could hardly give an advisory opinion about circumstances that it might later be called on to judge." Letter from Robert M. Rosenzweig to James D. Wascher (March 3, 1978).

[104] Chicago Daily News, Jan. 12, 1971; Newsweek, Jan. 25, 1971, at 52.

[105] Decision at 4.

[106] Letter from Richard W. Lyman to H. Bruce Franklin (January 18, 1971).

[107] Letter from Richard W. Lyman to H. Bruce Franklin (January 26, 1971).

[108] *Decision* at 5.

[109] *Id.* at 5.

[110] *Id.* at 5.

[111] *Id* at 5.

[112] *Id.* at 5.

[113] *The Stanford Daily*, February 10, 1971, at 1, col. 1.

[114] *Decision* at 5.

[115] *Id.* at 5.

[116] *Id.* at 5.

[117] *Id.* at 5.

[118] *Id.* at 5. In May 1970, radical students at Stanford called a "strike" to protest the American invasion of Cambodia and the continued presence of the Reserve Officer Training Corps program on campus. Throughout the week-long

strike, classes were often cancelled by professors or blockaded by demonstrators. At week's end, the president of the university cancelled classes for a day and closed the campus.

119 Decision at 5.

120 Id. at 7.

121 Id. at 7. A complete text of Franklin's White Plaza speech, as recorded by campus radio station KZSU, is set out in the Appendix.

122 Id. at 7.

123 Id. at 7.

124 Id. at 7.

125 Stanford University News Service release (February 11, 1971).

126 Decision at 7.

127 Id. at 9.

128 Id. at 9.

[129] *Id* at 9.

[130] *Id*. at 9.

[131] *Id*. at 9.

[132] *Id*. at 9.

[133] Letter from Richard W. Lyman to H. Bruce Franklin (February 12, 1971).

[134] *Id*.

[135] *The Stanford Daily*, February 16, 1971, at 1, col. 3.

[136] Letter from H. Bruce Franklin to Richard W. Lyman (February 25, 1971).

[137] See *supra* note 7.

[138] Letter from William F. Miller to H. Bruce Franklin (March 15, 1971).

[139] *In the Matter of Associate Professor Howard Bruce Franklin*, *Statement of Charges*, *supra* note 44, at 1-2.

[140] Stanford Policy on Campus Disruption.

141 Statement of Charges, supra note 44, at 4-6.

142 Franklin v. Atkins, 409 F.Supp. 439, 442 (D. Colo. 1976), aff'd., 562 F.2d 1188 (10th Cir. 1977), cert. denied, 46 U.S.L.W. 3665 (1978).

143 The members of the Advisory Board were: Donald Kennedy, chairman of the board and chairman of the department of biology (now Commissioner of the U.S. Food and Drug Administration); David A. Hamburg, vice chairman of the board and chairman of the department of psychiatry (now on leave in Washington, D.C. as president of the Institute of Medicine, National Academy of Sciences; George L. Bach, professor at the Graduate School of Business; Robert McAfee Brown, professor of religion (now teaching at the Union Theological Seminary in New York City); Sanford M. Dornbusch, professor of sociology; David M. Mason, chairman of the department of chemical engineering (now professor of chemical engineering and chemistry); and Wolfgang K. H. Panofsky, director of the Stanford Linear Accelerator Center.

144 Decision at 3.

145 Id. at 3.

146 Id. at 3.

147
Id. at 3.

148
Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant's Motion for Summary Judgment at 4, *Franklin v. Stanford University* before Santa Clara County, Calif., Superior Court, No. 277253 (March 15, 1977).

149
Stanford University News Service release (Sept. 29, 1971).

150
San Jose Mercury, September 29, 1971.

151
Palo Alto Times, September 30, 1971.

152
The Stanford Daily, September 30, 1971, at 1, col. 4.

153
Stanford University News Service release (Sept. 29, 1971).

154
Stanford University News Service release (Sept. 30, 1971).

155
Decision at 5.

156
The Stanford Daily, October 14, 1971, at 1, col. 1.

157
Id.

158
Palo Alto Times, October 14, 1971.

159
The Stanford Daily, October 15, 1971, at 1, col. 3.

160
The Stanford Daily, October 18, 1971, at 1, col. 2.

161
Id.

162
Stanford University News Service release (Oct. 20, 1971).

163
The Stanford Daily, October 20, 1971, at 1, col. 1.

164
Stanford University News Service release (Oct. 20, 1971).

165
The Stanford Daily, October 20, 1971, at 1, col. 1. Franklin, was, of course, aware of then-President Sterling's inquiry to the Faculty Advisory Board, discussed supra note 103.

