

Regional Oral History Office
The Bancroft Library

University of California
Berkeley, California

Malcolm Burnstein
Free Speech Movement Oral History Project

Interviews conducted by
Lisa Rubens
in 2000

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Interview with Malcolm Burnstein

Rubens: I'm with Malcolm Burnstein in his legal office in the Ocean View part of Berkeley. A building is being constructed next door, which is making a lot of noise. And since Mr. Burnstein is still a working lawyer, it appears that he will have interruptions. Mal, why don't you just start talking about significant memories you have regarding FSM.

Burnstein: The night of December 2nd, 1964, I was with my father in Detroit, because he was quite ill. Bob Treuhft, my partner, was arrested in Sproul Hall that night, and he was in Sproul Hall because I couldn't be there. Otherwise, I would have been in Sproul Hall and been arrested instead of Bob.

Rubens: May I call you Malcolm?

Burnstein: No, call me Mal. You may not call me Malcolm, unless you don't like me.

Rubens: Mal, could you tell me how you first encountered the FSMers?

Burnstein: It was in the fall of '64. After the first demonstrations—the ones in which Jack Weinberg was trapped in the police car—some of the FSM decided that they needed legal representation. Bettina Aptheker and a few other people had references to Bob Treuhft, who was then my boss. They came and wanted to meet with Bob, and Bob brought me into the meeting. Bob asked me if I would be the legal representation for the FSM. I said, "Sure, I'd love to."

Rubens: Had you already heard anything about it?

Burnstein: Oh, yes. You can't help but know what was happening on campus. I had reasonably close ties with certain law students ever since I'd gotten out of Boalt [Law School] in '58.

Rubens: Where had you gone before?

Burnstein: Oh, I went to Wayne State University in Detroit, and then I finished my B.A. at UCLA.

Rubens: Where were you basically raised?

Burnstein: I was raised in Detroit until I was nineteen. I left, never to live there again.

Rubens: When you got out of law school in '58, did you have a particular goal, focus, or expertise?

Burnstein: When I got out of law school, I had already been channeled. When I went to law school, I didn't know much about law. I knew a lot about politics. Basically, I knew nothing about law. But after I got in law school, I thought I

would do labor law and work for the National Labor Relations Board [NLRB] or something like that. I soon found, because I applied for a summer job with the NLRB, that I was not politically hireable. They just wouldn't touch me. I was in Youth for Wallace when I was young—Henry Wallace, that is. Working for Bob Treuhافت and Doris Walker tells you about my politics. The NLRB did not want to touch me. Apparently, everyone working for Wallace was on a government list as politically undesirable, even if as young as I was, because Wallace was left of the Democratic Party.

- Rubens: Do you want to, just for the record, say how the NLRB characterized the lawyers that you mentioned?
- Burnstein: Well, the NLRB didn't know about my association with them because I didn't have any association with them at that time. I am just characterizing my own politics: anti-redbaiting, quite progressive, and civil rights. That's what first got me into politics—civil rights. What got the FSM going was, of course, civil rights—both in the South and in Northern California.
- Rubens: What did you do when you got out of law school and then between '58 and '64?
- Burnstein: First year out of law school, I had a grant, a fellowship in Europe, to study in Paris. Which I did, studying international law. Then I clerked on the California Supreme Court for a year for Justice Thomas White, a little noted and not long remembered justice of the California Supreme Court. He needed a clerk when I came back from Europe, so that worked out fine. Then I went back to Europe on another fellowship to work with Frank Newman, who had just then been appointed dean at Boalt Law School. I worked with him in Geneva on international human rights. Basically, I didn't practice law for three years after I got out of law school. Clerking on the court, which was a wonderful experience, is not the practice of law. So, I started practicing law in '61.
- Rubens: How did you end up at Bob Treuhافت's?
- Burnstein: They offered me the job. They actually offered me the job in '60. Then I got the fellowship to go back to Europe, which was sort of funny because I think Frank Newman offered me the fellowship to keep me from going to work for the Treuhافت firm. But they just held the job open until I got back.
- Rubens: Why didn't Newman want you to work for them?
- Burnstein: Because the firm had Communists in it. Frank thought that I would have a good career in law and shouldn't be associated with Communists. Frank was a very nice man, a very nice mentor, a brilliant legal scholar, and a good friend. But he really had a block against working for progressive lawyers.

