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Law as Political Weapon*

Harry R. Blaine and David Kettler

To see no difference between political and other offenses is the sure mark of an excited or stupid head.

Henry Thomas Cockburn,
An Examination of the Trials for Sedition
(Edinburgh, 1888) I, 68

When law can do no right,
Let it be lawful that law bar no wrong.
Law cannot give my child his kingdom here,
For he that holds his kingdom holds the law.

William Shakespeare, King John

I.

American discussions of law often suffer from a fundamental ambiguity. At times the word "law" refers simply to the complex of rules, procedures, decisions, and activities which are the professional concern of lawyers; and at times, often in the same discussion, it conveys the normative expectations of liberal legalism. Thus, the speaker will contend that it is obligatory to obey "the law" because this is "a government of laws and not of men." But "the law" in the first, positivist sense may in fact have little to do with the kind of "law" envisioned by the second usage, where it embodies the constitutionalist contrast between general rules, fairly applied, and individual measures. In the Mississippi Delta, blacks normally and very precisely distinguish between the "day law" and the "night law," referring to the two shifts of police officers. Of course, it may be argued that combining the two senses expresses the empirical judgment that positive law in the United States usually approximates liberal law and the additional contention that such a tie is institutionally guaranteed by the courts. Such argument can be challenged

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1. The discussion draws throughout on the essays of Franz L. Neumann, especially "The Change in the Function of Law in Society," The Democratic and the Authoritarian State (Glencoe, Illinois, 1957), pp. 22-68, and on Judith Shklar, Legalism (Cambridge, 1964). The indebtedness is of a different sort in the two cases: the essay applies Neumann's approach and some of his basic ideas to a situation he had not come to view in this way; the authors depend on the clarification of issues in the other book to steer them from gross confusions in formulating their own argument.

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in a number of ways.  

Two of the most far-reaching challenges will not concern us here. The first questions whether the actual work of contriving, contesting, and enforcing legal decisions can ever in any important way correspond to the type of process envisioned by liberal legalism. And the second denies that the liberal conception communicates any coherent set of criteria. This is not the place for an encounter with these sorts of basic objections. We shall assume that they can be met, and that consequently different sorts of law-work at different times and in different places can be located at different points along a continuum which has at one pole authoritative or enforced commands produced without regard to general rules (“arbitrariness,” “Kadi-justice”) and, at the other, control over individuals exclusively in accordance with authoritative general rules, independently and fairly applied.  

The central issue which we hope to illuminate concerns a movement in contemporary America from the liberal to the illiberal end of this continuum. For observers of law who attend only to the decisions of the Supreme Court, or, more commonly, to newspaper editorials upon such decisions, the assertion of such a movement must appear absurd: isn’t “permissiveness” at the root of our “crisis of authority?” Haven’t the courts sacrificed the basic interests (or “rights”) of society to the claims of those embroiled with law? But it is necessary to distinguish between legal doctrine and men’s actual encounters with legal instruments and agencies. The forceful assertion of liberal legal principles may well serve, under some conditions, as little more than symptom of the dismay experienced by conscientious liberals. The propounding of these principles by even the highest courts may do little to halt the subjection of men to arbitrary rule if their rulings do not reach the abusive exercises of power.

It is proposed to amplify through a case study the following contentions:

1. Legal authority in America has been increasingly delegated to agencies which do not proceed in a legalist manner and which are not under effective legalist constraints.

2. According to Neumann, liberal legalism contains three elements: “... [T]he law must be general in its formulation, its generality must be specific, and it must be retroactive.” Neumann, op. cit., p. 23. Other qualities follow from these: “[L]iberalism regards as the rule of law exclusively the rule of statute law,... [T]he legal system of liberalism, therefore, was regarded as a closed system without gaps; [T]he judge, moreover, must be independent and litigations must be decided without regard for the desires of government. Hence there must be a separation of powers...” Neumann, op. cit., pp. 32, 37, 40.

3. There are promising signs that the current “radical” re-examination of American pragmatism will address itself in a systematic way to Realist and other forms of sociological jurisprudence. See Theodore Lowi, The End of Liberalism (New York, 1969), Charles Reich, The Greening of America (New York, 1970). The authors were sensitized to these developments by Sanford Levinson, whose interesting essay on the subject will appear in a forthcoming memorial volume for Robert McCloskey.
2. Individuals in America are increasingly subject to the power of these agencies.

3. Challenges to these agencies are construed as and then transformed into challenges to lawful authority supported by the whole legal machinery.

4. The ensuing encounters with primary legal agencies involve "political justice," i.e., defendants meet the least liberal face of legislation and the administration of justice.  

5. The "law" invoked by slogans of "law and order" tends to be a law divorced from liberal legitimacy; it tends to be law as political weapon.

6. This tendency feeds into the "crisis of authority" among segments of the population deeply imbued with the legalist myth of authority.

7. The pattern of delegation and the anti-legalistic exercises of power are rooted in emerging social and economic institutions and in the terms upon which power within these institutions is secured.

8. Forceful proponents of liberal legalism effectively operating within these institutions often find themselves unwittingly allied with those who carry on certain political struggles for change, and either trim their principles to enter into alliance with the dominant forces or are cast aside.

The contentions are stated in sweeping terms. They require explication, qualification, and support by evidence. Our contribution to such an undertaking will be modest: we want to tell the story of the uses of legal instruments and agencies at The Ohio State University during the spring and summer of 1970 and to show how these basic contentions can help us to make sense of those complex developments.

II.

In June of 1969, when Richard Nixon and his advisers looked for a university where the president could safely deliver a commencement address, it was sensible for them to settle upon The Ohio State University in Columbus. The successful football coach was a friend and supporter, Bob Hope was scheduled to receive an honorary degree, the university had a large and successful ROTC program; Ohio State could be seen to embody the America of the "silent majority." And in fact the event came off very well: the president was replaced by the vice-president, as it happened, but, except for a hundred bedraggled demonstrators chanting the obvious rhyme upon the vice-president's surname, the occasion was a triumph. (It should be said that the president of the university was compelled to bypass the Faculty Council in order to secure authorization from the board of trustees for the Hope degree, and it should also be recorded that two students who silently stood with their

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fingers raised in the V-sign while the vice-president spoke were hustled off by state police and charged under state law with disrupting a public meeting. But no matter.) Less than one year later, on Wednesday, April 29, 1970, several days before the Cambodian invasion and before the shootings at Kent State and Jackson State, well over one thousand students began a strike which came to involve thousands of students, six hundred or more arrests, and costs and damages estimated at one and one-half millions. The school was closed between May 7 and May 19; it operated for several weeks after May 21 within an area cordoned off by as many as five thousand National Guardsmen. What happened?6

This was no sudden spring madness. The signs had been clear for several years that the program of change being carried through by the managers of the university was encountering a new sort of resistance and that established techniques of counter-resistance could not suffice. It is important to emphasize the unfamiliar point that the crisis at Ohio State (and perhaps elsewhere) cannot be simply ascribed to new demands or new forms of unrest among students; challenges to existing power must be explained in considerable measure by reference to the new uses to which that power was being put. Some of these uses were allocated to the university by other agencies: the power over students’ draft status is a capital example. But others derived from the ambitions and policies of the managerial elite. A brief survey of developments is in order.

After the Second World War there ensued an extended period during which a disparate coalition strove to wrest control of the university from a traditional and very provincial group. Ohio State had been a comfortable and entertaining place, where the local middle class saw its children schooled, where decent professional careers were launched, and where the football team won. These sorts of generalizations always overlook the exciting professors here, the research group that caught fire there, and the pockets of diversity and innovation. But this does not pretend to be a detailed history. The thrust toward modernization during the 1950's and 1960's was clear to all. Allied in this effort were academics and administrators more oriented to national professional audiences than to local dignitaries and alumni, as well as the small but growing number of political liberals, especially in the law school, the social sciences, and the humanities. During the first decade, movement was cautious and very uncertain. In 1954, the university was censured by the AAUP for the way in which it dismissed a professor of physics who had refused to testify before a congressional committee; most liberal members of the modernizing coalition opposed the censure for they were

6. The summaries of events published in The Ohio State Monthly for June and July 1970 are inaccurate and tendentiously selected. There is now a reliable account, “The Spring Events at Ohio State,” in a Report of the Committee of Inquiry to the Faculty Council (Columbus, 1970).
unwilling to oppose the university. But they made important headway.

Entire departments were transformed. Strong chairmen were brought to philosophy, political science, German, and elsewhere, and they were cheered by liberal colleagues and progressive administrators as they prodded provincial older men into retirement or departure and brought in people with "good" degrees and research ambitions, notwithstanding the fact that they might be Jews or easterners. Then followed a series of public controversies turning on a revealing complex of largely symbolic issues. The liberal professors were able to win substantial concessions with regard to rules and policies which represented conservative provincialism. There was a progressive dismantling of regulations based on a role for the university in loco parentis. The academic faculty compelled the university to reject an invitation to the Rose Bowl in 1961 (the only faculty in the "Big Ten" ever to carry things this far! But, then, only for a year or so); not surprisingly, that controversy led to more intense hostility against faculty members from within the community than any occasion until spring term, 1970. Under sustained pressure from students energized by the civil rights movement of the early 1960's, faculty secured a substantial liberalization of severely restrictive speakers' rules on campus. By 1966, then, the modernizers had gained key positions within the administration of the university and liberals promised themselves a decisive breakthrough.

The breakthrough came; but it left the liberals behind. During 1967 and 1968, there were five major situations which revealed various aspects of the new constellation. Since all five also involved highly symptomatic uses of legal weapons, they merit some examination here.

1. Blue-Collar Workers' Strike. The union which has managed to organize a number of the lowest-paid university employees charges that management will not accord it the courtesies normal in serious bargaining and calls its members out on strike. The authorities call upon two sweeping legal resources: they secure a comprehensive injunction against any and all picketing, and they dismiss all striking employees under a state law outlawing strikes by public employees. Disciplinary officials of the university seek the names of the small group of students who join the picketers. An ad hoc committee of liberal faculty persuades the administration officials to retreat from their punitive course and to enter into sustained bargaining with a union made eager for a settlement by the coercive pressure and by the abandonment of the largely black strikers by their skilled white associates. During the last days of the strike, police attack student spectators drawn to the streets by the prospects of police arrests of pickets. A committee of the AAUP reports that police were allowed to cover their identifying badges and to use force beyond all possible justification. University officials are criticized for failure to protect interests of students. On balance,
however, this situation develops in accordance with liberal hopes: the university officials who advocated the harsh course against strikers are countered by the new provost who had been appointed with strong liberal support; those who sought punitive measures against students and faculty supporting the strike are displaced.

But there is a paradox in that victory. Liberals could not argue a consistent legalist position. They persuaded officials to evade the clear intent of the anti-strike law, although they also sought support for a new, less stringent regulation. They urged other officials to find ways of extending special protection against police for university students, while also pressing for grand jury inquiry into police conduct. Legal issues were arising with regard to which legalist approaches seemed to jeopardize other liberal objectives.

Or the seeming paradox can be resolved in another direction. The legal devices brought into play are among those which least accord with legalist expectation. A categorical no-strike law, like Ohio's Ferguson Act, has the form of a general statute; but its implementation always depends on a political judgment about the strength of the strike. Social workers and the like have been actually dismissed for striking, but teachers and fireman and others with political strength are always able to secure amnesty. Regulations governing police conduct and legal recourse in case of abuses similarly depend directly and all-but-exclusively on the political strength of the contesting parties. It is no elitist search for special privilege on behalf of students when university officials are asked to mobilize in their support; it is rather an appropriately political response to a non-legalistic aspect of the law. In the context of an ordinary labor dispute, the liberal veterans of the 1930's who played a leading role in resolving this controversy at Ohio State could respond to the reality of political conflict; and they could make gains. Other sorts of political situations soon left many of them helpless.

2. Demonstrations against Military Recruiting. It has been established practice at Ohio State to allow recruiters for governmental agencies to set up tables in prominent locations, such as the lobbies of classroom buildings and of the library. Students opposed to the Vietnam War begin a series of demonstrations against military recruiters. After some testing of limits, it becomes clear that demonstrators will not physically obstruct the recruitment. With the help of liberal faculty members, demonstrators negotiate a set of guidelines with the provost to define the limits of permissible behavior. But the deans of the Medical and Engineering Schools secure the arrest of students operating within the terms of these guidelines. They are charged with trespass. Liberal faculty members press administrators to honor agreements with students and
to secure dismissal of charges. Instead, university police officers persuade the judge to increase the bail for the twenty-three defendants; students serve brief workhouse terms; the demonstrations are broken.