166
Stanford University News Service release (Oct. 20, 1971). Under the concept of "democratic centralism" espoused by the Venceremos organization in its handbook,

Principles of Unity, "when a decision is made after struggle and discussion, all cadre [members] must implement it....We accept Chairman Mao's statement on discipline:... the individual is subordinate to the organization...the entire membership is subordinate to the Central Committee." Venceremos, Principles of Unity 15 (1971), reprinted in House Comm. on Internal Security, supra note 90, at 103. Noting Franklin's adherence to democratic centralism, one commentator asked: "And if, one might inquire, the orders of the center were to lie about what the orders of the center were to protect the professor's job....Could one believe that such a staunch revolutionary as Bruce Franklin would not obey?" N. Glazer, Why A Faculty Cannot Afford A Franklin, Change, June 1972, at 44.

167 Stanford University News Service release (Oct. 20, 1971).

168 San Jose Mercury, October 2, 1971.

169 The Stanford Daily, October 4, 1971, at 1, col. 5.

170 Palo Alto Times, October 2, 1971.

171 The Stanford Daily, October 4, 1971, at 1, col. 5.

172 Id.

[173] *The Stanford Daily*, October 22, 1971, at 1, col. 1

[174] Stanford University News Service release (Oct. 22, 1971).

[175] Stanford University News Service release (Oct. 25, 1971).

[176] Stanford University News Service release (Oct. 26, 1971).

[177] Stanford University News Service release (Oct. 25, 1971).

[178] *San Jose Mercury*, Oct. 26, 1971.

[179] *Palo Alto Times*, Oct. 26, 1971.

[180] Stanford University News Service release (Oct. 27, 1971).

[181] *The Stanford Daily*, Nov. 1, 1971, at 1, col. 3.

[182] *Palo Alto Times*, Oct. 30, 1971.

[183] *Id*.

184 *The Stanford Daily*, October 1, 1971, at 1, col. 4.

185 Stanford University News Service release (Oct. 5, 1971).

186 *Palo Alto Times*, October 5, 1971.

187 Stanford University News Service release (Oct. 5, 1971).

188 *Decision*, at 7.

189 *Palo Alto Times*, October 5, 1971.

190 *Decision*, at 7.

191 *Id*. at 7.

192 *The Stanford Daily*, October 4, 1971, at 1, col. 5.

193 Stanford University News Service release (Oct. 5, 1971).

194 *The Stanford Daily*, October 4, 1971, at 1, col. 5.

[195] Stanford University News Service release (Oct. 4, 1971).

[196] *The Stanford Daily*, October 4, 1971, at 1, col. 5.

[197] *Decision*, at 7-8.

[198] Stanford University News Service release (Nov. 3, 1971).

[199] Stanford University News Service release (Oct. 25, 1971).

[200] *The Stanford Daily*, October 25, 1971, at 1, col. 4.

[201] *Id*.

[202] *Id*.

[203] Stanford University News Service release (Oct. 26, 1971).

[204] *Id*. Moses himself acknowledged to the Board that, "'If I had to do again...I would not have gone away.'" Stanford University News Service release (October 5, 1971).

[205] *The Stanford Daily*, October 26, 1971, at 1, col. 3.

206 *San Jose Mercury*, October 26, 1971.

207 Stanford University News Service release (Oct. 28, 1971).

208 *The Stanford Daily*, October 29, 1971, at 1, col. 1.

209 *Id*.

210 *Id*.

211 Stanford University News Service release (Oct. 29, 1971).

212 *Id*.

213 *Id*.

214 *Palo Alto Times*, October 29, 1971.

215 *Palo Alto Times*, October 30, 1971.

