In the Supreme Court

OF THE

United States

OCTOBER TERM, 1966

No.

MARIO SAVIO, et al.,
Appellants,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
Appellees.

On Appeal from the Judgment of the Superior Court of the State of California, in and for the County of Alameda, Appellate Department

JURISDICTIONAL STATEMENT

NORMAN LEONARD,
1182 Market Street,
San Francisco, California 94103,
Attorney for Appellants.

MALCOLM BURNSTEIN,
1440 Broadway,
Oakland, California,

RICHARD M. BUXBAUM,
Law Building, University of California,
Berkeley, California,

HENRY M. ELSON,
2020 Milvia Street,
Berkeley, California,

STANLEY P. GOLDE,
508 16th Street,
Oakland, California,

DOUGLAS J. HILL,
1440 Broadway,
Oakland, California,
Of Counsel.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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JURISDICTIONAL STATEMENT

The 565 appellants listed in Appendix D appeal from the decision of the Superior Court of the State of California, in and for the County of Alameda, Appellate Department filed January 4, 1967, rehearing denied, January 17, 1967, affirming the judgments of conviction of appellants by the Municipal Court, State of California, Berkeley-Albany Judicial District,

dated June 28, 1965, whereby appellants listed in Appendix Di were convicted of violating California Penal Code Sections 148 and 602(o), and appellants listed in Appendix Dii were convicted of violating Section 602(o). Appellants were sentenced to various punishments ranging from 120 days' imprisonment to the payment of fines. The Municipal Court has stayed execution of its sentences herein until May 19, 1967.

OPINION BELOW

The unreported memorandum of decision of the Superior Court is reproduced in Appendix A hereto. The denial of the petition for rehearing and for certification is reproduced in Appendix B hereto.

JURISDICTION

The judgment of the Superior Court affirming the convictions was filed on January 4, 1967. A timely petition for rehearing before that court and for certification of the appeal to the Court of Appeal, First Appellate District, was filed on January 13, 1967 and denied on January 17, 1967. Notice of appeal was filed in the Municipal Court on April 14, 1967.

The jurisdiction of the Supreme Court of the United States to review the decision below is conferred by Title 28, United States Code, Section 1257(2).

STATUTES INVOLVED

Sections 148, 409 and 602(o) of the California Penal Code are reproduced in Appendix C hereto. Section 407, defining the terms used in Section 409, is also reproduced in Appendix C.

QUESTIONS PRESENTED

I

Whether Section 602(o) of the California Penal Code, forbidding certain types of trespasses upon certain public property, is unconstitutional, in violation of the Fourteenth Amendment and of the First Amendment as embodied therein, when applied, for the first time, to include demonstrations claiming First Amendment protection on property of the Regents of the University of California.

II

Whether Section 148 of the California Penal Code, making the resisting, delaying or obstructing of a public officer in the performance of his duties a misdemeanor, is unconstitutional, in violation of the Fourteenth Amendment and of the First and Fifth Amendments as embodied therein, when applied, for the first time, to include passive submission to arrest and passive refusal to cooperate actively with post-arrest removal procedures by participants in demonstration claiming First Amendment protection.

III

Whether Section 602(o) of the California Penal Code, when applied to convict of trespass persons simultaneously acquitted by the same fact finder of an unlawful assembly charge under Penal Code Section 409, where such acquittal was arguably because of constitutional grounds equally applicable to the trespass charge, is unconstitutional in violation of the Fourteenth Amendment and the First and Fifth Amendments as embodied therein.

IV

Whether the refusal of the trial court to permit either a single joint jury trial or a single representative jury trial, leaving appellants only the alternatives of eighty jury trials coupled with the denial of requested pretrial discovery proceedings and with inadequate assistance of counsel, or a non-jury trial, makes waivers of the right to trial by jury in favor of a similar representative but non-jury trial so coercive as to violate the Sixth Amendment and the due process clause of the Fourteenth Amendment; and whether it was a denial of due process in violation of the Fourteenth Amendment for the trial court to sentence those defendants who did not waive their right to a judicial determination of guilt or innocence uniformly to more severe punishment than was meted out to those defendants who pleaded nolo contendere to the same charges.

STATEMENT

On December 2, 1964 a large number of persons entered Sproul Hall, the administration building of the University of California at Berkeley, 4/6 RT 26,[1] intending to remain there until the University administration would reopen negotiations with them about the scope of their rights to political activity on the campus. Later that night 773 of them were arrested. Because of their claim that the activity they engaged in is constitutionally protected the reasons for the demonstration are relevant.

In September of 1964, without prior notice to student groups, the University administration forbade political activity of any sort on that part of the school's property which traditionally had been used for such activity. 4/2 RT 164; 5/3 RT 45. The action of the University led to an immediate protest from and confrontation with many politically active student organizations of all persuasions. 4/3 RT 51f. There resulted three months of frustrating, increasingly complicated and finally fruitless efforts at negotiation between students and the administration. 4/2 RT 197; 5/20 RT 65, 76, 78; 5/25 RT 121, 126. These events forced many students to reflect upon the appropriate role of students in maintaining academic freedom as well as on their general civic freedom to

[1]The Reporter's Transcript of proceedings is cited "RT" with date and page reference; thus, 4/6 RT 26 refers to the Reporter's Transcript for April 6, on page 26. The Clerk's Transcript for all defendants is cited "CT-A", with the page reference. The appellants' Opening Brief in the Superior Court, the Statement of Facts which is occasionally cited for shorthand record references, is referred to herein as "AOB" with the page reference. The Clerk's Transcript of the Court of Appeal is cited "CT-CA".

engage in political and social activities. AOB 80-92. Because those students, as they testified, came to believe that their administrative counterparts would agree to enter such negotiations only by counting, rather than by listening to, requests therefore, they decided to engage in this demonstrative sit-in. 5/4 RT 54, 63; 6/4 RT (A.M.) 7-12.