On one level, the story can be interpreted simply as a victory of traditional and conservative forces over the modernizing coalition. Campus police are under the control of a vice-president closely tied to the older group, and the professional deans involved are similarly connected. But it is important to look more closely.

The controversy touches fundamental political questions about the character and functions of the university. The demonstrators claimed that the recruitment is simply one symbol of the university's transformation into a manpower-training agency for dominant political and industrial powers in the society. Liberals defined the issues as one requiring a balancing of the rights of those wanting to speak in favor of these careers and those wanting to speak against them. The modernizers were content to see the matter defined in these terms, especially if that would avoid the sort of "trouble" which damages reputations for modernity and efficiency. But they would not endanger more basic objectives for the sake of such a definition. When their hand was forced, they operated out of their basic commitment to the university as precisely such a place as the demonstrators described; although, of course, they see their service to the technological society and its government in more complex and more favorable terms than their opponents.

Attempts by some faculty spokesmen to secure a comprehensive review of all service relationships between the university and major industrial, political, and military agencies were flatly rejected. Such a review might acknowledge the political character of the issues and accordingly open to legitimate political conflict matters which had been presented as professional and institutional imperatives. The earlier agreements in liberal terms were simply disregarded. The uses of law as a political weapon in this case are paradigmatic. The law in question is one which grants maximal discretion to the authorities: how does one distinguish trespassers in a public building from those who have "legitimate business" there? The decision to invoke the law is a purely political one.

That political decision affects the power constellation within the institution in several ways. It challenges the modernizers to carry their agreements with liberals to the point of an open breach with the new forces mobilized by the very fact that arrests have been made and reported in the press. And, of course, it functions as effective counter-resistance against a resistance as weak as the one here in question. With resources of time and money as scarce as they were, the need to fight the cases
and to pay bondsmen and fines depleted the energies of resistance. There are costs, too, of course: the possibility of making martyrs and increasing resistance always exists. (But these costs can be minimized with skill.)

Liberal sensibilities were soothed by the establishment of a Commission of Student Rights and Responsibilities. It labored through the year to lay out some rules and procedures governing demonstrations and the decision to call on external law. Its report was disregarded when the trustees enacted new "disruption" rules which contained so vague a definition of the offense as to make it generally available as a political weapon. The chairman of the commission, however, became the new provost.

3. Black Students' Sit-In and Criminal Indictments. The campaign of a newly formed Black Students' Union on behalf of quite modest demands culminates in a "sit-in" in the administration building. As with the anti-recruiting demonstrations, it is important to recognize that the students' action is as much a response to new functions and powers of the university as it is an embodiment of new expectations. As the university becomes the primary agency for screening aspirants to social mobility and as the increasing professionalization and sophistication of the university make the screen ever finer, the political demand for conditions which will somehow allow people to secure the required certification becomes more urgent. That demand is in time transformed into more "revolutionary" ones; but it is an inexcusable error to treat developments in the universities during these last years as if the demands underwent no change. In the spring of 1968, black students at Ohio State sought concessions which would lower the obstacles against their graduation.

The day-long presence within the administration building produces nothing more serious than a few instances of heckling and jostling. The provost refuses several offers of police help and, with the help of a liberal lawyer close to the students, signs an agreement covering many of the major demands. At the end of the day, provost and black leaders jointly pose for news cameras. A touching sign of the event is that thirty-four students sign a list which the provost undertakes to use to secure excuses for the classes missed that day. That list then comes to serve as the roster of those indicted by the grand jury on a battery of felony charges. The university bypasses its own procedure to impanel a special disciplinary commission composed exclusively of minor administrative officials; the penalties proposed by that commission are increased by the president. The agreements are scrapped, although a number of concessions are implemented. Two legal areas thus open for our examination.
a. The actions of the county prosecutor. It was clear at the time that this official chose a "popular" step in an election year. But it has become clear since then that he also acted at the instigation of some university officials, who sought to use his action in the same way as they had used the trespass arrests. The results were mixed. There was doubtless some impact on the other policies of the university: if the "sit-in" was defined by a grand jury as the occasion for felonies carrying more than life-term penalties, it could hardly be treated by administrators as the occasion for hard but successful negotiations. The indicted students were subjected to an ordeal which lasted for a year or longer. The energies of the students' allies were altogether taken up with the struggle against the indictments. On the other hand, the indictments were so overdrawn that the political character of the prosecutions could be shown to many who would not otherwise accept that. Support could thus be mobilized behind the black demands as well as behind the defense of the accused. A more limited campaign appealing to the goodwill and more intelligent self-interest of influential persons was also carried through. The indictments were finally dropped, after the prosecutor had been privately reprimanded by a group of prominent attorneys.

b. The actions of the university against the students. Liberal lawyers fought the abuse of the university's own processes and finally won the reinstatement of all the students two years after the event.

4. Professional Purification of the Sociology Department. A new chairman in the Department of Sociology establishes a new category of faculty: he announces that about one-third of the faculty are either "frozen" in their present rank and salary (if tenured) or due for termination. The grounds differ in detail but all come to a charge of inadequate professional accomplishment. The measures are hard but appear reminiscent of earlier modernizing moves. But the situation differs from the earlier in two important respects. First, the criteria for professional accomplishment differ from those applied earlier. Sociologists whose work does not fit the scientific paradigm dominant in the major agencies of the national profession are not credited for their publications and other accomplishments. Many of the liberals who supported and benefited from the earlier transformations in other departments would themselves be excluded under comparable rules (and in fact a number of the most prominent have been allowed if

7. This prosecutor recently achieved his (to-date) highest goal when he was appointed to a vacant seat on the bench.
not encouraged to depart since then). In addition, a number of graduate and undergraduate students experience the pressure against teachers they admire as direct pressure upon them to conform their intellectual interests and work rigidly to the dominant mode. They fight this as a political challenge. Protest campaigns among the affected students and faculty gain little support or understanding from others, and most of the faculty depart. Liberal faculty consider the issue exclusively within a framework of due process: did the "freeze" violate vested rights without due process?

The AAUP determines that the chairman acted unwisely but within his legal competence. This stark example is simply the most visible instance of a development which moves forward in various departments and offices. Programs of research and instruction are progressively reoriented to the imperatives of grants and contracts and to the training of the "scientific establishment." The trend exemplified in these changes at Ohio State has been revealingly described by the political scientist, David Apter:

Modern society then is composed of a small but powerful group of intellectually participant citizens, trained, educated, and sophisticated, while all others are reduced in stature if they are scientifically illiterate.... Solidarity, centered around the "establishment," makes nonestablishment people increasingly superfluous. Functional roles are those relevant to planning, policy, and research. The new "ideology" is increasingly rooted in a professional cadre of highly trained men.... The schools reflect the differentiation of the public into the disestablished and the established. Fifteen or twenty major universities provide professional education and post-graduate training.... A somewhat wider group of universities is anxious to move into this "academic establishment." ... The hierarchy of educational establishments intensifies bifurcation. The schools, colleges, and universities are becoming a major screening device.8

Present purposes do not allow us to inquire into the correctness of the claims implicit in that account. The point is that Apter well reflects the aspirations of the social scientist-modernizers who now found themselves in key positions at Ohio State. The new provost was a political scientist whose earlier career had clearly identified him with this view; the dean of the new College of Social and Behavioral Sciences proudly proclaimed and implemented it. These developments are of course

central to the "politicization" of the student bodies: not only that small proportion directly disturbed by the elimination of "qualitative dissent" from the university, but also the vastly larger number of undergraduates bewildered by new sorts of demands and frustrated by the reallocation of resources from undergraduate instruction to the expensive new programs.9

5. Dismissal of a History Teacher. On the morning after the assassination of Martin Luther King, an assistant professor of history tells his class that the event starkly puts before Americans a choice between complete abandonment of force and violence and unconditional enlistment on the side which has the greater measure of justification for its uses of force. To dramatize this statement on the case and to relate it concretely to the experiences of his class, he takes his draft card from his wallet, lights a match to it, and then circulates in the class two envelopes: one for draft cards and the other for financial contributions towards the purchase of weapons for blacks committed to armed self-defense. He repeats this dramatization at an outdoor rally. On both occasions, he returns the few draft cards placed in the "burning" envelope to their owners, telling them that they must carefully consider their course. The money collected (and there are several hundred dollars) is turned over to the Black Students' Union, whose activities in fact have nothing to do with armed defense.

The ensuing controversy was complex and cannot be reported here in any detail. But it is instructive to consider the sequence of events. The initial responses of the administration, acting through the provost, were mild. After some discussions with the chairman of the department and the academic dean, there emerged a decision to reprimand the teacher and to freeze his salary for the next year. The decision was released to the press. Two major developments dissolved these administrative measures. The director of the School of Journalism made public charges against the instructor, contending that he had incited a meeting to attack news reporters, a charge later shown to be without foundation but serving at the time as an effective counter to the generally favorable press-image of the teacher as a highly moralistic, "straight" young man. And the provost's decision is announced on the very day of the Black Students' Union "sit-in" discussed earlier. Spokesmen for the university promptly reported that the release concerning the teacher had been a preliminary draft pending a final decision and that it was issued to the press in the confusion attending the occupation of the building.

During the following week, news reports on a special meeting of the board of trustees quoted individual trustees as demanding the immediate dismissal of the offending instructor. These reports were confirmed to one of the authors during private consultations with the provost: the provost was taking political soundings among various faculty groups to determine his response to a categorical demand from the trustees for dismissal, with the added determination by the trustees that they would simply refuse to approve the contract no matter what the administration did. As a result of these developments, formal charges of “grave misconduct” were filed and a special hearing commission of faculty constituted, as provided by the rules of the university.

After fair and full hearings, the commission recommended to the president that there be no finding of misconduct with its attendant penalty of dismissal, but that the defendant be censured for his poor judgment and placed on some sort of probation during the next year. The president rejected this recommendation, contending that such poor judgment constituted grave misconduct and that there could be no such status as “probation” under the rules. He then proposed to the board of trustees that the instructor be dismissed, with a year’s notice. The board in turn took advantage of a provision of the rules which allows immediate dismissal where the offense is especially grave. The only technical violation of the rules, as determined by a committee of the AAUP, was apparently a failure by the board to hold some sort of hearing before increasing the penalty. A decision by the national agencies of the AAUP is still pending at the time of this writing (almost three years later!) and it may prove that there were other violations of “due process.” It doesn’t really matter, for our purposes. Several things emerge from the story, in any case. That the rules allow for upward revision of penalties at two levels merely exacerbates the basic condition already defined by the vagueness of the offense. Even unexceptionable adherence to fair procedures could not change the basic fact that a decisive requirement of liberal legalism is missing. Speaking of criteria in the German Civil Code precisely analogous to “grave misconduct,” Franz L. Neumann writes:

[These] are not specific laws with true generality. They embody rather a spurious generality. Because in present-day society there can be no unanimity on whether a given action, in a concrete case, is immoral or unreasonable, or whether a certain punishment corresponds to or runs counter to “healthy popular sentiment” they have no specific content. A legal system which derives its legal propositions primarily from these so-called general principles (Generalklauseln) or from “legal standards of conduct” is nothing but a
mask under which individual measures are hidden. A rationale for departures from strict legalist norms offered in an early version of a report by an Ohio State AAUP Committee further illuminates the situation. In defense of the president's powers of revision, the committee writes:

There is ... a necessary difference of perspective [between faculty and president]; the faculty can appropriately express its concern with human values in these matters while the administration can appropriately represent institutional values.... The effective functioning of the University requires the Office of the President be permitted to override arbitrary [sic] or unwise faculty decisions. Neumann offers the following account of the most influential National Socialist school of jurisprudence:

Institutionalism transforms the plant into a "social work and factory community" in which the worker is not only an instrument of the entrepreneur but also is "a living member of the working community of entrepreneurs and workers."... The core of institutionalism is the elimination of the legal person from the legal system, and the absolutization of the institution.... According to

10. Franz L. Neumann, op. cit., p. 29. See also Otto Kirchheimer, op. cit., chap. 5 and Judith Shklar, op. cit., pp. 152-3, 209-220. The following definition of legal punishment (as distinct from an act of hostility) refers to violent sanctions rather than the sorts of deprivations exacted in this case; but the basic principles apply:

Punishment is a "penalty imposed for the transgression of a recognized norm established either by coercion or consent in the course of a social relationship. The features that distinguish violent legal punishment from other kinds of violence ... are the fundamental conditions of legality. For violence to qualify as legal punishment, it must be imposed by duly constituted public authority for an act within its jurisdiction that is publicly judged to violate a legal rule promulgated before the act took place. In addition, the penalty must not exceed that stated in the law, and ... it must be inflicted with the intention or the reasonable probability that it will strengthen the disposition to obey the laws...."