216 *The Stanford Daily*, November 1, 1971, at 1, col. 3.

217 *Palo Alto Times*, October 30, 1971.

218 Robert Beyers, the director of the Stanford University News Service, figured prominently in Franklin's allegation made during the hearings that the Advisory Board could not render an impartial verdict in his case because of its exposure to prejudicial publicity prior to the hearings. "The board bluntly turned down our repeated requests to have formal voir dire to determine prejudice," Franklin said later. H. Franklin, supra note 83, at 34. Every Stanford faculty member, including, of course, those sitting on the Advisory Board, received copies of the news releases prepared by the News Service. Franklin alleged that News Service accounts of the events on February 10, 1971, and of subsequent developments were biased and constituted "a conscious attempt by Bob Beyers, head of University News and one of the leaders for several years in the effort to have me fired, to create the appropriate climate for bringing charges." Id. at 37. Specifically, Franklin complained to President Lyman prior to the Advisory Board hearings:

> you have been conducting my trial and convicting me in the press, and...almost every day the Stanford News Service, which you control, issues new statements about my case and sends [them] to every faculty member, including each of the individuals who are to try my case, statements laying out your side of it. In fact, the head of the News Service, Bob Beyers, is a prime witness in your case against me in civil court [referring to the University's attempts to obtain an injunction against

Franklin; see note 4 *supra*, and there is no distinction between the intent of his affidavit there and the "news" releases he sends to the press and the faculty.

Letter from H. Bruce Franklin to Richard W. Lyman (Feb. 25, 1971).

219 Stanford University News Service release (Oct. 6, 1971).

220 *Palo Alto Times*, October 6, 1971.

221 *Id*.

222 Stanford University News Service release (Oct. 6, 1971).

223 Stanford University News Service release (Oct. 7, 1971).

224 *San Francisco Chronicle*, October 7, 1971.

225 *Id*.

226 Stanford University News Service release (Oct. 7, 1971).

227 Palo Alto Times, October 7, 1971.

228 Id. and Palo Alto Times, October 8, 1971.

229 The Stanford Daily, October 8, 1971, at 1, col. 1.

230 Palo Alto Times, October 7, 1971.

231 Stanford University News Service release (Oct. 8, 1971).

232 Stanford University News Service release (Nov. 1, 1971).

233 Id.

234 Stanford University News Service releases (Nov. 1, 2, 1971).

235 The Stanford Daily, November 2, 1971, at 1, col. 1.

236 Id.

237 Id.

238 Stanford University News Service release (Nov. 2, 1971).

239
Id.

240
Id.

241
Palo Alto Times, November 2, 1971.

242
The Stanford Daily, November 2, 1971, at 1, col. 1.

243
The Stanford Daily, October 11, 1971, at 1, col. 1.

244
The Stanford Daily, October 25, 1971, at 1, col. 4.

245
Stanford University News Service release (Oct. 25, 1971).

246
The Stanford Daily, October 25, 1971, at 1, col. 4.

247
Stanford University News Service release (Oct. 25, 1971).

248
Id.

249
The Stanford Daily, October 13, 1971, at 1, col. 3.

250
Id.

[251] Stanford University News Service release (Oct. 13, 1971).

[252] *The Stanford Daily*, October 13, 1971, at 1, col. 3.

[253] *The Stanford Daily*, November 5, 1971, at 1, col. 1.

[254] *Id.*

[255] Stanford University News Service release (Dec. 21, 1971).

[256] *Id.*

[257] *Id.*

[258] *San Francisco Chronicle*, October 12, 1971.

[259] *Los Angeles Times*, October 13, 1971.

[260] *The Stanford Daily*, November 8, 1971, at 1, col. 1.

[261] *Palo Alto Times*, November 6, 1971.

[262] *The Stanford Daily*, November 8, 1971, at 1, col. 1.

[263] *Amicus Curiae Brief of Stanford Faculty Petitioners, In the Matter of Professor H. Bruce Franklin* (Nov. 8, 1971).

[264] *Id.*

[265] *Id.*

[266] *Id.*

[267] *Id.*

[268] *Amicus Curiae Brief*, *ACLU of Northern California*, *In the Matter of Professor H. Bruce Franklin*.