Shortly before the building was to be closed late that evening, a campus policeman announced that fact on each floor and requested that those present leave. 4/6 RT 37, 39, 41, 43. In addition, late that evening the Chancellor of the campus made similar announcements, specifying that in his opinion the meeting had now become an unlawful assembly and requesting those present to leave. 4/2 RT 126, 142, 154, 172. Arrests of the 773 defendants, including all appellants, began in the early morning hours of December 3, and continued until that afternoon, in the main because each person arrested was individually interrogated, photographed and fingerprinted. The defendants were charged with violations of California Penal Code Section 409 (failing to disperse from the scene of an unlawful assembly) and § 602(o) (refusal to leave a public agency after closing hours upon a custodian's request to do so, no lawful reason for presence being apparent). Six hundred and fourteen of them were additionally charged with violating California Penal Code § 148 (resisting, obstructing, or delaying a public officer in the performance of his duties) because of their failure to obey orders to abandon their protest and walk away from the place of arrest.

On January 26, 1965 a demurrer raising the constitutional issues presented in Questions I and II above was filed with the Municipal Court, Berkeley-Albany Judicial District, Berkeley, California. CT-A 125. The demurrer was denied from the bench after briefing and oral argument, on February 2, 1966. 2/2 RT 3.

Following the failure of various efforts, detailed below, to obtain a jury trial, all but two of the defendants were tried in the Municipal Court, without a jury, starting on April 1, 1965, the trial lasting for approximately eleven weeks. The trial that commenced on that date was of 155 of the defendants; the remaining defendants submitted their cases to the same trial judge on the basis of testimonial stipulations and the evidence adduced at the said trial. Much of the trial time was consumed by the presentation of facts raising the constitutional issues specified in Questions I and II above. The trial judge announced his verdicts on June 28, 1965. All defendants were acquitted of the charge of having violated Penal Code § 409 without specification of grounds; with one irrelevant exception, all were convicted of the other two counts as charged. 6/28 RT (entire transcript).

Sentencing began on July 19, 1965 and continued for several months. The trial court imposed sentences on those who had stood trial that were, almost without exception, twice as severe as those imposed on defendants who pleaded *nolo contendere*. Tables 2 & 3, AOB 327f. Appellants raised constitutional objections

to these variations on appeal, specifying the grounds stated in Question IV above. AOB 189-196.

On October 2, 1965 counsel for appellants moved to require the trial judge to reduce his findings of fact and conclusions of law to writing, because of the question whether inconsistent constitutional standards had been used in convicting under Penal Code Section 602(o) while acquitting under Penal Code Section 409 —the issue specified in Question III above. CT-A 303. The trial court denied this motion. CT-A 11.

The form of the appellants' trial had been a subject of much controversy before it began. On January 26, 1965 appellants moved to consolidate the complaints, which all defendants in groups of ten persons each, in order to obtain formal pretrial discovery proceedings, stating at the same time their aim of procuring a speedy jury trial. CT-A 150. On February 23, 1965 appellants moved for a consolidated, singe joint jury trial, CT-A 222, and in the alternative, for a single jury trial of a representative nature, in which a group of defendants would be first tried, the balance to submit their cases to the trial court (without a jury) on the basis of the evidence adduced at that jury trial, with the court free to make its own determination of the guilt or innocence of each of the submitted cases. CT-A 225; 3/1 RT 1f. These motions were made, briefed and argued on the grounds that included the constitutional grounds stated in Question IV above. Ibid. All motions were resisted by the prosecution and denied. CT-A 2, 3. Thereafter, because it appeared

impossible for defendants to secure speedy trials, effective representation of counsel, or any of the requisites of due process in a series of 80 lengthy jury trials, defendants moved under protest for a non-jury trial of all or a representative group of them, under the same conditions as were contained in the earlier motion for a single, joint or representative jury trial. CT-A 229, 231. The motion for a single, joint non-jury trial was denied. CT-A 3. The trial court postponed a ruling on the motion for a representative non-jury trial until all appellants appeared and individually waived their right to a jury trial. CT-A 3; 3/2 RT 2 et seq. Thereafter the motion, not resisted by the prosecution, was granted and it was stipulated that 155 defendants, chosen by the prosecution and defendants, be joined in a single non-jury trial. CT-A 233.

The circumstances leading appellants to waive their right to a trial by jury, and the constitutional issues resulting therefrom, were argued before the trial court, CT-A 229f, and upon the appeal to the Appellate Department of the Superior Court, County of Alameda. AOB 142-156. In that appeal, too, were duly raised the constitutional issues specified in Questions I through IV. AOB 121 to 141; 157 to 174; 189 to 275. The appeal was denied and judgment affirming the convictions entered on January 4, 1967. Appendix A. This judgment became final when the Superior Court denied a petition for rehearing and for certification to the Court of Appeal, State of California, First Appellate District, on January 17, 1967. Appendix B.

THE QUESTIONS ARE SUBSTANTIAL

The decision below raises and wrongly decides two of the central constitutional issues inherent in the growing number of large-scale civil or political demonstrations. Neither has been dealt with by this Court. The first question involves the constitutionality of wide-ranging trespass statutes when applied against passive demonstrations in non-sensitive public locations, particularly in educational centers. The second question involves the constitutionality of resisting arrest statutes when applied against refusal to cooperate actively in post-arrest removal procedures. Both questions are significant: because of their nature and because of the number of occasions on which they can be raised. In addition, an important constitutional issue is raised by the retroactive extension of both statutes below to include conduct not previously held nor reasonably expected to be within their scope.

A. The Unconstitutionality of California Penal Code Section 602(o) as Applied.

1. The decisions of this Court that uphold trespass convictions involve situations where trespass occurred in sensitive areas and conflicted with a significant countervailing public interest in keeping order. The courthouse demonstrations of *Cox v. Louisiana,* 379 U.S. 536 and 559 (1965), the jail demonstration of *Adderley v. Florida,* 385 U.S. 39 (1966), and the library demonstration of *Brown v. Louisiana,* 383 U.S. 131 (1965), have established the limited immunity of petitioning demonstrations when occurring in such sensitive forums. *Edwards v. South Carolina,*

372 U.S. 229 (1963) has, on the other hand, clearly indicated that similar statutes (in that case breach of the peace) will not be permitted to inhibit demonstrations of a reasonable scope and in an appropriate location. This case presents the important question whether a demonstration shall be permitted under *Edwards* because of its nature, or condemned under *Adderley* because of the happenstance of being charged under a public trespass statute.