E. V. Walter, Terror and Resistance (New York, 1969), p. 25. Walter's conceptions of power, resistance, and counter-resistance influence the analysis throughout. The transfer of criteria from exercises of public power involving violent sanctions to the sorts of situations depicted here is justified in large measure by the argument developed throughout the paper that the powers here in question function as important instruments of public control and that the sanctions imposed merge imperceptibly with penal sanctions. Beyond that, however, the analysis rests on the following: "For purposes of legal theory, the real distinction is not between governments and other agencies that enforce legalistic policies, but between legalistic and nonlegalistic modes of behavior, thought, and social policy." Shklar, op. cit., p. 55.

Renard, the institution is an organism or a legal structure which serves the commonweal. It is not a simple relationship; it is "existential." It is a unit, "a whole" in which the single individuals are integrated.... Thus the enterprise is divorced from the entrepreneur, the corporation from chairman and board.12

This parallel is not adduced as a underhanded way of suggesting that the objectives and purposes of "institutionalism" are the same in the two instances. But if such abandonment of legalism in and of itself has the significance which liberal commentators claim, then the similarity in this respect is not wantonly brought out. In the case under discussion, there were efforts to specify the vague charge by reference to AAUP injunctions against needless introductions of controversial matters into the classroom and demands for "objectivity." There are fundamental difficulties with these principles. The key concepts refer to assumptions about what is happening in a classroom which simply cannot be taken as self-evident.

The problems can only be mentioned at this point, but they cannot be overlooked because they form an important part of the complex here under review. With the "professionalization" of society, there is a rapid contraction of the size and importance of a "public" sphere juxtaposed to areas of private commercial and professional activities. It becomes less and less meaningful to distinguish the roles of teacher-researcher from the role of "citizen." One either addresses oneself to "public" sorts of issues and concerns in the course of one's work, or one accepts a passive relationship to the processes which make public decisions. The "scientific ideology" expounded by Apter in the essay cited earlier accepts this; but it minimizes the clash between this view and the one embodied in AAUP principles through the claim that the new politics is, so to speak, immanent within rigorous objectivity. If one questions this ideology, one is nevertheless left with the problem.13

The issue is sharpened by the heightened awareness among students that education is a form of power. Any conduct on such an occasion as that in which this case emerged is thus perceived to be political conduct. The requirement that classrooms proceed with professional discipline as usual, then, is a political requirement which approaches the scientific ideology to the extent that the disciplines come to embody it. This is not to suggest that every teacher at Ohio State except the dismissed instructor acted on that day in accord with the scientific ideology; obviously he was singled out because of the dramatic quality

of this extraordinary conduct. No one challenged those who canceled classes or devoted them to special tributes, etc. But the decision in this case was significant, nonetheless, and indicative of trends which would become substantially clearer during the following two years.

To sum up the conclusions to be drawn from this sketch of five incidents, let us contrast the liberal vision of the university, and of the place of law within it, with the emerging reality. The classical statements derive from von Humboldt and John Stuart Mill. "The goal of education," in the words of an historian, "was to be the cultivation of harmonious personalities in men. The universities were to be given an ethical task: the search for truth—because the truth makes men free." 14 This goal was also in the highest sense a political one. The autonomous university would serve the liberal state by fostering the capacities which such a state requires. Although liberal spokesmen differ in matters of detail, it can be said that this conception of the university's task generally is seen to entail three sorts of relationships to the state and its law. First, the university is to be constituted a legal corporation possessing such attributes as may be required for the conduct of its affairs. Second, the members of the university are to be provided with the legal safeguards guaranteed to all individuals while in the pursuit of their peaceable affairs; this includes police protection against interferences or deprivations of rights, but also comes to include some participation of courts and other public agencies in protecting individuals against gross abuses of the corporation's "private power." 15 Third, the universities may be strictly private foundations or they may be fostered and supported by governments who recognize that autonomy is the necessary condition upon which the highest service of the universities depends. This conception of the university was developed in contrast to authoritarian or crudely utilitarian conceptions in Germany before 1848, in Victorian England, and in the United States during the first two-thirds of the twentieth century.

We are not now concerned to ask whether such a conception is a desirable or practicable ideal today. We are concerned to show that contemporary universities of the sort described by Apter cannot be seen as imperfect approximations of this ideal, that an institution like Ohio State has deeply rooted structural characteristics which incline it in directions directly antithetical to those envisioned by the liberal scheme, and that an orientation to practice governed by liberal conceptions will alternately lead one into a posture so "radical" as to confuse and frighten him, as one is caught up in the politics of structural change, for which liberalism is a poor guide, or lead to complicity through the misapplication of liberal nomenclature to forces which now perform basically illiberal functions. When training, screening,

and the inculcation of the scientific ideology become the prime purposes of the university, and when the implementation of those purposes requires political mastery over old and new resistances, the character and function of law and legal agencies will differ decidedly from those assumed and expected by liberal legalism. Law serves as political weapon.

We do not say that politics is wicked and only legalism justified. Political actions must be weighed by political criteria and met by political responses. But legalistic arguments uses as a propagandistic tool pollute the universe of public discourse, and political weapons disguised as legal agencies of a liberal state threaten the minimal but essential securities which legalistic arrangements can provide. The degradation of public discourse contributes massively to that contemporary crisis of legitimacy which John Schaar has fittingly described as follows:

Events, institutions, and moral and epistemological ideas which,
taken together, constitute modernity have virtually driven humanly meaningful authority and leadership from the field, replacing it with bureaucratic coordination and automatic control processes, supplemented when necessary by ideology and phony charisma.16

David Apter and others will argue that the scientific ideology has the capacity for reconstituting legitimacy in society, although there will always remain the problem of ideological and irrational challenges from among the disestablished. Schaar does not so much question the empirical possibility as underline its meaning, when he remarks, "[Those] in this tradition see a polity not as a people with a culture seeking together the forms of order and action that will preserve and enhance that culture, but as a mass or collective that is made into a unit of control by propaganda. That is no doubt a fairly accurate conception of most modern systems of rule, but it is worth remembering that a politics of propaganda and ideology is not the only possible politics."17 It is not appropriate to pursue these questions in this place; but it is important to mention them so that the basic thrust of this

17. Ibid., pp. 285-6; see also Theodore J. Lowi, op. cit., Jurgen Habermas, "Technology and Science as Ideology," in Toward a Rational Society (Boston, 1969). E. V. Walter summarizes well the important argument of Hannah Arendt:

[She] points out the consequences when the notions drawn from areas of productivity invade the understanding of control and authority. . . . Therefore, when the idea of control is confused with notions of fabricating and building, people may be viewed not only as instruments but also as materials to be shaped according to design. From this viewpoint resistance may be interpreted as the unyielding property of a stubborn material.

essay be clear. We contend that the illiberal political process was far advanced at Ohio State by 1970; we contend that the events of 1970 must be understood in considerable measure in terms of that process, the cynicism about official claims to legitimacy which was pervasive among students, and the manipulative use of law and legalistic phrases; but we do not contend that the "bad guys" cannot consolidate their gains and that "the system" is bound to succumb to revolutionary forces. There may be many more commencements at Ohio State with Mr. Agnew, Mr. Hope, and their friends. It all depends on our ability to understand the costs of what is happening and on what we do.

III.

To interpret a complex sequence of events like these exclusively in terms of relations among the parties within this particular institution is to abstract from the broader constellation within which these relationships are constrained. But it is not an arbitrary abstraction. Of course, the students and faculty at Ohio State resonated to happenings elsewhere. And the managers responded to pressures and opportunities emanating in the broader social and political structure. The main trend of events, however, cannot be explained by some theory of culture-contact and imitation or by some theory of diabolical manipulation from "outside." The basic forces had been, so to speak, internalized within the institutional system of power and the systems of resistance at Ohio State.

Walter defines a "power system" as "a pattern of actions, performed by specific persons, which controls a range of behavior in a specific group and deals with instances of behavior, within a given range, out of their control." To speak of a "power system," then, is not to prejudge questions of legitimacy; it is not a pejorative term. "Resistance," on the other hand, as seen from the ruler's perspective "may be understood as defective cooperation of greater or lesser degree, or as some kind of behavior, intentional or not, that renders authority incomplete."

In any institution as complex as a modern university there will be countless instances of resistance, both "inertial" and "reactive." But we are interested here in some patterns of reactive resistance; i.e., resistance "specifically oriented to political authority." Walter distinguishes three levels of force: "(a) challenge, which may take the form of warning, protest, remonstrance, or rebuke; (b) disobedience of specific commands, obstructions, refusal to cooperate with certain decisions, or retaliation in some other sphere; (c) withdrawal of support or an attack on the entire authority of the ruler—usually described as secession and rebellion." 18 In this language, the situation at Ohio State can be described as one in which inertial resistance among students was in some measure transformed into reactive resistance.

of the first sort. There followed an advance among some participants to the second level. The established policy of those in control of the power system was to treat the situation as one at the third level, even if that ran the risk of forcing some to that point.

On April 24, 1970, an audience of several hundred students assembled on the steps of the administration building applauded the reading of a long list of "demands," which can be divided into four major classes, identifying the forces which coalesced in the strike movement. First came a set of symbolic and practical black demands. The most striking thing about these in contrast to the demands of earlier years was their direct and sophisticated incursion upon the power system. They asked not only for an official concerned with black student affairs, having the status and operating budget of a vice-president, but also for a community advisory committee which would provide that official and his programs with organized support. In this they simply adapted to their present needs the experience of other groups who had been able to build a basis of support into the structure of the university during the earlier phase, when the land-grant university assembled a congeries of services for a variety of clients: agriculture, labor, journalists, and the like. (The dominant economic interests in the region had no need for such special protections since they had always supplied all the members of the board of trustees.) Ohio State had made some provision for black interests, of course, but results were inordinately sparse, even in comparison with similar institutions in the area. More than that, the organized black students felt that they were actually losing ground. There had been very little recruiting of black faculty, and the pool of available candidates was known to be very depleted. A young doctoral candidate appointed as an assistant to the dean of men had been denied any resources or influence and had then been compelled to resign as a result of conduct which many considered justified.

The second set of demands related to the conduct of war research at the university and to ROTC. The anti-war movement at Ohio State had a fairly small core of actives but had managed to mobilize quite a respectable following for the Moratorium activities of the preceding autumn. Polls at Ohio State, like those elsewhere in the country, showed a substantial majority in favor of American withdrawal from Vietnam. The campaign against recruitment, however, had gained no response beyond the actives, and the ROTC issue had been substantially defused by a series of adjustments eliminating the pressure on students to choose ROTC. The organized groups actively presenting themselves as supporters of the Communist revolutionaries were small and were badly harassed by the local police. (At about this time the last chairman of the local SDS had six separate charges...

19. At a land-grant institution such as Ohio State it is required by law that ROTC be offered. Until recently, however, the university required all male students to take two years of military science.
outstanding against him, ranging from disorderly conduct and keeping a disorderly house to inciting to riot by distributing leaflets in downtown Columbus on the day after some upheavals in the black ghetto to unlawfully harboring a minor. This abuse of legal process was fairly widespread, especially against the "street people" of the area. It was clearly abuse because charges were often brought without any expectation of prosecution, in the hope of driving the "undesirables" out of the area. Recalcitrants were occasionally imprisoned.)

There was considerable overlap between the leadership of the anti-war movement and a group of graduate students in political science vigorously opposed to the professionalization of the department. These characteristics of the anti-war group are important because they helped to shape the administration's response to them. On the one hand, their past weakness led to a crucial underestimating of their potential support and a total failure to appreciate the significance of the alliance between them and the leaders of the organized blacks. On the other hand, past associations with them in the context of conflicts within political science led the provost to identify them as ideologically sophisticated opponents of the system he was seeking to further; this made him less willing, perhaps, to make the sorts of symbolic gestures which might have managed this situation as others had been managed.