[269] *Id.*

[270] *Id.*

[271] *Id.*

[272] *Id.*

[273] *Id.*

[274] *Id.*

275 Id.

276 G. Gunther and H. Packer, Statement in Response to the Brief Amicus Curiae Filed On Behalf of the American Civil Liberties Union of Northern California, In the Matter of Professor H. Bruce Franklin 2 (November 30, 1971).

277 Id. at 3-4.

278 Id. at 3.

279 Id. at 4.

280 Decision, at 3.

281 Id. at 3.

282 Id. at 3.

283 Id. at 4.

284 Id. at 4.

285 Id. at 4.

286 Id. at 4.

287 *Id*. at 4.

288 *Id*. at 4.

289 395 U.S. 444 (1969).

290 *Decision*, at 4.

291 *Id*. at 4.

292 *Id*. at 4.

293 *Id*. at 4.

294 *Id*. at 4.

295 *Id*. at 4.

296 *Id*. at 4.

297 *Id*. at 4.

298 *Id*. at 5.

299 *Id*. at 5.

300 *Id*. at 7.

301 *Id*. at 7.

302 *Id*. at 8.

303 *Id*. at 8.

304 *Id*. at 9.

305 *Id*. at 9.

306 *Id*. at 9.

307 *Id*. at 11.

308 *Id*. at 11.

309 *Id*. at 11.

310 *Id*. at 11.

311 *Id*. at 11.

312 *Id*. at 11.

313
Id. at 11-12.

314
Id. at 11.

315
Id. at 12.

316
Id. at 11.

317
Id. at 12.

318
Id. at 12.

319
Id. at 12.

320
Id. at 12.

321
Id. at 12.

322
Id. at 12.

323
Id. at 12.

324
Id. at 12.

325
Id. at 12.

326 *Id.* at 12.

327 *Id.* at 13.

328 Letter from Richard W. Lyman to Robert Minge Brown (January 8, 1972).

329 *Chicago Sun-Times*, January 23, 1972.

330 *The Stanford Daily*, January 6, 1972, at 2, col. 1.

331 *Id.*

332 *Id.*

333 (Stanford) *Law School Journal*, Feb. 3, 1972, at 2, col. 1.

334 *Id.*

335 *Id.*

336 Statement of the Officers of the (Stanford) Law Association, quoted in a letter from Elaine Wong and Wallace Scott Burke to the Board of Trustees of Stanford University (January 19, 1972).

337
Id.

338
Id.

339
Id.

340
The New York Times, January 11, 1972.

341
The Dallas Morning News, January 8, 1972.

342
Chicago Daily News, January 11, 1972.

343
Concord, N.H. *Monitor and Patriot*, January 27, 1972.

344
A. Dershowitz, *ACLU News*, February 1972.

345
Id.

346
Id.

347
G. Gunther, *ACLU News*, February 1972.

348
Id.

349
Id.

350 *Id.*

351 H. Packer, *supra* note 85, at 78.

352 T. Grey, quoted in text of panel discussion on the Franklin case, (Stanford) *Law School Journal*, Feb. 3, 1972, at 4, col. 1.

353 Memorandum of Decision on Motions for Summary Judgment at 13, *Franklin v. Stanford University*, Santa Clara County, Calif. Superior Court, No. 277253 (Jan. 4, 1977).

354 *Id.* at 5.

355 *Id.* at 5.

356 *Id.* at 6.

357 *Id.* at 6.

358 *Id.* at 8-9.

359 *Id.* at 9.

360 *Id.* at 10.

361
Id. at 12-13.

362
Id. at 13.

363
409 F.Supp. 439 (D. Colo. 1976), aff'd., 562 F.2d 1188 (10th Cir. 1977), cert. denied, 46 U.S.L.W. 3665 (1978).

364
Franklin's appointment had been approved in succession by the University of Colorado's English Department faculty (by a vote of 26-5), the Dean of the College of Arts and Sciences, the Provost, and the President of the University. Id. at 441.