Whether a trespass or a breach of the peace is involved, the rules for applying the principles of these cases to the great bulk of "in between" factual issues remain to be developed. The constitutional issue is framed in terms of three variables: the place of the demonstration, the nature of the demonstration, and the scope of the applicable statute. This Court has not yet had the opportunity of laying down standards to test the constitutionality of applying statutes more objectionable than the one at issue in *Adderley* (entering property with a malicious intent), especially when the assembly being attacked is a large one, but is in a public location more appropriate to its professed purpose. Balancing these variables, it is submitted that the case below was wrongly decided. It involves an *Edwards* type of situation and the principles there established should be used though a trespass statute is the sanction sought to be applied.

(a) Appellants conducted a demonstrative sit-in in a form not previously before this Court.[2] The sit-in

[2]None of the previous sit-in decisions of this Court, whether involving trespass or breach of the peace charges, justifies the

was conducted in and only in the public corridors and stairwells of Sproul Hall. The building being the political and administrative center of the Berkeley campus of this State university, the demonstration, protesting important political aspects of the governance of students, was at the appropriate location. In this it resembled the situation in *Edwards,* just as a demonstration before a classroom or laboratory would have resembled the meetings at inappropriate locations in *Cox* and *Adderley.*

(b) The applicable statute, Section 602(o), reads as follows:

> "Every person who willfully commits any trespass by . . . refusing or failing to leave a public building of a public agency during those hours of the day or night when the building is regularly closed to the public upon being requested to do so by a regularly employed guard, watchman, or custodian of the public agency owning or maintain-

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result reached in the present case. Indeed, they do not purport to review the statutes but are all based upon special fact situations. The first group of these is the "abatement" group, following *Hamm v. City of Rock Hill,* 379 U.S. 306 (1964), whether using the Federal Civil Rights Act of 1964, or leaving this issue open, as in *Bell v. Maryland,* 378 U.S. 226 (1964). The second group of cases is the group in which a state's segregation policy was so intimately involved in the prosecution of the sit-ins as to become state action and fall under the Fourteenth Amendment. These cases, including *Robinson v. Florida,* 378 U.S. 153 (1964), *Griffin v. Maryland,* 378 U.S. 130 (1964), *Peterson v. City of Greenville,* 373 U.S. 244 (1963) and *Lombard v. Louisiana,* 373 U.S. 267 (1963), are therefore not relevant to the problem under consideration. The same is true for the third group of cases, involving breach of the peace rather than trespass statutes, in which this Court reversed for the lack of evidentiary basis for the sit-in convictions. *Barr v. City of Columbia,* 378 U.S. 146 (1964); *Garner v. Louisiana,* 368 U.S. 157 (1961).

> ing the building or property, if the surrounding circumstances are such as to indicate to a reasonable man that such person has no apparent lawful business to pursue . . . is guilty of a misdemeanor."

Unlike the statute in *Adderley,* which forbids entry upon property with malicious intent, this statute purports to cover even conduct protected by the First and thus Fourteenth Amendments. See *Marsh v. Alabama,* 326 U.S. 501 (1946); *Tucker v. Texas,* 326 U.S. 517 (1964). Even if such protected behavior were deemed exempted by the "apparent lawful business" clause in order to save the statute, the actual decision whether the behavior is so exempted is in fact left to the discretion of the janitor or custodian, since only if he makes the request to leave is the statute operative. This unfettered discretion is at least as objectionable as that of the policeman who can decide on arrest directly, *Shuttlesworth v. City of Birmingham,* 382 U.S. 87, 90 (1965), and in essence vests in him the right to say what ideas may be disseminated, *Cox v. Louisiana,* 379 U.S. 536, 557 (1965). The "closed hours" requirement can obviate these problems only if it is assumed that no political assembly or petitioning demonstration at a public building can ever be legitimate if extending into closed hours. In sum, the statute is crucially different from *Adderley,* and the relation between the statute and the trespassing behavior one not yet considered by this Court. This trend toward piecemeal statutes directed bluntly yet indiscriminately at particular demonstrations seriously inhibits the full

panoply of political expression guaranteed all citizens by the First Amendment. (See e.g. 6A Ark. Stat. Anno. § 71-1803 (1959); Cal. Penal Code § 602.7 (1965); 3 Anno. Code Md. Art. 27, § 577A (1966); Page's Ohio Rev. Stat. Anno. Title 29, § 2917.21.1 (1964).)

(c) The assembly was a large one. The building, however, was not blocked; aisles were left open for normal traffic while officers and employees remained, only thereafter were they fully used. 4/6 RT 15, 20; 4/8 RT 35; 5/3 RT 30; 5/4 RT 31, 33.

(d) The demonstration, though in the form of a sit-in, was a direct political assembly. While demonstrations, including sit-ins, are not pure speech but involve non-verbal conduct as well, they—and this sit-in—are political expressions deserving of some protection lest the First Amendment be relegated to the protection of meaningless, because uncommunicated, individual speech. Each participant through his person as well as through verbal statements communicated to the general public and to the University and State administration his protests against constraints upon political activity imposed by that administration. The demonstration deserves the protection of the First and Fourteenth Amendments; the grievances of the participants were real, and there were at that time no channels of communication leading to the administration through which the process of negotiation could be conducted. 5/4 RT 54, 63; 6/1 RT 113; 5/24 RT 52, 55; 5/5 RT 57, 58. The political, and thus First-Amendment-oriented aspects of this sit-in were thus

significant and not mere facades for irrational or worthless acts.