The third demand is especially pertinent to our central concern. What had united the blacks and the anti-war students was common opposition to the "disruption" rule adopted by the trustees after the spring of 1968 against the recommendations of the committee of which the present provost had been chairman and against the vote of the Faculty Council. Charges under this rule had been filed during March and April against leaders of both groups. In both cases, the political decision to act had been made by a recently appointed vice-president for student affairs whose renowned puritanical propriety was affronted by some allegedly disrespectful conduct. The details are not interesting, but there was no violence involved, no interference with any academic work, no defiance or determined confrontation. A completely vague rule was applied to situations considered ambiguous both by campus liberals and others. There were demands for amnesty and for an elimination of the rule. In fact, the protest against the disruption rule was the issue used to attract faculty speakers to the rally and to attract considerable sympathy within the student body.

The fourth set of demands also have to do with the power structure of the university. The demonstrators demanded "fifty percent student representation" on university committees. The slogan itself came from a group of students in the School of Social Work who had been striking in support of that principle during the week before. The occasion for the demand was the conviction that a popular unorthodox professor was in the process of being
forced out by his colleagues on grounds of "unprofessional" attitudes. The main group of demonstrators had not much initial interest in this class of issues; in fact, they had been prepared to announce nothing more than a demand that this change be instituted in the School of Social Work until the peculiarity of such a course dissuaded them. The demand embarrassed faculty supporters of the strikers later and was seldom defended in just these terms by strike leaders; but it doubtless played an important part in the success of the movement. It stood for a basic concern with the things troubling students in their immediate situation: dormitories were overcrowded, but first- and second-year students were required to live in them because bondholders had been promised that there would be such a rule; there had been a sharp rise in tuitions at the beginning of the year; "in the Autumn Quarter, too, nearly five hundred courses were closed out, some of them being popular or even required courses for many students.... This situation continued for the Winter and Spring Quarters, with nearly four hundred courses closed each term, affecting one-fourth of the student body." 20

It will not do to ascribe these conditions simply to the parsimony of Ohio legislatures or the archaic tax structure of the state. Settled university policy allocated scarce resources to the development of professional graduate programs. The dean of one of the major colleges expressly instructed the curriculum committee of his college to reject all proposals for new lower division courses. When undergraduates write home that they have been standing in line all day unable to get into courses, the legislature will vote new funds, he supposedly remarked. Other structural factors contributed to the same results. Junior faculty was recruited and promoted on the basis of its contribution to research programs. The point of the observation is not to repeat familiar bromides about the sacrifice of "teaching" to "research." The point is rather that faculty was recruited on the basis of its suitability of contract- and grant-oriented programs and patterns of research. Students often did not understand these forces; but they experienced their consequences. The demand for "student-power" represents that experience and manifests resistance to it.

The initial response of the administration to the reading of the "demands" was cautious and perhaps conciliatory. An emissary from the provost invited the "leaders" into the building for a discussion. The invitation was refused and two revealing reasons given. First, the spokesmen expressed fear that those who entered the building would be subjected to arrest or to charges under university rules. This was what had happened to the leaders of the black student demonstrations twice before, as they saw it. (It may be noted now that by the end of the summer term virtually all the students selected as negotiators by the striking students were indeed ousted from school.) Second,

many of the students in the crowd objected to the political pattern of having these matters handled in confidential meetings between officials and students supposed to be representative. Some of this may have stemmed from distrust of those who would be the leaders; some from protest against the symbolic closedness of the administration building; ever since the protests of 1968, all doors to the administration building had been locked and guarded at the first announcement of any sort of demonstration. Control over the building was also routinely transferred to the commanding police-official, so that university officials professedly lacked even the power of changing this condition for good cause. In any case, a speaker for the students said that they would return on the following Wednesday for a reply to the demands and that they would strike if they were not satisfied with the reply. It is almost certain that this proclamation was an improvisation designed to break the impasse on the steps.

The next actions of the university were ambiguous. On the one hand, the provost managed to arrange two meetings between spokesmen for the students and various officials. These meetings were largely taken up, it appears, with efforts to show the students that the more reasonable of their demands were already being met as quickly as was practicable and that the rest were unworkable or impossible of attainment or unfair. Two conversations with the provost at that time reveal much. When a faculty member on an informal occasion immediately after the demonstration expressed general sympathy for the provost's trials but also expressed his own opposition to the "disruption" rule, he received a furious reply that the student demonstrators had already "disrupted" the work of his office. To the faculty member who accompanied the students during the first discussion, the provost remarked, "Bring them again." The teacher had never before met any of the students. This attitude, that the students' actions were fundamentally improper and that they did not represent any genuine forces on the campus within the student body, found more dramatic expression. Already on the day after the demonstration (and while his office was trying to persuade students to attend a meeting with him) the provost gave the press a contemptuous account of the student "demands." This administrative reaction reached its climax in the actions of the president on Monday, April 27. Without regard to the discussions presumably in process, he prepared a letter which was published on the front page of the student newspaper on the following morning and which was delivered to each faculty member that day. "The President urged that a cooperative effort be made to 'discharge our responsibilities in concern with the mission of this institution.' " He continued:

I believe that it is a tribute to more than 40,000 students on this campus that they are willing to work within the existing structure in an effort to solve problems of mutual concern to all of us. At the same time, I believe it is a disservice to those students and to
members of the faculty when a fraction of one percent of the student body can mount an issue that detracts from the central purpose of the institution and dissipates the energies of so many of us who are willing to work here. Problems today, in my view, can be resolved best by engaging in an intellectual process designed to solve problems rather than by wasting energy, time, and resources in reacting to demonstrations, confrontations, and demands designed to circumvent the orderly and civil processes of an institution.21

By Tuesday evening, the elected student government had voted to support the strike. The following morning, a substantial proportion of the students in the liberal arts boycotted classes. Strike marshals were overwhelmed by the turnout of students: energies and resentments had been tapped which had not been known to exist.

But it is not the purpose of this paper to chronicle the progress of the strike. We have attempted to portray some of the forces involved. Now we shall concentrate attention on several uses of law. Such examination will show, we believe, that law did not serve to restore anything similar to the order envisaged by liberal legalism; law served, rather, as political instrument in a political struggle against politics. We have emphasized the initial stages because decisions were then made which set in motion the processes which shaped the remaining events. The brilliant discussion of “The Structure of Counter-Resistance” by E. V. Walter explains this point.22 Walter opens:

A political community is a system of cooperation before it can be anything else. In hierarchical communities such as chiefdoms and states, men and authority initiate and judge the course of interactions. Their subordinates sometimes experience political decisions as acts of force—that is, as commands against their will bearing unfavorable consequences for their own lives or for the community as a whole. They may react to unfavorable situations and render authority incomplete by performing isolated acts of resistance or by pursuing highly integrated political activities. Groups resist not only to oppose specific policy but also to preserve their vitality and to defend their internal social environment against disruption.23

He then identifies phases of organized resistance. The phase of “alarm reaction” is the time when the “undesirable command is rejected and

21. Ibid., p. 60. The “orderly processes” of such institutions are reminiscent, mutatis mutandis, of Walter’s description of counter-resistance devised by the rulers he is studying: “Political methods of confining the (resisting) chiefs usually designed hierarchies of overlapping jurisdictions, and tangled skeins of official functions with complexities that only the king’s power could resolve.” Walter, op. cit., p. 329.
23. Ibid., p. 336.
resources are mobilized to punish or countercontrol the establishment . . . . It is often a moment of rapid communication and intense interaction, creating new ties and solidifying old relationships." A major unifying force is "perceiving the establishment as an opponent." Such symbolic circumstances as the locked doors of the administration building at The Ohio State University and such material circumstances as the filing of "disruption" charges foster such perceptions. Next comes the "stage of action . . . when resistance achieves maximal strength. Usually at this stage the establishment modified the initial force. It withdraws the original command or else reinforces the initial decision with persuasion, with additional coercion, or with violence." 24

Walter notes that, if the threat to the system of cooperation is minimal, "the establishment can afford to deal with it by watchful neglect. . . . For example, if demonstrators protesting the activities of military forces, an economic organization, or a university limit the resistance to criticism or challenge, and if their action remains external to the cooperative system in question, visible counter-resistance may be avoided. If the action interferes with the system of cooperation or if the protest manages to persuade members of the organization to withhold cooperation, however, active counter-resistance of one kind or another is inescapable." 25

When a judgment of interference is expressed in the language of "disruption," of course, it becomes clear that this judgment depends in considerable measure on the political definition of the system of cooperation itself. When the struggle directly involves that definition, as it did at Ohio State, it is not surprising that some contestants will in good faith disagree about the extent of "disruption." For many of those who sided with the resisters, neither the protests nor even the strike constituted disruption because encounters and discussions about the purposes of universities were seen as extraordinary but integral aspects of the system of cooperation itself. The provost and his staff, in other words, were not to be seen as having been "disrupted" in their work when they were called to deal with demonstrators; they were called from one part of their work to another. 26 Most of the resisting students saw things in this way, although not all. There was vacillation among administrators, but the prevailing current is clear.

Even when a situation is recognized as having reached the action stage of resistance, the establishment naturally has the alternative of making the concessions which would satisfy the resisters. Men in power, Walter remarks, usually assume that their power is severely compromised when they "give in." They do not usually calculate the social costs of failure to do so. Walter sums up the experience:

24. Ibid., p. 337.
25. Ibid.
26. This viewpoint pervades "The Spring Events," op. cit.
If the establishment fails to respond before the resistance moves to the peak of adaptations in the second phase, the interactions, relationships, and mobilization in the dissident group may create a new social reality for the members. Conditions of the second phase may stimulate the group to new perceptions and new expectations which make it impossible for them to return to the old compact.27

Techniques of counter-resistance which attempt to lead men to withdraw resistance voluntarily, such as arguments, flattery, promises, bribery, tokens, rewards, buying off leaders, negotiation, bargaining, exchanging advantages, rapidly become unavailable as the second phase unfolds. Rulers are constrained to rely on coercive techniques: penalties and force “to secure an involuntary withdrawal of resistance or simply in order to crush resistance by armed strength.”

Depleting the opportunities for voluntary cooperation does not destroy cooperation, but it changes the nature of the system. It leaves few resources beside the coercive apparatus of the state. The loss of voluntary cooperation induces a mood of desperation and a conviction that cooperation must be maintained at any cost. It increases the temptation to depend on the “forced choice” game of incentives and on the violent removal—ultimately the violent inhibition—of resistance. In extreme cases, transformation of the entire society may be the price of counter-resistance.28

As Walter emphasizes, constitutional order is designed to prevent such developments; it confines “resistance to legitimate actions, makes it predictable, and promises that the manner of its expression will not endanger the system of cooperation.”29 A major sign of such order is liberal legalism. The unavailability of liberal legalism is a basic sign of the absence or the malfunctioning of constitutional order. From the point of view of the general analysis, it does not matter whether the malfunctioning results from an establishment which deliberately evades full implementation of constitutionalism in order to enhance its own power or whether constitutionalism is ruptured by the emergence of resistances which cannot be accommodated within its frame of reference. In either case, we enter into the realm of “political justice.” From the standpoint of our political assessment and reaction, of course, it matters greatly.

The main theses of this essay can then be restated as follows:

1. The resort to coercive counter-resistance and the unavailability of liberal legalism in the Ohio State situation arise from the absence of a constitutional scheme compatible with legalism within the institution. It should be clear that reference to a “constitutional scheme” in this statement

27. Walter, op. cit., p. 338.
28. Ibid.
29. Ibid., p. 339.
does not intend any specific historical model of such a scheme. Our use derives from Walter's general requirement for institutional arrangements able to manage conflict and from the additional specific requirements implicit in legalism. Whether constitutional schemes can be designed and established in these senses which will also be compatible with the forces required to manage the tasks of post-industrial society is a central problem of contemporary political theory, in revolutionary socialist thought as well as in controversies within welfare states.

2. The objectives and principles of the power system are incompatible with the legitimation of political opposition and conflict, and without such legitimation there cannot be a constitutional scheme in the sense here intended. On this matter, there was a significant and dangerous convergence among the views of modernizers, liberals, and the sorts of traditionalists active in the Ohio setting. For modernizers, the governing assumptions are schematized in the "scientific ideology;" for liberals, in the liberal conception of the university; and for the traditionalists, in a myth of pseudo-Gemeinschaft playing on the harmony among the forces constituting the university (after the elimination of alien spirits) and between those forces and the surrounding community.