365
Id. at 450.

366
Id. at 451.

367
Id. at 452.

368
Id. at 450.

369
G. Gunther, supra note 347.

370
Franklin v. Atkins, 562 F.2d 1188, 1191-1192 (10th Cir. 1977), cert. denied, 46 U.S.L.W. 3665 (1978).

371
Id. at 1192.

372
429 U.S. 274 (1977). In Mt. Healthy, the Supreme Court ruled that an untenured public school teacher who challenges his or her non-retention on First Amendment grounds has the burden "to show that his conduct was constitutionally protected, and that this conduct was a 'substantial factor' - or, to put it in other words, that it was a 'motivating factor' in the...decision not to rehire him." 429 U.S. at 287. Once the teacher carries this burden, then his or her employer must show "by a preponderance of the evidence that it would have reached the same decision as to...reemployment even in the absence of the protected conduct." Id. at 287.

373
The Stanford Daily, February 13, 1974, at 1, col. 1.

374
Mabey v. Reagan, 537 F.2d 1036, 1046 (9th Cir. 1976).

375
Tinker v. Des Moines Community Independent School District, 393 U.S. 503, 513 (1969).

376
Pickering v. Board of Education, 391 U.S. 563, 572-573 (1968).

377
James v. Board of Education, 461 F.2d 566, 574 (2d Cir.), cert. denied, 409 U.S. 1042 (1972).

378 *In the Matter of Associate Professor Howard Bruce Franklin, Statement of Charges, supra* note 44, at 5.

379 *Id.* at 6.

380

> Some commentators contend that where the overt action [of which a faculty member is accused] does not violate laws or violates laws that are not generally enforced by the government the university may punish such conduct whether it occurs on or off the campus only if it violates moral principles of intra-university behavior or moral principles of social conduct generally, and only so long as such moral tenets are relatively stable and do not extend beyond those generally accepted by the national university community or the national general community, respectively.

Emerson and Haber, *Academic Freedom of the Faculty Member As Citizen*, in *The Scholar's Place in Modern Society* 135 (H. Baade ed. 1964). The common law of the campus applied by the Faculty Advisory Board in the Franklin case may well embody "moral principles of intra-university behavior" as envisioned by Emerson and Haber.

381 *In the Matter of Associate Professor Howard Bruce Franklin, Statement of Charges, supra* note 44, at 4-5.

382 Statement of the Officers of the (Stanford) Law Association, *supra* note 336, at 3.

383
Brandenburg v. Ohio, supra note 71, at 447.

384
Memorandum of Decision on Motions for Summary Judgment, supra note 353, at 10.

385
T. Grey, supra note 352.

386
Molpus v. Fortune, 311 F.Supp. 240, 249 (N.D. Miss.), aff'd., 432 F.2d 916 (5th Cir. 1970).

387
See note 365 supra.

388
Decision, at 7.

389
Id. at 9.

390
Letter from Joel I. Klein to James D. Wascher (April 19, 1978).

391
372 U.S. 335 (1963).

392
See the oral arguments of J. Lee Rankin, representing the American Civil Liberties Union as amicus curiae in Gideon v. Wainwright, as quoted in A. Lewis, Gideon's Trumpet 175 (1964).

[393] Tape recording of telephone conversation between H. Bruce Franklin and James D. Wascher (April 8, 1978).

[394] Letter from Joel I. Klein to James D. Wascher, *supra* note 390.

[395] 406 U.S. 404 (1972). The Court in *Apodaca* ruled that the Sixth Amendment right to trial by jury in all criminal prosecutions, as applied to the states through the Fourteenth Amendment, does not require that juries in state prosecutions to reach a unanimous verdict. The *Apodaca* decision reflected a trend among the states away from the unanimity requirement. Prior to the decision, at least 13 states permitted majority verdicts in civil cases, three states allowed non-unanimous verdicts in minor criminal (misdemeanor) cases and two states permitted majority verdicts in all criminal prosecutions for non-capital offenses. H. Zeisel, ...And Then There Were None: The Dimunition of the Federal Jury, 38 *U. Chi. L. Rev.* 710, 722, nn. 50, 51, 52 (1971). Today, at least 22 states allow non-unanimous verdicts in civil trials, four permit them in minor criminal cases and two (Louisiana and Oregon) permit them in all criminal trials for non-capital offenses. The Supreme Court continues to require unanimous verdicts in *federal* jury trials. *Johnson v. Louisiana*, 406 U.S. 356, 370-371 (1972)(Powell, J., concurring).