(e) Academic freedom values are involved in this case; they strengthen the claim to protection against trespass sanctions for exercising rights protected by the First Amendment. See *Keyishian v. Board of Regents of University of State of New York,* 87 S.Ct. 675 (1967). Almost all of the appellants were students at the time. The record reflects their concern over the right of students to participate in the decision-making process at a university, when that process affects their ability to learn and function as community-spirited citizens. The recognition by the other members of the academic community that these rights inhere in membership therein justifies considering these rights to be components of academic freedom. See Newman, The Berkeley Crisis: Recollections, Overview, and Response to Professor Louisell, 54 Calif. L. Rev. 118 (1966). The faculty overwhelmingly and formally endorsed appellants' position (Academic Senate Resolution of December 8, 1964, Minutes of the Berkeley Division, December 8 and 10, 1964, p. i, reprinted in O'Neil, Reflections on the Academic Senate Resolution, 54 Calif. L. Rev. 88, 89 n. 4 (1966)); and after the trial, so did the administration. Newman, *supra* at 121; AOB 19-20; see also 5/25 RT 89, 92 (testimony of President Kerr).

2. Also involved in this appeal is a significant dispute as to the scope of this Court's recently confirmed "enlargement" doctrine. Pursuant to *Bouie v. City of Columbia,* 378 U.S. 347 (1964), it is a violation of the

due process clause of the Fourteenth Amendment retroactively to interpret a state statute so as to broaden its application, when a more conservative reading may have been relied upon by persons engaged in conduct claiming a certain degree of constitutional proctection. Equally, it is since *Shuttlesworth v. City of Birmingham,* 382 U.S. 87 (1965) clear that where the trial court's fact-finding process leaves a conviction under an otherwise valid statute (there, refusal to "move on" at police officer's order after blocking traffic) open to the possibility that a substantive standard was used which would be an unconstitutional intrusion on the exercise of First Amendment rights (refusal to "move on" at police officer's order), the conviction is invalid.

The process of applying these principles in the diverse statutory contexts which are utilized against civil and political assemblages throughout the nation has not yet been undertaken. The facts of this case reflect the recurrent problems raised when typical trespass, breach of the peace, unlawful assembly or resisting arrest statutes are used to punish such conduct.

Section 602(o), the trespass statute involved, is only by strained extension readable as, and was never suspected of, covering University property in its definition of "public agency." This is most vividly shown by the fact that following a long line of similar enactments, the California Legislature, at the same 1963 session at which it enacted Section 602(o), enacted a major tort liability act which defined the general term

"public entity" as including "the Regents of the University of California, and any public agency"! California Government Code, Section 811.2. Conversely, there has been in the Penal Code since 1955 an article, § 558, specifically punishing trespasses on University property (which, as it happens, applies only to one campus in Southern California).

In this case a precedent for extended coverage did exist by the time of the appeal of these convictions to the Supreme Court, but it arose in a manner which should preclude its application to the present appeals.[3] Appellants submit that it is important for this Court to review the extent to which state appellate procedures can thus convert the ban on retroactive extensions of criminal statutes into disingenuous applications of stare decisis.

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[3]Eight of the 773 demonstrators were juveniles. They were separated out of the complaint groups, placed before the local juvenile courts and convicted pursuant to state law for their participation in the demonstration. This case was appealed to the (then District) Court of Appeal by their counsel, who were not connected with appellants' counsel. Appellants' counsel by letter requested that court to postpone consideration of that case until their own appeal could be heard, since the former record was based on a three hour hearing before a juvenile judge and the constitutional facts consequently had not been developed on that record, CT-CA. This letter was not answered. The (District) Court of Appeal affirmed in an opinion, *In re Bacon,* 240 C.A. 2d 34, 49 Cal. Rptr. 322 (1966), that in dictum passed upon challenges to the relevant statutes. Appellants petitioned to intervene in the petition for rehearing, CT-CA, but this, as well as a rehearing, was denied, 240 C.A. 2d at 63; CT-CA. (Counsel wish to note that the court, in the main opinion, 240 C.A. 2d 34 at 40, lists them as *amici curiae,* a designation counsel vigorously deny is appropriate.) Then, in disposing of appellants' own appeal in January of 1967, the Superior Court cited the precedent of *In re Bacon* as dispositive of the issues raised. Appendix A.

3. This appeal also involves the application of the doctrine announced in *Shuttlesworth v. City of Birmingham,* 382 U.S. 87 (1966) to a situation where a trial court without findings of fact acquits persons claiming First Amendment protection for their conduct of one charge, while convicting for the same conduct under another charge to which the First Amendment claims are equally relevant.

> "The trial court made no findings of fact and rendered no opinion. For all that appears, that court may have found the petitioner guilty only by applying the literal—and unconstitutional—terms of the ordinance. . . .
>
> Because we are unable to say that Alabama in this case did not judge the petitioner by an unconstitutional construction of the ordinance, the petitioner's conviction . . . cannot stand." (Id. at 92).

The question is important because of the prevalent practice of placing a multiplicity of charges under similar general statutes—breach of the peace, unlawful assembly, trespass—against participants in peaceful assemblies and demonstrations. See e.g. 6 Civil Liberties Docket 47, No. 552, La. 2; 6 *id.* 48, No. 552, Va. 8; 7 *id.* 5, No. 58.21; 7 *id.* 12, No. 123.24; 7 *id.* 103, No. 55.19; 9 *id.* 3, No. 51.44; 9 *id.* 3, No. 51.45; 9 *id.* 38, No. 51 Pa. 2; 10 *id.* 6, No. 51.54; 10 *id.* 17, No. 58.28; 10 *id.* 17; No. 58.29; 10 *id.* 17, No. 58.31; 10 *id.* 17, No. 58.31a; 10 *id.* 79, No. 552 S.C. 2b. This case presents a paradigm example of the practice. Appellants were charged with violations of California Penal Code Section 409—failing to disperse from the scene of an

unlawful assembly after due warning—as well as of Section 602(o). Appellants' defenses against both charges were in part factual and statutory, in greater part constitutional. The trial court acquitted all defendants of the Section 409 charge; the event involved was, of course, the same event as that involved in the Section 602(o) charge.

Following the acquittal appellants moved for findings of fact and conclusions of law to perfect the record, arguing that it was impossible to tell whether the trespass convictions were based upon a reading of the statute open to constitutional challenge or not. The motion referred to the acquittal on the unlawful assembly charge and requested findings on the reasons for the acquittal, since this would resolve any question of constitutionally dubious inconsistent verdicts. CT-A 303. This motion was resisted by the prosecution and denied by the trial court. CT-A 11.