3. And the scope of the power system controls aspects of behavior so central to existence in modern society that it is meaningless to speak of freedom or democratic self-determination if these aspects are simply abandoned to such control. Some liberals came to recognize the important political character of the university in the course of these conflicts and are working to transform the older liberal conception of the university into one in which conflict can be accommodated. But they tend to underestimate the extent to which the power system is weighted against this. At Ohio State, at least, the recommendations of such liberals are being cast aside or crudely adapted to minor propagandistic uses. At the time of this writing, major liberal spokesmen seem to be retreating from these insights.

When counter-resistance is successful, Walter concludes, the process of resistance enters its third phase, "the stage of exhaustion, when the resisters lose the capacity to oppose or to maintain relationships within the group. The stress is too long or too acute if the relationships change detrimentally or if the group succumbs to the environment." Recent commentators, buoyed by the calm on the campuses, have inferred from conditions during the
present year that the resistances of last year were somehow not real. Such a view fails to pay tribute to the efficacy of pacification as a political process and, of course, denies us of an occasion to assess the costs.

IV.

1. Legalized Hostility: Violence and Intimidation. The most drastic and dramatic manifestations of power involve the use of violence as an agency of compulsion, and the recollections of those who witnessed the political conflict at Ohio State will be dominated by memories of gas and shattered glass. Those recollections are both misleading and accurate. Actual violence played relatively little role in counter-resistance or resistance. Intimidation through the threat of violence, however, was central to the former; an atmosphere of violence was created and sustained for more than a month. The sporadic assaults by resisters upon symbolic objectifications of authority, three or four outbreaks of window-breaking, matches in some wastebaskets, bottles and rocks thrown at policemen (mostly returned gas cannisters), were peripheral to the resistance. This is, of course, a controverted point; but it can be substantiated. There have been innumerable trials and hearings involving individuals influential in the strike leadership; in none of them has there been evidence of planning or executing violent acts. In a statement to the Faculty Council justifying the refusal to negotiate with strike leaders on May 12, the provost said:

Moreover, to have negotiated with the Ad Hoc Committee would have been to legitimize a group who vowed to shut us down, whose leadership lost control to violent elements and circumvented ... regular processes open to aggrieved persons.33

To speak of loss of control, however, falsifies a far more complex situation. One of the primary objectives of counter-resistance was to eliminate the possibility of control, and one of the basic tactics was to treat student assemblies as riotous mobs. There has been much discussion of the "theatrical" character of resistance in contemporary America; what has not been appreciated is the fact that authorities command and utilize theatrical resources which far overshadow those of the resisters. Those who command uniformed military force have at their disposal the capital dramatic device. To walk through night-streets emptied by curfew, patrolled by carloads of policemen armed with shotguns and gas-grenade launches, and overwatched by police helicopters equipped with the newest Vietnam-tested searchlights, as the authors did, is to appreciate this power. Other dramatic vignettes can be recalled: the central area of the campus clouded with tear gas on the second morning of the strike, while a semicircular skirmish line of masked guardsmen with fixed bayonets moves forward to "disperse" what had been a

peaceable assembly; the ceremonial loading of weapons in the line of guardsmen facing a noisy crowd of demonstrators on the day after the shootings at Kent State; the armed barricades at every entrance to the vast university area during the shutdown; armed cordons inspecting every vehicle and passerby in a radius of a half-mile around the university and troops patrolling the campus in units of fifty.

Some of this potential for violence was turned into practice. On the second day of the strike, at least seven students were struck by shotgun pellets; there were some beatings during or without the pretext of arrest; gas shells were used as general tools of violence, especially during the first days; there may have been some slashings. That there was not more violence is due in part to effective work by some students and faculty who stood between the students and the armed forces during several of the most dangerous situations, although their effectiveness rapidly diminished when they came to be seen as agencies of counter-resistance. (It is noteworthy that official spokesmen from the very beginning sought to cast them in that light; this attempt did not have immediate impact because the military forces manifestly did not accept them in that way and their participation in the common danger told more than official press releases.) And then, too, the organized students avoided giving openings to violent repression. Actual acts of force then played a role distinctly subordinate to the design of intimidation through hostility.

The aura of hostility serves as a control device crucially different from coercion through forceful threat of punishment. In its extreme form, the difference can be expressed as the distinction between terroristic rule and every other form, however authoritarian. Authoritarian rulers, as Walter points out, punish definite acts of resistance and break up organizations suspected of sedition. But terroristic regimes enter upon a "chemical" procedure: they seek to deprive people of the power of resistance; "independent social clusters and unauthorized political associations tend to dissolve in the medium of extreme fear."34

There can be no question of characterizing the conditions at Ohio State as those of a terroristic regime, in any strict sense of the term. At most it can be said that there were occasions when the authorities came close to creating a "zone of terror" within parts of the student community. But, more generally, we can take note of the place occupied by this theater of hostility upon the continuum between terrorism and legalism. The overwhelming puissant presence of armed might in itself documents the charge that hostility rather than deterrence was the chosen agency of pacification. But two details will sharpen the picture. On the second day of the strike, after a desperate morning and afternoon, during which National Guardsmen, city policemen,

34. Walter, op. cit.
state troopers, and deputy sheriffs vainly and violently sought to "disperse" student-demonstrators, an officer of the National Guard performed the miracle of restoring good-natured order by the simple expedient of acting politically. In a dramatic gesture, he jumped on a soapbox, tore off gas mask and pistol, raised fist or V (which one is disputed), and told the students that he sympathized with them, felt confident that they would gain just objectives, assured them of their rights to peaceable assembly (notwithstanding the previously ordered dispersal and impending curfew), and promised to put his men between the students and the despised police. The officer was deprived of his command within the hour and reprimanded in front of his men (and of the students who were by then fraternizing with them), and his promises were disavowed. News reports during the following days indicated that he had also been threatened with loss of his job as a fireman. Assiduous intervention by mediating faculty members managed to avert mass arrests of students who had overstayed the curfew on the strength of the earlier commitment, a concession later cited by the provost as an instance of "tacit bargaining," but the essential message was clear.

One of the major elements of the tactic of hostility is to create a sense that the threatening force is inexorable, a force in some important sense out of control. On the day after Kent State, late in the afternoon, some fifty feet of sidewalk between two buildings separated about one hundred and fifty guardsmen with live ammunition and orders to clear the campus from about fifteen hundred students, including, it is rumored, several hundred who had come down from Kent that day and some indeterminate number who had pried up bricks from the sidewalk. The windows of the adjoining building were crowded with observers and demonstrators. Between the two forces, sitting with their backs to the students to minimize angry verbal exchanges, were about thirty students and faculty. This situation continued for some two hours. Influential faculty members gained entrance to the heavily guarded administration building and pleaded with university officials to ease this tension by making some sort of conciliatory appearance before the students far behind the scene where the most furious demonstrators were congregated, or at least to intervene with the military to withdraw and allow the crowd to dissipate in the approaching evening. All such attempts were turned back with the contention that the situation was not in their control.

After one clearing maneuver, during which marshals were able to coax the crowd back with only one half-brick thrown while guardsmen cleared the building of a portion of those in it, the actors resumed their places for another hour. Then, without warning or explanation, the military force backed off toward their vehicles. For another thirty minutes, the guardsmen stood in a line in front of their trucks, with loaded weapons and fixed bayonets. Ducked under the bayonets were the student and faculty marshals. Crowded up against them were the jeering students. Then the Guard left for
the day.

The reasons for this form of counter-resistance reach beyond the structure of the university. The Ohio State events erupted less than a week before a primary election; Governor James Rhodes sought the Republican nomination for senator and his campaign had consisted largely of charges that his opponent was too permissive towards revolutionary lawlessness. Those subjected to intimidation at Ohio State, like those subjected to the ultimate harshness at Kent State, were doubtless victims in part of the governor's political campaign. The demonstrations could have been a threat to him; after all, they were taking place at state universities after eight years of his administration, but he sought to make them an asset. A triumphant entry at the head of his victorious troops would make the right impression. The matter was urgent. Ohio State struck on Wednesday; the demonstrations focusing on Cambodia began on Friday, at Bowling Green and Ohio University, as well as Kent State, and Election Day was on Tuesday. Through Tuesday night, the events at the universities had to be portrayed as riotous risings by despicable minorities. On Wednesday morning, it became clear that the governor had lost his bid. On Wednesday afternoon, he ordered the closing of the affected universities. But four students had been killed on Monday.

In addition to these vile calculations, the policy of hostility can also be traced to the sentiments widely shared within the surrounding community. The hostility of police and many guardsmen simply reflected their personal feelings and those of their neighbors. But such attitudes, like those of the local judges, must be seen more as a resource of policy than as a cause of policy. Without the sentiment, the policy would have been less effective. But a different policy, especially given the powers of prior censorship which were granted by the media in the name of "responsible" journalism, could have countered the sentiments instead of inflaming and mobilizing them (as was done by repeated portrayals of the situation as one in which the peaceable and industrious denizens of the university were being assaulted by a tiny mob of outsiders who were alien in spirit if not in fact). The fact is that the policy of hostility continued and resumed after the governor's interest in the matter faded.

While other universities similarly situated recessed their work in a mood of conciliation, Ohio State decreed a closing which resembled an act of collective punishment. Students were given twenty-four hours to vacate dormitories. Faculty and staff, as well as students, were wholly excluded from the grounds, with temporary exemptions for faculty available only through degrading applications to police and administrators and permitting only errands carried out under the supervision of the police. Students were expressly told that there was no provision for their receiving credit for work or refunds of fees, and staff was similarly denied any reassurance about
resumption of work or reimbursement. These stringent restrictions were eased as the university moved toward reopening after a week or so; but they helped to create the situation of forced choice under which many operated in the succeeding weeks.

More than that, the threat, which accompanied the eventual reopening, to reimpose these sanctions without remission in the event of further "trouble" managed to generate a hostility among students and between students and most faculty which had not existed before. Five days after school was reopened, the university was proclaimed a "cordoned area;" five thousand guardsmen enforced a state virtually indistinguishable from martial law. Any violation of any instruction from any officer was proclaimed to be a penal offense. The imposition of this military occupation was justified by a spate of glass-breaking which spilled off the campus onto surrounding streets; it involved fewer than a hundred participants and ended without police intervention. On the day the Guard came back, a student group enjoying administration patronage distributed a leaflet which said, "We are a community again." And indeed the resistance movement soon entered the stage of exhaustion.

The other techniques of counter-resistance must be seen within this broad dramatic setting. Faculty and students entering the campus to take part in the negotiations which were finally set in motion had to pass through barricades and to show identity cards at several stages of their journey. On the second or third night of the cordon, guardsmen attacked a group of journalists: both groups believed that some students and faculty would defy the curfew that night in nonviolent protest, but this was not to be. Observers watched in amusement as some forty or fifty of the last demonstrators threw marshmallows toward the guardsmen protecting the administration building and as they launched "grovel-attacks" during which they crept forward towards the building, bleating "Agnew, Agnew." But, the observers had to remember the flower fastened to the rifle at Kent State and to watch the disgust on the faces of the soldiers.

The resort to armed force was fundamental policy. The law which enables authorities to create a state of hostility within the civic community cannot be seen as other than antithetical to legalism. There can be armed enforcement of unambiguous lawful commands and there can be lawful punishment within a legalist frame of reference; but the vague and sweeping instructions which governed the activity which has been indicated above, with its arbitrary exclusions and inclusions, its overreactions and military demonstrations, its curfews and cordons, are quite a different matter.

2. Criminal Law: The Uses of Arrest. Actions under criminal law were closely tied to the stratagem of hostility. Hundreds of students were swept up during the first days, charged with violations of curfew, disobeying police orders, rioting in one degree or other, destruction of property, and resisting
arrest. Many of these were quite literally innocent bystanders and others could see no way of distinguishing what they had done from unpunished actions of others and had no way of knowing what they had to do or to avoid in order to escape future arrest—unless it was to stay completely out of the way. There is no doubt that acts were committed which would qualify for punishment under the most legalistic application of rigorous norms. But there is equally little doubt that the relationships between these acts and the imposition of penalties were almost accidental. One of the amusing documented incidents involves two undercover agents of the state police. They were busy during the first day of the strike: photographs identify them as playing leading roles in the gate-closing which precipitated the first police intervention in the strike. They were then arrested by their compeers and formally charged with resisting arrest.35 (It seems that the charges were later dropped.)