396 L. Jayson, _The Constitution of the United States of America: Analysis and Interpretation_ 1204 (1973).

397 H. Zeisel, _supra_ note 395, at 722.

398 _Decision_, at 3 (emphasis added).

399 Van Alstyne, _supra_ note 30, at 128-129.

400 Joel Klein, who helped to represent Franklin before the Advisory Board, writes:

> I do not see any way that Franklin could receive a fair hearing by a faculty group that had known about him and had read about him for years. He had repeatedly been portrayed by the local media as a gun-toting crazy who was bringing local workers...on to the otherwise placid Stanford campus. For years these professors had listened to Franklin's extremist, inflammatory rhetoric. As human beings they simply could not ignore that mind set when they sat as judge and jury in Franklin's case. I do not fault these men for that. But it is for this reason that such people could never have sat on a jury in a judicial case. They were what we lawyers call biased.

Letter from Joel I. Klein to James D. Wascher, _supra_ note 390. Franklin himself is even more outspoken on the issue of bias, alleging that the five members of the Advisory Board who voted to dismiss him had, prior to the offenses of which he was accused, "all declared themselves as wanting to get rid of me." Tape recording of telephone conversation between H. Bruce Franklin and James D. Wascher, _supra_ note 393.

[401] Apodaca v. Oregon, 406 U.S. 404, 413-414 (1972).

[402] Letter from Joel I. Klein to James D. Wascher, supra note 390.

[403] H. Black, Black's Law Dictionary 1345 (1968), citing Button v. Metcalf, 80 Wis. 193, 49 N.W. 809 (1891).

[404] Jan Vetter, the professor of law at Boalt Hall who served as counsel to the Advisory Board during the Franklin hearings, notes that he is "not prepared to say" that the "strongly persuasive evidence" standard of proof applied by the Board is a lesser standard than "beyond a reasonable doubt." The "strongly persuasive" standard put "a pretty high [burden] of proof on the University Administration," Vetter says. Notes from telephone conversation between Jan Vetter and James D. Wascher (April 25, 1978).

[405] H. Black, Black's Law Dictionary 580, citing State v. Koski, 100 W.Va. 98, 130 S.E. 100, 101 (1925).

[406] J. Kaplan, Decision Theory and the Factfinding Process, 20 Stan.L.Rev. 1065, 1073 (1968). The author, Stanford Law Professor John Kaplan, was one of two Stanford faculty members who signed the amicus curiae brief submitted by the American Civil Liberties Union of Northern California

in the Franklin case. Kaplan's analysis of standards of proof was cited with approval by Justice Harlan, concurring in In re Winship, which held that the Constitution required application of the reasonable doubt standard in all criminal prosecutions.

> In a civil suit between two private parties for money damages...we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor [and we therefore apply the preponderance of the evidence standard of proof].
>
> In a criminal case, on the other hand, we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty....In this context, I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination in our society that it is far worse to convict an innocent man than to let a guilty man go free.

In re Winship, 397 U.S. 358, 371-372 (Harlan, J., concurring) (1970).

407
Kaplan, supra note 406, at 1074.

408
Id. at 1074-1075.

409
397 U.S. 358 (1970).

410
In re Winship, 397 U.S. at 363.

411 Board of Regents of State Colleges v. Roth, supra note 73, at 573.

412 The dismissal of a professor for "urging and inciting to the use of illegal coercion and violence," much like the discharge of a defense employee on security grounds during the McCarthy era, could "effectively prevent a worker in some fields from engaging in his occupation at all and... [may be] a badge of infamy that restrict[s] opportunity" in unrelated fields as well. Kaplan, supra note 406, at 1075-1076.

413 Mabey v. Reagan, supra note 374, at 1046.

414 Collins Securities Corp. v. Securities and Exchange Commission, 562 F.2d 820, 821 (D.C. Cir. 1977).

415 Id. at 824.

416 Id. at 821, citing SEC Order Accompanying Opinion in In The Matter of Collins Securities Corporation, Joint Appendix at 1111.