The acquittal under Section 409 may well have been due to the lawful nature of the assembly, because of its protected character under the First and thus Fourteenth Amendments. Under those circumstances the trespass statute would have been unconstitutionally applied, since the recognition of the lawfulness of an assembly (on the same public property and during the same hours) because of its First Amendment character would preclude rejection of a "lawful business" claim of Section 602(o), if indeed it would not preclude a conviction under any public trespass statute.

Thus the sequence of events under the Section 409 and Section 602(o) charges would fall within the evil

condemned in *Shuttlesworth.* It is submitted that *Shuttlesworth* is equally applicable where the possibility of an unconstitutional construction of the relevant statute can be gleaned not alone from its face but from the extraneous circumstance of the fact finder's action under another statutory charge. This is a substantial federal question since it can arise whenever the same conduct is charged under more than one statute, a frequent occurrence in this class of cases.

B. The Unconstitutionality of California Penal Code Section 148 as Applied.

1. To use § 148 against the post-arrest behavior of appellants would attribute an undeserved and illegitimate element of violence, of resistance, to their quintessentially passive behavior. This Court has not yet passed upon the major constitutional question whether mere and complete inaction on the part of an arrested person can be additionally punished under resisting arrest statutes. Certiorari was dismissed as improvidently granted in *Turner v. New York,* 35 U.S. L.Week 3391 (May 8, 1967) presumably because the record facts therein justified a disorderly conduct charge. Perhaps excepting a couple of the 773 defendants there is no such evidence in this record; and given the varying locations and times of all arrests, these arguable instances can hardly be said to taint the post-arrest situation as a whole. Appellants' conduct changed not one iota from that engaged in before arrest. They did not even "go limp," but remained in the same position they were in before arrest. CT-C

649. Under these circumstances there are two objections to the application of such a statute.

First, the application of an additional sanction to arguably protected behavior is a significant constraint upon the exercise of First Amendment freedoms. These statutes apply, as does the present one, to any behavior resisting, delaying or obstructing an officer in performing his public duties. A group standing on a sidewalk before a state building, told to move on and not doing so, would violate Section 148. The statute does not in its terms apply only when the conduct a person is ordered to stop is illegal conduct. As a result the statute is the more used the more the conduct at issue is legitimate, since the participants are then least likely to perceive the justification for stopping their demonstration. Thus the arresting officers in essence can bootstrap any peaceful and by definition orderly situation into a punishable event. Secondly, if the assembly is indeed a passive one and its conduct does not change after an arrest for participating in it, then a conviction under such a statute would be so totally without evidentiary support as to deprive a defendant of due process of law under *Garner v. Louisiana, supra,* and *Thompson v. City of Louisville,* 362 U.S. 199 (1960).

The absence of a constitutional ruling has resulted in an abuse of this sanction in demonstration situations. See, e.g., 7 Civil Liberties Docket 5, No. 58.20; 8 *id.* 8, No. 55.26; 9 *id.* 5, No. 55.70; 9 *id.* 6; 9 *id.* 41, No. 58.16; 10 *id.* 17, No. 58.27; 11 *id.* 62, No. 51 Cal. 11.

The present case presents the first occasion for this Court to pass on the basic and substantial question whether refusing to cooperate in one's removal from an assembly or demonstration claiming First Amendment protection can properly be subject to an independent penal sanction under statutes like California Penal Code Section 148.

2. The "enlargement" issue earlier discussed is also raised by the convictions under Penal Code Section 148, making it a high misdemeanor to resist, obstruct or delay a public officer in the performance of his duties. Whatever the possibility that "staying limp," the classic hallmark of passive disobedience, can properly be the subject of penal prohibition, the present statute had never before the present case been read to cover mere inaction on the part of arrested persons. As the record here indicates, some appellants assumed and stated to the arresting officers that they did submit to arrest and would offer no resistance. AOB 53-54. Under these circumstances, interpreting the statute for the first time in this case—and therefore retroactively—to include passive non-cooperation is an "enlargement" within the *Bouie* doctrine, and violates the due process clause of the Fourteenth Amendment. This Court should determine whether *Bouie* protects against state criminal procedure that would create precedent out of an event to apply against an appeal from that same event.

C. The Denial of a Meaningful Jury Trial and the Imposition of Penalties for its Assertion.

1. Appellants further raise the claim that the trial court's refusal to explore meaningful alternatives to the unreasonable notion of 80 separate trials as the price for trial by jury, as developed in the statement of facts, violated the Sixth Amendment of the United States Constitution and deprived appellants of the equal protection of the laws and of their liberty and property without due process in violation of the Fourteenth Amendment.[4]

Appellants were denied their request for a jury trial of a representative group, the balance submitting their cases to the court on the basis of the record and any additional testimonial stipulations needed. This

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[4]Appellants also raise here the questions of federal procedural due process involved in: the trial court's rejection of a request for formal pretrial proceedings because not provided for by state law, though necessary to fashion meaningful jury trial possibilities; the trial court's acceptance into evidence, *as admissions,* 4/12 RT 60; 4/15 RT 43, 56, of statements elicited from almost all appellants after arrest without a warning of their rights to counsel, and in some cases in the face of a specific request for counsel, 4/12 RT 22, 24, 85, 86; 4/13 RT 92, 98, 117, 122, 127; 4/14 RT 10, 11, 13, 28, 31, 42, 48, 50, 51, 52, 53, 54, 66, 70, 71, 74, 76, 78, 85 (of the 155 defendants at consolidated trial only); the trial court's acceptance of evidence of obstruction or delay under Penal Code § 148 in the face of arresting officers' warnings to defendants that "resistance" would be charged, 4/13 RT 39, 83; 4/14 RT 23 *(Cox v. Louisiana,* 379 U.S. 559 (1965)); and the double jeopardy aspects of punishment imposed upon identical conduct engaged in before arrest (trespass) and after arrest (resisting arrest).

form of proceeding was found acceptable—but only for a non-jury trial. Indeed, the number of defendants finally so tried, 155, greatly exceeded the 30 for whom appellants had requested a representative jury trial. It is thus apparent that trial mechanics were not the issue; had they been, the notion of a representative non-jury trial would also have been rejected. The trial court, in refusing a jury version of a representative trial but accepting a non-jury version of the same, acted to deprive appellants of their right to a trial by jury. The proffered choice of 80 trials, coupled with the refusal to explore any procedural amelioration of such a staggering trial load, gave appellants Hobson's choice only, and created an unconstitutionally harsh condition for the exercise of a constitutional right. *Sherbert v. Verner,* 374 U.S. 398 (1963). The subsequent waivers of trial by jury, required to be entered before the court would even rule on the representative non-jury trial procedure, thus do not cure the effects of this coercion.