The arrests served the counter-resistance in several ways. They lent credibility to the armed displays and contributed to general intimidation. Their sheer magnitude supported the portrayal of the situation as a violent crisis. Doubts thus cast on the contention that only a few were involved could be countered by claims about the numbers of "nonstudents" active in the situation. Every arrest exacted financial costs: the organized resistance felt honor-bound and politically impelled to secure release on bond of every arrested student; Columbus police apparently file charges more serious than they mean to press with the express design of having high bail assessed. Penalties depended on the dress and demeanor of the defendants and on the precise degree of hostility of the judge. In most cases, it appears, charges were eventually lowered to the point where students could simply forfeit bail; and they were encouraged to do so. Arrests were also intended to open students to other sorts of penalties or to raise other sorts of threats. Authorities counted on parental interventions against students, fear about the consequences of arrest records on career ambitions, and actions by university authorities. In fact, as will be discussed below, the University Committee on Discipline announced on the third morning of the strike the immediate suspension (in disregard of its own rules) of fifty students on no basis other than their having been arrested. This effort was, however, successfully countered by liberal faculty members, especially an effective professor of law. In future situations, however, arrests will automatically carry more weight: the Ohio legislature has enacted a law which threatens any student or professor with suspension upon his arrest under a variety of charges, including charges under a newly created campus-disruption law; and expulsion or

35. One of the authors was able to elicit testimony (with the aid of another attorney) from a campus policeman that, prior to the police appearance at the April 1970 demonstration, they were ordered to book all persons arrested on charges of trespassing and resisting arrest. This, whether or not the arrested individual "resisted."
discharge follows upon conviction without exception. But under the circumstances of spring 1970 the use of these legal measures was less effective than might be thought. The very arbitrariness of the arrests brought support to the resistance; the raising of funds provided an integrating activity for organization; the shock upon ordinary Ohio students of angry encounters with police, jailers, and judges strengthened resolve (awakened it) as often as it intimidated. Still, there was a cumulative counter-resistance impact. That organizers' energies were absorbed in fund-raising and disbursing became a hindrance to the movement. The deterrent against activity became weightier as other counter-resistance techniques took hold. Two groups of arrests have to be distinguished from these. The first took place early in the strike: a research associate prominently identified with the anti-war movement was arrested and charged with felonious crimes. The actions alleged to be involved were identical with those which lead to minor charges against others; but it seems that this arrest represented one effort to create the much desired impression of a “radical professor” behind everything (there was a parallel hue and cry after some Weathermen were alleged to have come to town). The effort fizzled out.

The second distinctive group of arrests involved several hundred and had quite a different design. Late in the stage of exhaustion, there was a poorly attended march to the ROTC Building which involved some pushing and shoving across a fence between marchers and cadets. During the week following some 150 students were arrested (often wakened in the night) and charged with disturbing a public meeting. The arrests continued into the next weeks, reaching many of the organized core and leadership. Photographs presumably taken at the demonstration formed the basis for the selection. It is a reasonable speculation that these were taken and identified by state highway patrolmen in cooperation with campus security officials and that the last wave of arrests was carried on at the instance of at least some university officials. The arrested included a number of those still engaged in negotiations with (probably other) university officials at the time. The political character of the charges is clear on its face; it is underlined by the fact that all those arrested were also charged with violating the provisions of the cordon, as had been done by far more massive demonstrations during the ten days before. It then proved that the cordon had been lifted the day before. But the major point of the last group of arrests became clear when university officials announced that they would enforce against all arrested students the terms of a federal statute which denies federally assisted support to anyone charged with campus disturbances. This was taken as “requiring” the cancellation of all assistantships and many fellowships. Then, during the summer, hearings on university charges commenced. The county prosecutor did not intervene at all in these events; no indictments were asked of the grand jury. There is a good

and reliable explanation. The prosecutor felt that he had been led down the garden path by university officials in the case of the black demonstrators two years before, for he had been urged to press the case and then eventually left in the lurch. He just wasn't going to get involved.37

It should be clear from the above that the widespread application of political justice needn't involve a reign of terror. Hundreds of students were arrested on charges filed for their political effect and many were penalized, either directly through courts of law or indirectly through sanctions triggered by the legal action and intended to be triggered by it. Seen in the context of the broader project being pursued by the officials of the university, the arrests appear far more effective than when they are seen exclusively in terms of the counter-resistance. They have helped to oust and to label a number of those considered antagonistic to the professional university. This is the major significance of the last arrests; that was already a use of law in aid of the “normal” mission of the university quite as much as it was a last step toward mopping up resistance.

3. Civil Law as Power Resource. As important as criminal law and in many ways more effective was the recourse to civil action. There were three such uses, two developed directly by university authorities and the third launched by private individuals with the active support (if not at the instigation) of some important officials at least. The first appeal to civil courts played an important part in the initial attempt to destroy the organization of resistance; it was designed to produce the loss of control by the leadership which the provost later put forward as justification for refusals to negotiate. By the first evening of the strike, the university had secured and posted throughout the campus a temporary restraining order against named individuals and the class of leaders of all groups and committees believed to be involved in the protest. The order prohibited so wide a range of actions and statements that legal counsel advised all the individuals involved simply to leave town if they did not want to be seized for contempt of court. On the preceding afternoon, when there was an angry crowd assembled in front of the administration building after the first wave of gassings and arrests, the leaders had pleaded for nonviolence, had succeeded in securing the departure of an important segment of the group (the organized black students were led away by their leaders), and might well have prevented the window-breaking that did erupt if there had not been a perhaps fortuitous arrival of massive police reinforcements which provoked to fury a number of those in the crowd who were convinced that this signaled a police onslaught against them. In any case, by the following morning the leaders were huddled in consultations with lawyers at the time that armed guards were instructed to disperse with gas the

37. There is another plausible explanation. The politically ambitious county prosecutor might not have wanted to fight a free speech case with a judgeship in the offering.
audience that had peaceably assembled in response to the call from the evening before: leaders had pleaded with the angry crowd to leave and come back on the following morning for an orderly buildup of the protest movement. The crowd was aimlessly standing around when the police action began. Although new leadership emerged and some leaders cautiously recommenced activities during the succeeding days, the fact remains that they were decidedly inhibited in their organizational work. (Under Ohio procedures, it should be noted, temporary restraining orders cannot be appealed.)

The second court order played a relatively minor part in giving some direction to the activities of National Guardsmen during the demonstrations following Kent State. The order prohibited the activities of students who had stationed themselves in the doorways of several buildings. The amount of physical obstruction involved, as distinct from dramatic moral suasion, is disputed. There were faculty marshals and police present at each of these doors and there were no incidents other than heated arguments and exchanges of taunts. All doorways were evacuated without incident when the court order was read. And during the following day, thirteen thousand students (about thirty percent of those present on campus that spring—and a massive majority of those whose work brought them into the colleges surrounding the center of the university) took part in a referendum which favored the position of the strikers on most issues and overwhelmingly blamed the administration for the course of events. This also suggests that there was not, on the days before, the kind of action which would have polarized the student community. In any case, this order more nearly corresponds to the expectations of legalism, provided that one concedes that the activities of a university can properly be subsumed under categories designed to protect private property and pursuits. That the writs were served by troops of National Guardsmen with loaded weapons and fixed bayonets is another matter again. Put in that context, where a defiant gesture might have triggered shootings, the order assumes its place in the strategy of hostility.

The third appeal to the courts was not launched until the end of May and corresponds in intention as well as timing to the wider effort to eradicate the
political sources of future resistances. It was effective in a number of ways. What was involved was a novel claim for standing before the court made on behalf of several students who alleged that they were being deprived of important property rights, as were others of the class they claimed to represent, through the actions of defendants. In addition to eight student leaders, the suit attacked a faculty member well-known as politically active in the community and as sympathetic to the concerns of the students. Since his public activities during the strike, although controversial, were generally recognized as markedly different from the work of strike leaders, involving among other things a stint as captain of faculty marshals, his inclusion served a number of distinct purposes. In part, it was a practical matter: a considerable proportion of local financial support for the lawsuit was said to be directly conditioned upon inclusion of the professor in question. More broadly, the presence of the professor on the list fulfilled the expectation generated by leading public officials, from the president of the United States down, that these things resulted from the demonic manipulations of vicious professors. Then too, it was hoped to force the dismissal of the professor in question and the intimidation of others, either through securing the relief sought by the court or, indirectly, through generating other actions against him with the help of publicity.

The indirect route may be said to have had some results, although they were mixed. The professor in question had in fact resigned from The Ohio State University early in March to accept appointment at another university. The lawsuit reinforced a campaign launched against that appointment at the other place. Eventually, despite vigorous support for the appointment by administrative officials of the other institution, the board of trustees refused to honor the commitments made. But the failure of the lawsuit against the professor helped to enlist that administrative support and helped to secure a financial settlement and alternative employment. Without the lawsuit, the campaign might have been even more successful.

But this side of the matter is perhaps peripheral to the basic question of the relationship between this measure and other aspects of counter-resistance. The plaintiffs asked for four remedies: a temporary injunction directed to all plaintiffs and enjoining an extraordinary range of peaceable activities, including those normally required of all of them by their normal obligations as students and teachers; a permanent injunction more nearly approximating the terms of the temporary order earlier secured by the university; a declaratory judgment stating a legal obligation of the board of trustees to expel all the students involved and to discharge the teachers (professor and graduate assistants); and damages of one million dollars, on behalf of the

40. Some of this rests on authoritative information acquired during the legal negotiations which led to the eventual dropping of charges against D. Kettler, the co-author of this essay who was caught up in the action.
class. The last demand served, as it was intended, to gain nationwide publicity for the action: major newspapers throughout the United States printed the names of all those charged, including the professor, and characterized them repeatedly as "strike leaders."

The "million-dollar lawsuit" was public relations magic. The temporary injunction was designed to humiliate the students before their followers, if it could not secure their arrest. The effectiveness of injunctions arises not only from the ease with which they can be secured from sympathetic local judges and from their often vague and sweeping prohibitions, but also from the fact that their threat and weight is usually not appreciated by those who are not directly affected. The student leaders who curtailed their activities under the threat of the first injunction already suffered from a loss of confidence from supporters who could not understand why they were making such a fuss about a "mere" civil action when others had been subjected to criminal charges; apparently the powers of the courts to punish contempts are not well-appreciated, except by lawyers and clients. Counsel in these cases made it a condition of their accepting the clients that temporary restraining orders not be tested in the major practicable way: by disregarding some of the more clearly unconstitutional provisions. More generally, it must be understood by others as well as it already is by those who initiate such suits that the mere filing operates as an important political weapon. Defendants are in fact as well as in name thrown upon the defensive. This involves both a vast drain on time and energy in attempting to secure counsel (no easy task in a community where counsel for such defendants receives anonymous death-threats and scornful comments from colleagues and clients) and in attempting to finance counsel for matters adroitly defined as merely private and for which support from established or informal organizations is hard to get. In some ways more basic is the shift in moral and political posture: from being initiators and actors, those affected see themselves and are generally perceived as reactors and victims. Even if supporters see them as "innocent victims," or especially in this case, it is a perception less compatible with exercising leadership functions than the earlier. Where organization is highly developed and leadership well-established, these consequences are far less marked and in any case far less important. But in a situation like that in Columbus in June of 1970, the political effects were telling. The lawsuit intensified the trend toward the stage when "resisters lose the capacity to oppose or to maintain relationships within the group." This could perhaps have been counteracted if it had been possible to carry out a plan put forward by one adviser, a proposal to make the lawsuit an occasion for comprehensive and influential challenge to the whole fiction that the conflicts on campus result simply from the malign manipulations of a few leaders. That plan could not be carried out because there was no imaginable way of raising the money which it would require since it had to be assumed that the case would be lost in lower courts.
if fought in this way and that vastly expensive appeals would be needed. Then, too, it would have required a complete commitment by all defendants to this activity, and this could not be secured precisely because most of those involved were indeed students whose primary commitments were to the pursuit of the work out of which their involvement in these affairs sprang. In any event, lawyers would not even contest allegations made at the hearings on the restraining orders for fear that the testimony generated out of such contests might be used against their clients in some way in criminal actions against them which had to be feared, especially since the prosecutor and his staff sat as spectators in the courtroom.