417 Id. at 824.

418 Id. at 826.

[419] Id. at 824.

[420] Id. at 825, citing In re Fisher, 179 F.2d 361, 369-370 (7th Cir.), cert. denied sub nom Kerner v. Fisher, 340 U.S. 825 (1950); Dorsey v. Kingsland, 173 F.2d 405, 406-407 (D.C. Cir.), rev'd. on other grounds, 338 U.S. 318 (1949); In re Adriaans, 28 U.S. App. D.C. 515, 524 (D.C. Cir. 1907); and In re Ryder, 263 F.Supp. 360, 361 (E.D. Va.), aff'd., 381 F.2d 713 (4th Cir. 1967).

[421] Id. at 824.

[422] J. Kaplan, supra note 406, at 1072.

[423] In re Winship, supra note 410, at 369-370 (Harlan, J., concurring).

[424] Letter from Joel I. Klein to James D. Wascher, supra note 390.

[425] A. Hammond, Academic Freedom at Stanford: Lessons of the Franklin Case, Science, March 17, 1972, at 1224.

[426] Van Alstyne, supra note 9, at 84.

[427] Three sections of the California Penal Code appear to proscribe the type of conduct in which Franklin allegedly engaged. Title II, Section 404.6 of the Code provides in relevant part:

> Every person who with the intent to cause a riot [defined in Section 404 as "Any use of force or violence, disturbing the public peace, or any threat to use such force or violence, if accompanied by immediate power of execution, by two or more persons acting together, and without authority of law"] does an act or engages in conduct which urges a riot, or urges others to commit acts of force or violence, or the burning or destroying of property, and at a time and place and under circumstances which produce a clear and present and immediate danger of acts of force or violence or the burning or destroying of property, is guilty of a misdemeanor....

West's Ann. Calif. Penal Code, §404.6 (1970). Title II, Section 409 of the Code provides in relevant part: "Every person remaining present at the place of any riot, rout, or unlawful assembly after the same has been lawfully warned to disperse...is guilty of a misdemeanor." West's Ann. Calif. Penal Code, §409 (1970). Title II, Section 415 of the Code provides in relevant part: "Every person who maliciously and willfully disturbs the peace or quiet of any neighborhood or person, by loud or unusual noise, or by tumultuous or offensive conduct, or threatening, traducing, quarreling, challenging to fight, or fighting...is guilty of a misdemeanor." West's Ann. Calif. Penal Code, §415 (1970).

[428] Van Alstyne, supra note 9, at 84.

[429] Commager, supra note 28, at 222.

430 Van Alstyne, *supra* note 9, at 84-85.

431 Van Alstyne, *supra* note 30, at 128-129.

432 See the text of the AAUP's "Statement of Principles on Academic Freedom and Tenure", *supra* note 12.

433 Committee A Statement on External Utterances, *supra* note 39.

434 *Id.*

435 See the text of the Statement of Principles, *supra* note 12.

436 *Decision*, at 11.

437 *Id.* at 11.

438 K. Lamott, *supra* note 84, at 14.

439 However, the late Herbert L. Packer, then Professor of Law at Stanford and critic of Franklin, wrote in 1972: "Many people have observed that [Franklin] should have been dismissed for incompetence as a teacher. His teaching...was bizarre. To mention just one example, he cited Edgar Snow as the leading prose writer in English of this century." H. Packer, *supra* note 85, at 79.