The use of state procedural limitations against trial aids such as pretrial discovery, and against submission of cases on the record adduced before a jury in a related case, in order to cause or in effect causing coercive waivers of the right to a jury trial, is a federal question of growing importance. If such essentially tactical and expediential considerations can apply to mass arrest situations, then the process of defending constitutional, especially First Amendment, freedoms is significantly diluted. In addition, even if the state law charges are upon unimpeachable grounds, the fact

of group participation will by itself lead to second-rate trial possibilities, raising important and as yet completely unexplored due process problems. Compare the situations analyzed in Klein, Ogren & Thomas, Analysis and Statistics, in Symposium on Watts 1965, Arrests & Trials, 3 Law in Trans. Q. 177 (1966) and Court Congestion and Related Problems of Civil Rights Demonstrations, 41 Commonwealth 171 (1965). See Barrett, Criminal Justice: The Problem of Mass Production, in Jones, ed., The Courts, The Public And the Law Explosion 94 (1965).

2. The statement of facts indicates that the trial court applied a mechanical sentencing formula that arbitrarily discriminated against those defendants who would not plead *nolo contendere* and thus violated appellants' rights under the due process clause of the Fourteenth Amendment. Of the 655 defendants who would not waive their procedural rights all but 34 received sentences at least twice as severe as those imposed upon the 101 defendants who pleaded *nolo contendere*. AOB 287-326. Yet the latter defendants pleaded to the same group of charges; no charges were dropped. This procedure, uniformly applied, can only be seen as an unconstitutional punishment for refusal to waive the right to a factual determination of guilt.

The decision below raises substantial federal questions of general importance. Appellants respectfully request this Court to note probable jurisdiction; to the extent any of the questions are deemed properly raised upon a writ of certiorari, they respectfully request that this Jurisdictional Statement also be con-

sidered a petition for the issuance of a writ of certiorari.

May, 1967.

Respectfully submitted,
NORMAN LEONARD,
Attorney for Appellants.

MALCOLM BURNSTEIN,
RICHARD M. BUXBAUM,
HENRY M. ELSON,
STANLEY P. GOLDE,
DOUGLAS J. HILL,
Of Counsel.

(Appendices Follow.)

Appendices.

Appendix A

In the Appellate Department
Of the Superior Court of the State of California
In and for the County of Alameda

Criminal No. 235

People of the State of California,
Respondent,
v.
Mario Savio, et al.,
Appellants.

MEMORANDUM OF DECISION
Dated: January 4, 1967

By the Court:

We have carefully examined the record in the above-entitled case and find no procedural error. The judgments and each of them are, accordingly, affirmed on the authority of In re Bacon, 240 ACA 34 and Adderley et al. v. Florida, ... US ....., 17 L ed 2d 149, 87 S Ct .....

Appendix B

Superior Court of the State of California
In and for the County of Alameda
CLERK'S NOTICE in re RULING
The People of the State of California

v.

Mario Savio, et al.

Date: January 17, 1967 Action No. 235

In the above entitled action pending in Appellate Department ....., you are hereby notified that the Court Orders that the Petition for Rehearing be and hereby is Denied. The Court further Orders that the Application for Certification be and hereby is Denied. The Court further Orders that the Application for Stay of Issuance of Remittitur be granted and is hereby stayed to February 17, 1967.

Yours truly,
Jack G. Blue, County Clerk,
By Vernon F. Blake, Deputy.

Appendix C

California Penal Code Section 148:

Every person who wilfully resists, delays, or obstructs any public officer, in the discharge or attempt to discharge any duty of his office, when no other punishment is prescribed, is punishable by a fine not exceeding one thousand dollars, or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment.

California Penal Code Section 602(o):

Any person who wilfully commits any trespass by either:

. . .

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

California Penal Code Sections 409 and 407:

Every person remaining present at the place of any riot, rout, or unlawful assembly, after the same has been lawfully warned to disperse, except public officers and persons assisting them in attempting to disperse the same, is guilty of a misdemeanor. Whenever

two or more persons assemble together to do an unlawful act, and separate without doing or advancing toward it, or do a lawful act in a violent, boisterous, or tumultuous manner, such assembly is an unlawful assembly.

Appendix D(i)

Abascal, Manual
Adams, Eileen
Adams, Mary Jane
Adams, Mary Kathleen
Adler, Margot
Akers, Charlene
Akin, Mark Huxley
Alexander, Lynn
Alexander, Richard
Alexander, Roberta
Allister, Anya
Anastasi, Ronald
Anderson, Michele Cohen
Artel, Linda
Artman, Charles
Asay, Roger
Ashkenas, Gail
Atkin, June Nikki
Axelrod, Nancy
Baker, Kenneth
Barglow, Michael
Barki, Dan
Barnes, Larry
Barnes, Linda
Barter, Kenneth
Bartlett, Deborah
Bearden, Dennis
Beasley, Richard
Bell, Bruce
Berg, Darwin
Bergren, Carl
Bergsten, Martha Callaghan
Berkowitz, Madelon
Biasotti, Jo Ann
Bingham, Edward
Bishop, John
Black, Allen
Blickman, Victoria
Blum, Kenneth
Bollinger, John
Bookstein, Abraham
Bordin, Charles
Botkin, Joseph
Bouchard, Thomas
Bowman, Judy
Bozman, Barbara
Bradford, Della
Bradsher, Ann
Brannam, David
Brewer, Iris Baron
Bridges, Barbara
Brindiero, Glenn
Brister, Bob
Broadhead, Richard
Brodsky, Joel
Brown, Lana
Browne, Stephen
Brownlee, Jeanne
Bruderlin, Fred
Bruenn, Jeremy
Brunner, Wendell
Butler, Alan
Calmus, Lawrence
Casagrande, Elspeth Jane
Cash, Norma
Castleberry, Donald
Chambers, Terry
Christensen, William
Cicconi, Marie
Cirese, Robert
Cohn, Andra
Cole, Mary
Coleman, Hilbert
Coleman, Kate
Collins, Randall
Collins, William
Coontz, Stephanie
Coopersmith, Paul