These details may appear superfluous to those regularly connected with legal work in the courts. But they form intimate part of a political assessment. Time, money, prestige, self-confidence, attention are the resources of political leadership. The extent to which they are all absorbed by this sort of challenge cannot be overlooked. We stress the impact of the suits rather than discussing the court actions, because these latter, while still incomplete, made relatively little impact on the course of the resistance. Intervention by a highly respected metropolitan attorney led to the issuance against the students of a restraining order far milder than that requested. Offensive against principles of free speech and assembly, it nevertheless played little role at this late stage of developments. Adroit management by an able local attorney secured an exemption of the professor from the order. Even here, the political character of these actions is clear. While exempting the professor from the court order and certifying that there had been no evidence which could be construed as advocacy of violence, the judge felt constrained by his sentiments or by the political expectations of his electoral and other constituencies to express his disdain for the professor’s views and to warn that some future development might lead to reconsideration of his decision.41

We are dealing with legal instruments, in other words, whose availability and impact in cases like these may be somewhat hedged about by legalist constraints, if the political resources can be mustered for having these invoked, but which are mainly determined by political factors. A legal defense based on constitutional arguments concerning civil liberties quickly ran into a storm of state citations drawn from the annals of antilabor injunctions, a record also written largely by political forces. The complicity of university officials in this “private” action is plain from the fact that the sole evidence supporting the plaintiff’s case consisted of a long affidavit from a minor administrator detailing the damage supposed to have been done in connection with the strike and tendentiously excerpting passages from speeches made by the defendants through a loudspeaker supplied by the

41. In January of 1971, this judge resigned so that he could accept the endorsement of the Republican party in the coming fall election for mayor.
university and thoughtfully equipped with a tape recorder. The excerpts revealed that the defendants who were strike leaders indeed expressed strong views about the merits of university officials and of their actions and that they encouraged their followers to hold firm. There was not one phrase which incited to illegal conduct.

But it is not intended to reargue the case here; the basic point has been established. Just as it was not necessary to portray a blood bath in the discussions of legalized violence or to describe a Volksgericht in the account of political crime, so it need not be argued that civil courts in these cases ruthlessly demolished all possible rights, in order to support the contention that these were political uses of legal process having functions basically different from those envisioned by the legalist theories of law and legitimacy. Kirchheimer states the minimal point:

> Where the tradition is still strong enough to preserve a minimum of procedural safeguards, a political trial today consists not so much in having unassailable positions of power one-sidedly sustained, as in the fact that competing power-groups pit their strength against one another.\(^4\)

4. Lawless Law: The Powers of the Institution. The sanctions at the disposal of an institution like Ohio State are not limited to depriving individuals of certain facilities within the institution; its actions can label and stigmatize with as great social effect as those institutions which have the power to define failures, lunatics, superfluous men, or criminals. If politics is anything at all like a process providing authoritative allocation of scarce social resources, then the university is a basic political institution in our society. More than that, its processes are also political in the sense that its principles of action are those chosen by the system with sufficient power to have its

42. Otto Kirchheimer, op. cit., p. 86. Several other passages from this invaluable aid for the understanding of political justice are sufficiently important to warrant citation in this sketch of problems. Kirchheimer calls our attention to the special character of witnesses in political cases: all of them are likely to be politically involved in the outcome. So, for example, in Columbus, testimony was by policemen, whose authority was everywhere challenged by the demonstrators. Or it came from university officials. See pp. 82-85. For a characterization of local administration of justice in America, see p. 287. For the rationale of many political prosecutions (Berrigan!) and for help in understanding the perhaps inadvertent side effect of the civil suits against strike leaders, note the following:

> If it is possible to transplant moral doubt and conflicts of loyalty from the government camp into the camp of the opponent, then one has the chance, other things being equal, of holding the line.

Neumann helps explain the relative powerlessness of constitutional legalism in these local courts: "The greater the power of the state, the more readily will the judge submit to its authority. The weaker the state, the more he will try to realize his private class interests." Neumann, op. cit., p. 53. On the weakness of "the state" in American local government, see Lowi, op. cit.
choice prevail. We borrow a summary statement from Robert Paul Wolff's thoughtful discussion:

No institution can remain politically neutral either in its interaction with society or in the conduct and organization of its internal affairs. To pretend otherwise is merely to throw up a smokescreen; it is a way of rationalizing the value commitments already made, by attempting to remove them from the area of legitimate debate. Students for a Democratic Society speak of the need to politicize the campus. Moderate professors and students oppose this politicization, which they protest would alter the character of the university for the worse. But the truth is that every campus is now politicized, necessarily and unavoidably. The radicals do not wish to inflict politics on a realm which once was happily apolitical. They only wish to force an awareness of the already political character of the university, as a first step toward changing the policies which the university embodies or pursues.\footnote{Robert Paul Wolff, The Idea of a University (Boston, 1969), pp. 74-5. This is the conclusion of an effective assault upon diverse myths. Wolff's skills as critic considerably outweigh his abilities as political analyst, and we do not accept his further conclusions or the assertions about university politics upon which they rest. Concerning the political powers of labeling and some ideologies which disguise them, see Theodore S. Szasz, "The Rhetoric of Rejection," in Ideology and Insanity (New York, 1970).}

The imposition of sanctions is a small part of political power, of course; but that is our primary concern here. We have already seen that the management of The Ohio State University initially construed the student demands and demonstrations as acts of resistance to which concessions should not be made. We have examined three dimensions of lawful but not legalist counter-resistance. We now turn to the most complex arena, the inner processes of the university. This is complex because of the sheer mass of actions, the numbers of individuals involved, the diversity of forces with enough political resources to play some role and perhaps exercise some influence, and the crisscrossing of trends and countertrends consequent upon these facts.

We can simplify this complex by distinguishing three phases. During the first phase, from the beginning of the strike until the convening of the Faculty Council on May 12, counter-resistance was almost exclusively coercive. From May 12 until May 22, when the cordon was established and five thousand National Guardsmen returned to campus, there was some turn toward a counter-resistance seeking a voluntary end to resistance, using arguments, flattery, promises, bribery, tokens, rewards, buying off leaders, negotiation, bargaining, exchanging advantages in various combinations, but all within the environment created during the first phase. The third phase saw a return to coercion, with some tokens granted to the secondary resistance which had been generated during the first phase and placated during the
second. Our concern is with the first and third phases, although we will glance at the second.

The first phase is characterized, from the standpoint of internal governance, by a substantial suspension of constitutional processes. As will be clear, these processes at best left sweeping powers to the private dealings between administrative officials and trustees, but rules and custom combined to give some measure of influence to a Faculty Council as authoritative rule maker. The president presided at meetings of this body and major administrative officials had ex officio positions and staffed the most important working committees and councils. Nevertheless, it was a forum able to legitimate some faculty judgment and it had even come to give a voice to the president of the student body and the chairman of the graduate students' council. Under normal circumstances, administration spokesmen expect to control this body; but the members had opposed the disruption rule, they had spoken against the prosecution of the thirty-four indicted blacks the year before, and they had rejected the president's recommendation for an honorary degree for Bob Hope. In any case, the president received a petition asking for a special meeting filed in accordance with the rules on the second day of the strike. He refused to call a meeting for two weeks. On May 9, fifty-three of the elected sixty-six members met at a church off campus (since no meetings could be held on the barricaded campus, it will be recalled) and a considerable majority made known their determination to assume the authority of the Faculty Council at a subsequent meeting, if no proper meeting was convened.

The impetus for this "secondary resistance" came largely from liberal faculty members active in something misleadingly called the "Senate of the Colleges of the Arts and Sciences." When the large College of the Arts and Sciences was broken up some years before, and the constituent departments reassigned, in combination with departments from other colleges, into units integrated by professional rather than historic ties, this shadow organization was called into existence as a symbolic sop to the academic liberals who had been maneuvered into support for the reorganization largely through deanships dangled before two of their most influential number. The deanships never materialized and the "Senate" had only as much influence as it could generate through earnest high-mindedness. Its membership was largely self-selected, in effect, since departments delegated those of their members who were sufficiently sympathetic to the enterprise to commit some time. Under the conditions of vacuum which prevailed during the first phase of the strike, this forum proved to be an important organizational asset to liberal faculty and others opposed to the policy of coercion. It generated committees to explore possibilities of negotiations; it called for and prepared materials for faculty meetings of the colleges; and it prepared the way for the actions by Faculty Council members. This information is peripheral to our main story, but it gains in interest because it helps us to interpret some
developments since the strike. The shadow existence of the Colleges of the Liberal Arts is being ended by administrative manipulation, in the name of community and more intimate identification with the smaller administrative units. An historic agency of liberal resistance to the scientific modernization program is thus being liquidated.44

One of the major objectives of those who sought to end the constitutional hiatus was to reassert control over the administration of university discipline. The University Discipline Committee which had been established some years before under a rule imposed by the trustees over the objections of Faculty Council had entered into active collaboration with the coercive policy of the administration. Effective work by liberal lawyers, working upon the only other faculty and student agencies with any leverage during the phase of coercion, the organizations of marshals, had managed to set some limits to this course; but serious problems remained and threatened to become vastly larger. A memorandum, "The Management of Campus Justice," lists six major areas of deviation from the committee's own rules and from minimum standards of due process: temporary suspension of fifty-three students without prior hearing, inadequate time to prepare for hearings, inadequate opportunity to obtain witnesses, interference with the right of faculty representation, lack of specificity in the charges, and irregular communication with the president.45 The formal language of the memorandum alludes to some reasonably colorful occurrences: some rushed hearings patently called to provide some expulsions for the board of trustees meeting on the next day, then hurriedly canceled upon telephone instructions from on high when faculty representatives made vehement protest; an attempt to exclude professors from the College of Law from effective service on behalf of students; and, of course, the initial undertaking to suspend without hearing all students arrested. But liberal successes in stemming these operations were manifestly temporary and had also managed to destroy the legitimacy of the university's disciplinary procedures more thoroughly than many of the liberals might have wanted. The inability to reform the rule or the process is an important theme running through the second phase and preparing the way for the third.

Faculty Council accepted the lead of the liberal members struggling to end coercive counter-resistance. The body pressed successfully to have school reopen without National Guard occupation; it designated five of its members to serve as a faculty delegation at negotiations which it mandated; it voted a suspension of disciplinary proceedings until both rule and procedures could be changed and then voted a legalist replacement for the disruption rule. None of these initiatives attained their primary objectives. The removal of

44. At this writing, liberals operating in the Faculty Council have been able to block this move. But the war, apparently, is not yet over.
the National Guard could not importantly affect the aura of hostility, when police checkpoints around the campus sharply challenged all those seeking entry, and with repeated incidents with black students and others bearing the "wrong" signs. No one was admitted without an ID card, and there were even spot checks among pedestrians on the campus itself. There was simply a change in dramatic instruments.

The story of the negotiations is long and not in order here. But several points must be stressed. The phase of coercive counter-resistance had affected the character of the resistance in the ways that Walter suggests: the movement which had asserted itself against the actions of the establishment could not be managed in ways that might have been available at the outset. The leaders who took part in the negotiations had to meet the constant pressure of a constituency hardened in its resistance by the hostile responses of the authorities. It may be, as Walter appears to believe, that a de-escalation of counter-resistance simply cannot work and that no negotiations could have succeeded. But it is conceivable that the discussions could have been allowed to become occasions for a political restructuring transcending the perspectives of counter-resistance, or at least that some dramatic concessions to the political needs of the movement as well as to its substantive interests could have precluded the last phase of repression. As it is, the authorities refused every political concession: they downgraded the talks, insisted on meetings on their own procedural terms, rejected every plea for urgency or drama.46

When the authorities finally recognized that the blacks formed the moral as well as organizational backbone of the demonstrations, they undertook to placate them with the concessions, in principle, already granted two years

46. Although written from a philosophical perspective quite different from that of this paper, the work of J. G. A. Pocock is helpful for understanding the argument here developed. In his terms, we are dealing with a dominant paradigm whose terms exclude consideration of the issues in ways at all acceptable to the resisters. On the seemingly "empty" debates about procedures for negotiations and the like, he makes the following searching observation:

[To] structure a situation in a certain way—to represent it as a problem of a certain order and not of another—will, in a value-saturated speech and area of experience, imply if it does not assert a certain distribution of value priorities, a certain strategy of choice between values, and will in this way erect biases in favor of one or another competing group. Political debate will then become interested debate as to the form of the problem which the parties are to see themselves as required to solve; a very little acquaintance with the importance of procedure in judicial, parliamentary or diplomatic debate shows that this is so in empirical reality.