440
American Association of University Professors, *supra* note 10.

441
Earle, *supra* note 33, at 29.

442
Id. at 29.

443
J. Silber, *supra* note 36, at 37.

444
Hook, *supra* note 32, at 85.

445
Herberg, *supra* note 35, at 2.

446
Memorandum of Decision on Motions for Summary Judgment, *supra* note 353, at 13.

447
M. Barone, G. Ujifusa and D. Matthews, *The Almanac of American Politics 1978* 48 (1977).

448
R. Evans and R. Novak, *Nixon in the White House: The Frustration of Power* 273 n.* (1971).

449
J. Schell, *The Time of Illusion* 57 (1976).

APPENDIX

TRANSCRIPT OF PROFESSOR FRANKLIN'S SPEECH DURING THE NOON HOUR ON FEBRUARY 10, 1971

People are complaining about the meeting going on a long time. [Laughter from the audience] But, you know, you see I think that we could inconvenience ourselves for a few minutes considering what we're trying to do here. Now, there were some, there were some hot emotions at the beginning of the meeting when Bob Grant and Larry Diamond tried to subvert what we were doing. And I think a lot of people misunderstood where things were and what was coming down. Because they believed that they're really very sincere people and so forth. And not that we're some kind of lunatic who just has some private axe to grind; we being the radicals, the revolutionaries. The fact of the matter is that a lot of us were doing precinct work out in the community in 1964, and at that time we were opposed by the Bob Grants and Larry Diamonds of the world. We were called Traitors and Saboteurs of the war at that time. In 1965 the most radical act here was when 24 people stayed overnight in an all-night vigil at the fountain and people came down and beat us up and threw us into the fountain. In '60, in late '65 or early '66, when we had here the first act in the United States of open identification with the Vietnamese people, and a blood drive in North Vietnam, people threw garbage at us. Called us "dirty jew bastards" and "traitors" and so forth. And at every point, you see, when the movement was being built, there have been people who have come out to talk about the tactics alienating the vast mass of people and we understand where that's coming from. Now they come out here and tell us that we shouldn't be doing anything on the University. We should be going into the community. We're the last ones in the world to oppose doing anything in the communities. The fact of the matter is that most of our comrades are working full-time in the community 'cause they come from the community, and they're brown and black and white working-class and poor people. And, see, there's a very extreme form of false consciousness that's created on a university campus. Because we get the illusion because there are a lot of people gathered here that this is a, this is the most advanced opposition to the war. But that poll that was cited, it wasn't a poll of people who were in favor of the McGovern–Hatfield Amendment. They don't know what the fuck that is. It was a poll of people who want to get out of Southeast Asia right now and that poll, which is, and remember it was a poll of people over 21, and mostly white, but that poll showed something. And that is that 60% of those people with a college education wanted to get out of that Southeast Asia now. 70% of people who only have a high school education want to get out of Southeast Asia now, and 80% of people with only a grade school education want to get out of Southeast Asia now. [applause] .. so want to talk about, about high consciousness, high consciousness is the consciousness of the people most oppressed by U.S. imperialism, which includes as a main institution of that Stanford University. And that's why whenever people from that community, whenever poor working class youth from that community, get a chance to come on the campus at Stanford and do a little material damage, they are very eager to do so. Because they recognizewhat Stanford University really is, even if people here don't. Now, see, what the question is, the question of what we do. Now people get up here and talk about workers striking, and the important thing is for us to go out into the community, and tell the workers to strike. Well, that, I mean, it's true that, that the workers have the ability in the long run to bring the war to an end. The war that started with the extermination of the Indian people and black people, and Mexican people, and went on to the point where extermination of people in Southeast Asia. Yes, it's working people who can do that if they strike. But to ask us, for us to ask workers to risk their chances to survive, to physically survive, by really striking, when we can't do a kind of fake strike, is to stand the world on it's head. [applause] Well, when we talk about, see we're just ripping off that term strike when we talk about striking at Stanford. This isn't a strike. We're not risking anything. It's a voluntary boycott. A shutdown of some of the University as a demonstration of something. Now, now what we called a strike last year, and it lasted really about three days and it kind of dragged on, and, you know, in an odds and ends way and some people did it. But just the fact that we were able to move our little finger that much, that electrified the working people of this area. That's a fact and the people who were down there on that picket line, down at shipping and receiving, knew that practically every single truck driver who came there when he saw us on strike said "Okay." He was prepared to risk his job and turn that truck around. And in four states, four states, teamsters linked up concretely with student strikers and said that they would strike if the students were willing to strike. And factory workers were walking out. And the day after that we called that strike there was a record absenteeism of all factories in the Bay Area. See, now what we're asking is for people to make that little tiny gesture to show that we're willing to inconvenience ourselves a little bit and to begin to shut down the most obvious machinery of war, such as and I think it is a good target, that Computation Center. [applause] [Shouts of "right on. . . ."]