Corey, Jane
Cortes, Michael
Cowan, Richard
Crawford, William
Crocker, Eileen Lindsey
Curo, Forest
Cyr, Agnes
Darney, Deen Ann
Davenport, Mary
Dayton, Walter Wedige
Dean, Thomas
Deitch, Ralph
Dennis, Thomas
Denny, Donald
Desmet, Mark
Devault, Christine
Doner, Natasha
Doughty, Ellen
Drogin, Richard
Druding, Susan
Duke, Michael
Dunbar, Richard
Dunbar, Sharryn
Early, Daniel
Eden, Marilyn
Edminster, John
Eisen, Michael
Eisenstein, Diana
Eliet, Patricia
Ellinger, Wallace
Erenberg, Marney
Eschelman, Alan
Evanson, Michael
Fagerholm, Judy
Fast, Dennis
Feitis, Rosemary
Feller, Gary
Felsenstein, Lee
Ferguson, Shannon
Figen, Ethan
Fink, Richard
Fisher, Ralph
Fishman, Irving
Fiske, Thomas
Flemming, Elena
Ford, Anthony
Forester, Philip
Frank, David Lewis
Frank, Katherine
Freed, Ira
Freedman, Warren
Freeman, Jo
Gardner, Gail
Garfield, Frank
Garlock, Jonathan
Garlock, Susan
Garson, Barbara
Garson, Marvin
Geneson, David
Germain, Donna
Gerould, Pamela
Gillers, Ina Kilstein
Gillers, Stephen
Ginsburg, Jerry
Gleason, Phillip
Glick, Barry
Goddard, Robert
Goertzel, John
Goff, Delores
Goines, David
Goldblatt, Lee Frances
Goldberg, Arthur
Goldberg, Devora
Goldsmith, Renee
Golwyn, John
Goodman, Brenda
Goodwin, Jerrold
Gordon, Barry
Grabowski, Helaine
Grant, Philip
Gravalos, Elizabeth
Greenberg, David
Greenberg, Robert
Greenleaf, George

Greenslade, Brett
Gregory, John
Gregory, Roberta
Grenz, Lilly
Groves, Anne
Haber, Les
Haberfeld, Peter
Hallinan, Conn
Hallinan, Matthew
Hallum, Peggy
Halpern, Michael
Hamilton, Steve
Hamlin, Larrie L.
Hannaford, Dale
Hardin, Marc
Harris, Halli
Harris, Joseph
Harrington, Gordon
Hatch, Carol
Hawkins, Wendy Chapnick
Hawley, Susan
Hechler, Stephen
Herberich, James
Hernandez, Luis
Hickey, Karen
Hicks, James
Hiken, Louis
Hirsch, Geoffrey
Hitz, Henry
Hixson, Charles
Hollander, Lynne
Hollander, Fred
Holt, Dennis
Houillion, James
Huberman, Alice
Huberman, Jaime
Hudson, Marsha
Hughes, Mary
Hunter, Richard
Ilyama, Patricia
Imhoff, Susan
Irlenborn, Peter
Israel, Peter
Jackson, Janet
Jacobsen, Marna
James, David
James, Michael
Janke, Peter
Jankowski, Nicholas
Johnson, Elsa
Kalitinsky, Sylvia
Kamornick, Phillip
Kanter, Elliott
Kapiloff, Paul
Kashinsky, Daniel
Katz, Paula
Kaufman, Denise
Kausek, Caroline
Keig, Daniel
Kennedy, Linda Kaye
Kennedy, Susan
Kepner, Diane
Kepner, Gordon
Kershaw, Alexander
King, Jonathan
Kirchner, Daniel
Kirkland, Kenneth
Klein, Margaret
Knight, William
Knowles, Jonathan
Knowlton, Judith
Kogan, Michael
Kolodney, David
Korshak, Gerald
Kovacs, Irene
Kramer, Dana
Kramer, Fredrica
Kroll, Michael
Kroll, Robert
Kroopnick, Peter
Kurzweil, Bettina Aptheker
Lapenta, Joseph
Laszlo, Frank
Lawrence, Patricia

Lehtman, Harvey
Leiter, Ronald
Leonard, Kenneth
Leonard, Stephen
Lester, Lewis
Levant, Lowell
Levenson, John
Leventhal, Linda
Levine, Anita
Lhospital, Claude
Lima, Margaret
Lipner, Leonard
Lipson, Steven Marc
Litewka, Albert Bernard
Litewka, Jack Paul
Lloyd, Mary
Lorimer, Michael
Loskutoff, Douglas
Ludeke, Russ
Lustig, Jeffrey
Lustig, Stephen
Lyons, Glenn
Maclaren, Robert
Malbin, Edward
Marcus, Michael
Margetti, Louis
Mark, Brian
Markley, Landis
Marsh, Phillip
Matteson, Peter
McDaniel, John
McGah, Walter
McLaughlin, Douglas
Mellin, Pamela
Melnick, David
Mendershausen, Ralph
Merrill, Elizabeth
Meyer, Richard R.
Meyers, Richard
Miller, Evelyn
Miller, Richard
Miller, Wendy
Miller, William
Milligan, Marilyn
Millstein, Carolyn
Millstein, Jerry
Minkus, David
Mitchell, Charles
Moon, James
Moore, Stanley
Morris, Marc
Morrison, Ronald
Morshead, Judy
Mortenson, Elfreda
Moule, Jeanne Golson
Moule, Robert
Muldavin, Hanna
Muldavin, Peter
Mullen, Rodney
Murphy, Craig
Murphy, Stephen
Nanas, Richard
Neidorf, Margaret
Nelbach, Mary
Nelson, Mary
Nickerson, Steven
Noble, David
Nusinow, Carole
Oleson, Norman Lee
Olive, Michael
Opler, Nora Jean
Osgood, Eleanor
Paik, Daniel
Papo, Michael
Parke, David
Patterson, Eugene
Peacocke, Dennis
Peters, Judith
Peterson, Susan
Pickard, Ronn
Pierce, Thomas
Pilacinski, Bohdan
Pinsker, Harold
Plagemann, Stephen