"Political Ideas as Historical Events " (Paper presented to the 1970 Annual Meeting of the American Political Science Association), p. 6. The unpolitical intellectual habits of many of those who allied themselves with the resisters deprived the resisters of support precisely when they entered upon this crucial phase of their conflict, although their opponents understood very well why they insisted on "civil" and established procedures
before. They would establish an office of minority affairs, appoint as head of the black studies program the candidate approved by the advisory committee months before, make a contribution to a newspaper for black students, etc. The white students, within the negotiating sessions as on the Oval, were prepared to follow the lead of the blacks in these matters; but the impatience of the organized black students could not be contained. With leaders absorbed in the discussions and compromised by their involvement in the suspect process, new patterns of influence emerged. The black students demanded a resumption of the strike three days after school reopened; the leadership acceded to the demand in an unconvincing way; it was three days before the meeting of the board of trustees which was to ratify the agreements already reached and the leaders could not plausibly reconcile their acceptance of these agreements with the call to militant action. When the white students postponed action, the organized blacks erupted in anger. This eruption signaled failure of the tactic of buying off the blacks. It also neutralized the "secondary resistance," at least for a time, and the

and on the normal processes of problem management. See above discussion of opening stages of the conflict. Pocock's paper raises a number of difficulties for the view being developed here, because he makes the "liberal and conservative" supposition that established paradigms will tend toward two-way communication and, consequently, he might well object to some of the forms of challenge utilized by the resisters. The gross disjunction between one-way and two-way communications systems corresponds to the liberal-pluralist desire to classify systems as either "totalitarian" or "democratic" (or politically "undeveloped"). Pocock's position is considerably more subtle than this brief caricature would allow but cannot be dealt with in detail here. Our argument throughout rests on the supposition that the variety of political systems and correspondingly of communications-paradigms is vastly greater. Even within the negotiation sessions at Ohio State there were present representatives of at least four or five paradigms: traditionalist-authoritarians (concerned to compel obedience), modernizers operating in terms of the "scientific ideology" (concerned to undercut the very possibility of resistance), liberals (concerned to foster the sort of "two-way communications" taken as the norm by Pocock), and the diverse array of resisters, seeking some adequate contrasting paradigm. With the modernizers in control, the resisters found themselves driven to despair. Demands and proposals were constantly subjected to the test of "reality" in the discussions, but the spokesmen for the establishment were in a position to create new "realities." Agreements tentatively reached generated actions and reactions, many within the control of the dominant partners in the discussions—and these were then adduced as "realities" against the agreements themselves. When the student-negotiators sought to adapt such methods to their own use, and even students representing nonstriking groups were driven to this, they found that their instruments of power had dissipated or were not under their control. Liberal spokesmen, who acted as though the wish for a comprehensive paradigm constituting a two-way communication system would make it so, helped to undercut the resistance effort. On "reality" in the context of the scientific ideology, see Peter Euben, "Political Science and Political Silence," in Green and Levinson, eds., op. cit. On varieties of paradigms and their problems, see Sigurd Burckhardt, Shakespearean Meanings (Princeton, 1968). For further discussion, see David Kettler. "On Ideology and Ideologues." forthcoming.
negotiations were designed as much as noncoercive counter-resistance to this movement as much as they were designed with an eye to the other. The troops were back the next morning and no further concessions were made at the discussions which continued sporadically through the succeeding weeks. The trustees, moreover, felt free to sweep aside several of the concessions made. Attempts to reconstitute the resistance were defeated by the effects of intimidation, the absence of organizational discipline among whites sufficient to carry them through a change of political styles, and the reassertion of the "normal" institutional pressures to accommodation, as professors persisted in pointing classes toward examinations and grades. The negotiations, in sum, may be adjudged a failure, if they are judged from the standpoint of liberal hopes of ending coercion and eliminating grounds of resistance; but they may well be considered a success, if they are seen as a step in a more complex strategy of counter-resistance. They did manage the "secondary resistance" and they weakened the original organized resistance by weakening the leaders and depoliticizing many of the others.

That the students' discontents remained is clear. As late as May 27 five to six thousand students joined a jeering parade through dormitories and buildings "looking for" the president so that they could negotiate with him instead of underlings. But the students were no longer on strike and no longer expected any concrete results. Another light is shed on the official conception of these negotiations by the fact that the students who were, in the provost's earlier word, "legitimized" by being invited to take part were subsequently brought up on charges based on activities prior to the discussions and most were then ousted. Calling a strike, it was later determined, was itself an act of "disruption" in the terms of the rule and subject to penalty. This breach of faith gravely affronted several of the faculty members who had urged the student leaders to enter into the negotiations even though this would jeopardize their capacity to lead the resistance. But then it no longer mattered much.

Liberals and other faculty members became hardened to affront as the second phase of counter-resistance gave way to the third. There was no protest against the fact that the terms of the cordon gave the military commander authority over the conduct of classes, not to speak of prior censorship of every leaflet circulated. The authority was never exercised in the first respect and it was benevolent in the second, and that sufficed an exhausted and frightened population. The president ignored the Faculty Council's decision to suspend disciplinary hearings until a committee of the council could propose new criteria and new procedures; the board of trustees accepted this proposal to continue actions under the old rule and to replace the University Disciplinary Committee with an outside attorney designated by the president as hearing officer. Two weeks later, the board of trustees flatly rejected the new rule finally enacted by Faculty Council and endorsed
by other agencies concerned with student affairs.

The arrests and civil actions marking the third stage have already been described, as were the university actions linked to them. Students employed by the university were dismissed without prospect of appeal, if they had been arrested or were defendants in the civil suit or had university disciplinary charges outstanding. Disciplinary hearings were now conducted with exemplary good manners and courtesy to attorneys and defendants, but the disruption criterion made acquittal practically impossible in the cases of known strike leaders, given the basic political commitments of the examiners. One student was acquitted when his attorney got an admission from the arresting officer who was testifying against him, first, that he had told the university prosecutor that he could not recognize the defendant and that he had then been coached as to his dress; and, second, upon being shown a press photograph made at the moment of arrest, that the black student then subject to charges was not the black student whose conduct he had been describing. But not every student had both a William Kunstler able to extract such admissions and such a neat case. Other cases easily come to mind. Two white strike leaders were charged under the disruption rule with "intimidating" university officials. Nearly identical records produced opposite results: one student was suspended for three academic quarters, the other was found not guilty by the reviewing authority (a vice-president), although the hearing officer had recommended a three-quarter suspension. It would be impossible to justify this from the record: both individuals had supported the strike both publicly and privately but neither had either advocated or committed violence. What must be taken into account is the role that each played in the above-mentioned negotiations: one student-negotiator was to play the "heavy;" another, a mediator; another, friend of the faculty team, etc. The strike leader who was not dismissed had played the role of friend of the administration and in so doing had developed an honest relationship of mutual trust with a major vice-president (not the reviewing authority in this case). This vice-president testified for the student at his disciplinary hearing and there has been some suggestion that his influence within the university may have had some bearing upon the outcome.

In other, less spectacular, cases the university's case revolved around the fact (as proved by arrest) that the student in question had been present at the scene of an alleged disruption. In a case in which one of the authors participated, a student had been arrested in a hallway where, testimony had established, first, that numerous "non-demonstrators" were present and, second, that, even if the student had wanted to obey an order to leave the premises, he could not because of the press of the crowd. Although the university's case consisted of attempting to prove that a disruption did occur and that the student was present, the hearing officer refused to grant a
motion to dismiss on two occasions.47 The student was placed on disciplinary probation for two quarters, thus making it impossible for him to receive monetary assistance of any kind from the university. Another student, whose crime consisted of telling a university vice-president to "go fuck yourself," was suspended for three academic quarters at the same hearing. Most student demonstrators were simply punished for carrying on the non-violent politics of protest.

There is a continuum between such penalties and those imposed by departments in subtler ways. In one department, for example, all students seeking renewed teaching assistantships were required to account in writing for any class canceled for reasons other than ill health and attendance at professional meetings. New applicants were similarly screened. Subjecting students to such inquiries usually obviates the need to punish: those who might resist are intimidated, compromised, or driven away. The drive toward modernization resumes. A committee under a noted liberal chairman had been at work all summer on a detailed inquiry into the events of the spring; the report had been filed and its major recommendations virtually ignored. Another committee brought in the proposal for a university senate with student representation, which had been envisioned in late spring as a response to existing structural failings. The Faculty Council allows the report to be dismissed with a few amused remarks by the president.48 Everyone is glad to be back at work. Things are quiet. The team went to the Rose Bowl, but lost. Maybe next time.

V.

It is unnecessary to labor the point of this story; however, several clarifications are in order. The paper has not assessed the objectives or the politics of the resistance. For our purposes it was sufficient to show that it was politics and not crime or "disruption." We have indicated our sympathy with a university not harnessed to the "scientific ideology" (in Apter's phrase), a university which fosters "qualitative dissent" (in Nettl's term), as well as other sorts of activities not here discussed. These indications have not been supported by positive argument. All that is necessary for the sake of the main contentions is recognition that the choice between these alternate

47. The first motion was made upon the completion of the university's case; the second at the close of the hearing. Both motions were refused on the grounds that the hearing officer did not have authority to grant such motions, although other hearing officers had done so on several occasions.

48. At a meeting of the Faculty Council in January 1971, thirty-three students were added to the council as voting members to serve until such time as a university senate is established. This, of course, was passed over the strong objections of a coalition of modernizers and traditionalists. Fortunately for the students and their supporters, this was a special meeting that was poorly attended by this coalition.
models, or among numerous others, is a political choice in principle and has been a political choice in fact. Nor have we sought to design a constitutional order for the university which could institutionalize legitimate political conflict over these matters or even to argue that the problems are soluble. All we have sought to show is that a constitutional order does not now exist and that liberal strategies for securing one rest on doubtful conceptions of the goal and inadequate perceptions of the obstacles. But we do not mean to be innocuous. Our target is the devaluation of legal language and legal forms when they are used to cloak irresponsible power. And our target is a system of power which requires such degradation of political relationships as a condition of existence. There is no prophecy in the essay. We do not say that such a system must dissolve itself. There is reason to fear that power without authority can prevail for long periods of time. We do not say that the resistance must rise again, and triumph. But we do think that it might.

A last point. There is a growing literature of contempt and self-hatred about places like Ohio State. One of us has just left Columbus after fifteen instructive and often rewarding years; the other remains associated with the institution after more years than that. The political struggles at Ohio State are substantially the same as those reported by Sheldon Wolin at Berkeley or David Underhill at Columbia. There are local provincialisms and peculiarities; some of the officials are so blatantly incompetent and others so narrowly bigoted that some things are worse than they might be in a more sophisticated place; but one provost mentioned in this story already has a higher position at a generally respected Eastern institution, and the current provost moves easily in the company of his peers. The students share the prejudices of their generation about organization, but they worked with great resourcefulness and energy and sustained a serious effort at a high level of basic aspiration over a longer period than any comparable movement in recent years. And the faculty operated within the frames of reference available to its generation and station; but there was an amazing level of public spirit and lot of ingenuity. We will not condescend to the mathematicians and chemists who patrolled the streets night after night and contained their own fears: they are often unpolitical and bewildered by the manner and aims of the demonstrators; but there was not one betrayal, not one abandonment of the basic affection for the students. (This does not mean, of course, that there was not betrayal by "scientific ideologues" posing as neutrals in the conflict between students and administrators.) Nor are the criticisms of the liberals a mark of disrespect. Six hundred teachers assembled at a mass meeting while the school was closed, and they listened with courtesy to explanations of the issues and argued with integrity. They had not sympathized with the demonstrators; they were uncertain about many of their objectives or about the implications of legitimate conflict; but they came to talk to the students and to listen to them and even to broaden
positions already adopted. We are not snobbish or apologetic about Ohio State. This is an American story.49

49. This contention has been strengthened by developments in the six months between writing and publication. The provost is to be president at Macalester College; the vice-president identified as tied to the traditionalist reaction is to be provost of a liberal arts college in another state; the president has announced his retirement; the dean cited as an important spokesman for the modernizers is provost of a major state university elsewhere. The modernizing process continues at Ohio State and is integrated with the process nationwide.