Power, Patricia
Raugh, Michael
Reece, Craig
Reinsch, John
Reske, Tanga
Richardson, David
Roberts, John
Robman, Steve
Rodriguez, Carl
Rogers, Janet
Rosenfeld, Edward
Rosi, Leonard
Rossman, Deborah
Rossman, Michael
Rothe, Cydny
Rubin, Carolyn
Sabinson, Mara
Samuels, Barbara
Samuels, Jim
Sanders, Peter
Sandifur, Leland
Sapiro, Ruth
Saslow, Stephen
Satterthwaite, William
Saunders, Richard
Savio, Mario
Savio, Suzanne Goldberg
Schiffrin, Rebecca
Schimenti, Emile Dan
Schmorleitz, Richard
Schorer, Judith
Schultz, Marston
Schumm, Uriel
Senf, Diana
Shapiro, Anne
Shapiro, Dana
Shapiro, Lawrence
Shapiro, Marsha
Shattuck, Kate
Shea, Michael
Schechner, Mark
Sheingold, Joan
Sheppard, Mary Jane
Shippee, Mary
Showers, David
Shub, Beth
Shub, Michael
Siegel, Ilene
Siegel, Leni
Silveira, Jose
Silverman, Barbara
Silverman, Barry
Silverstein, Murray
Siminowski, Tedi
Simons, Keith
Skiles, Durward
Smith, David P.
Smith, Garwood
Smith, James C.
Smith, Jon Rogers
Smith, Linda
Smith, Michael James
Smith, Michael Reid
Smith, Sharon
Snodgrass, Hershel
Snow, Andrea
Sobel, Suzanne
Sokolow, Fred
Sokolow, Kathleen Wilson
Sokolow, Stephen
Sonnenshein, Susan
Sosna, Leonard
Stapleton, Elizabeth
Stapleton, Sidney
Steinberg, Alan
Stering, John
Stevens, Michael
Stine, Peter
Stromberg, Eugene
Sugarman, Gary
Sullivan, Thomas
Summers, Frank
Taft, Penelope
Takagi, Mae

Tangen, Jan
Tempey, Damon
Tener, Marvin
Terwilliger, Paul
Thomas, Lois
Thon, Adrienne
Thoreen, Keith
Tout, Carol
Trupin, Sue
Turner, Brian
Turner, William
Upton, Albart
Urmann, Michael
Van Eps, John
Veedell, Esther
Viani, Brian
Vogel, Robert
Wald, David
Wald, Hazel
Waldron, Jack
Wall, Hyale
Wallach, Marlin
Walsh, Carolyn
Walter, Virginia Kerber
Walters, Alfred
Warren, Phillip Michael
Watson, Donna
Wedum, Ellen
Weil, James
Weinberg, Jack
Weinberger, Michael
Weller, Thomas
Wellings, Julie
Wells, Andrew
Wells, Benjamin Franklin, III
West, Sumner Lee
White, Lorace
Wiczai, Diane Schwartz
Wiczai, Louis, Jr.
Wilde, Anthony
Wilson, Jeanne
Wingate, Seth
Winter, Robert
Winthrop, Susan
Wofsy, Alan
Wolfson, Robert
Woodner, Jonathan
Yellin, Florence
Zahm, Barbara
Zeiger, Ronald
Zimdars, Janice
Zimmerman, Laurel
Zion, Matthew
Zvegintzov, Nicholas
Zysman, Madeline

Appendix D(ii)

Aitkins, Dunbarr
Ambro, Richard
Avery, Richard
Bancroft, Frank
Bekes, Robert
Bergman, Peter
Bergsten, Gordon
Bills, David
Blum, Elizabeth
Blum, Joseph
Brunke, Fred
Buttrey, Marilyn
Clewlow, William
Coit, William
Colby, Richard
Colton, Richard
Cook, William
Cornett, Ann Laurette
Cotham, Joseph
Cowan, James
Davidson, Russ
Deck, William
Del Bourgo, Rafaella
Eden, Robert
Feldman, Eric
Fischer, Charles
Freedman, Jane
Friedland, Marion
Friedman, Ellen
Gladstone, Evan
Gross, David
Ham, Margaret
Havas, Eva
Hightower, Julie
Hirschfeld, Robert
Huntington, John
Jacobs, Alan
Jaffee, Sherryl
Kasinsky, Harold
Kass, Robert
Kimball, John
Kimball, Kathleen
Kirmmse, Bruce
Klapper, Bonnie
Klein, Michael
Kline, Karen
Knop, Larry
Kraft, Kris
Kramer, Ivan
Lakeland, William
Leary, Sallie
Levy, Esther
Lindheim, Daniel
Lindo, William
Lipton, Peter
Luben, Paul
Marcus, Michela
Mason, Clarke
Masterson, Martha
McKean, Sandy
Meyer, Arthur John
Milligan, John
Mock, Ronald
Moore, Merrylyn Phillips
Muryama, Carol
Nelson, Victoria
Novick, Robert
Oliviera, Edwin
Paulson, Alan
Peacocke, Terry
Platt, Martha
Pyle, Haley Lynne
Radu, Judith
Reichbart, Richard
Rhett, Norman
Rice, Barbara
Rosenzweig, Larry
Rosenzweig, Richard

Ross, Andrew
Salzberg, Kenneth
Sapp, Paul
Seay, George
Sheldrick, Dennis
Shodell, Michael
Snyder, Russell
Stanton, William
Stein, Bernard
Steiner, Karen
Stiffler, Price, Jr.
Weldon, Alice
Wellman, David
White, Lynda
Wiesner, Peter
Willis, Lyle
Wirtz, Stephen
Zaretsky, Malcolm