- Rubens: You were at the top of your class—I mean, to clerk for a Supreme Court justice and to have these grants. Did you know anything about Treuhaft that made you really want to be in his firm? Did you ask him to hold it open?
- Burnstein: I knew about the firm because by that time I had become a member of the National Lawyers Guild. I knew that the National Lawyers Guild was made up of progressive lawyers around the country. I met the local guild members. There weren't all that many. Don't forget, we're coming out of the McCarthy period. Progressive anything was pretty low back in those days. So, I had met all the progressive lawyers in the area, or at least all the ones that were members of the guild. The Treuhaft firm offered me a job. So I said, "Great," since I had no interest in working for a large firm, a corporate firm. And the government wasn't going to hire me—I found that out already. This seemed like a very good opportunity, so I took it.
- Rubens: International politics didn't continue to draw you, even though you've had all these experiences and opportunities? Labor law had a particular appeal?
- Burnstein: Well, initially, and the Treuhaft firm did some labor law. But mostly they did poor people's law. This was back in the days before there was any serious legal aid societies. There was a small Legal Aid Society in Alameda County, consisting of one or two lawyers for the whole county of a million people. So, our firm ended up doing an awful lot of essentially legal aid work at no charge, or very little charge, to clients.
- Rubens: How many were in the firm at that time?
- Burnstein: There were five of us here: four partners and me.
- Rubens: Would you mind just stating the partners' names?
- Burnstein: Bob Treuhaft, Aubrey Grossman, Bert Edises, and Ed Grogan. Bert had been a member of the [Communist] Party. I don't think Ed was ever a member of the Party. Ed was a labor lawyer specializing in worker's comp. He later became a worker's comp judge.
- Rubens: It sounds like an active, engaged law firm. You had been there a year before FSM?
- Burnstein: No, the firm actually broke up before the FSM. The firm broke up, Bob Treuhaft joined with Doris Walker firm, and they hired me. At that point, it was Treuhaft and Walker. I was the associate. So, there were three of us at that point.
- Rubens: Anything to say, particularly, about why it broke it up?

- Burnstein: You know, I have no recollection, if I ever knew. I was only the young associate. I probably wouldn't have known why the partnership dissolved.
- Rubens: Treuhaft asked you if you would represent the FSM?
- Burnstein: Yes, he's offered me the chance to do that, and I said, "Fine, I would like to very much."
- Rubens: Do recall the impressions of the first meeting?
- Burnstein: I recall meeting in Bob's office, at 1440 Broadway, in Oakland. At the corner of Fourteenth and Broadway, on the tenth floor.
- Rubens: I mean, did you feel the university had overstepped its bounds?
- Burnstein: Oh, there's no question about it because the university is a public institution. The First Amendment prohibits the government—and that includes state and local government as well as the federal government—from censoring the content of speech, except in very limited circumstances. It certainly prohibits censoring the content of political speech. That's exactly what the University of California was doing. It was censoring the content of political speech. It was unconstitutionally doing so. The students were absolutely right in their initially very modest demand, that they be allowed to re-establish tables at the corner of Bancroft and Telegraph, at the entrance to the university. That's all they wanted to do. That's what they had been doing for years. When the university shut that down, all they wanted to do was put their tables back there. They ended up, of course, with tables everywhere on the campus.
- Rubens: By the time they met with you, Jack Weinberg had been arrested for violating campus regulations?
- Burnstein: Well, he had been held in the police car for thirty-seven hours.
- Rubens: It's around that incident that the Free Speech Movement actually crystallized: eight students negotiating that they not be suspended.
- Burnstein: Right. They had been given some kind of penalties for sitting at tables. Then Jack, who was out of school by then, sat at the CORE [Congress of Racial Equality] table. He was arrested for trespassing, but the arrest was never really consummated. He was let out of the police car at the end of it.
- Rubens: I was going to ask what were the first charges that you were dealing with?
- Burnstein: There were no criminal charges that I recall out of that. I could be wrong about that. You know, we're talking a lot of years ago. But we certainly didn't represent Jack in any of those charges. I believe we would have had there been any such charges.

- Rubens: By letting Jack out of the car, they effectively dropped the charges?
- Burnstein: I believe that's exactly what happened.
- Rubens: Basically, nothing was filed.
- Burnstein: After all, the charge was trespass. If the university had decided, "Well, okay, we'll authorize his being on the campus for that purpose," then there isn't any trespass, so the charge sort of disappears.
- Rubens: Do you remember what the meeting was specifically?
- Burnstein: Well, I don't remember who came. I believe Jack Kurtzweil was one of the people. There were two or three students who came—maybe more. I know Bettina Aptheker was there. I believe Jack was there. I have no recollection of who else was there.
- Rubens: And that's the day after the car incident?
- Burnstein: I don't know which day—. It's not the day after necessarily, but it's shortly thereafter. What happened, you see, is after the incident in the car, the university had agreed to a negotiation, setting up a tripartite committee of administrators, students, and faculty. The students came to us for advice in how to deal with that committee. The role that I first performed was advising the student negotiators on that committee.
- Rubens: Do you have a recollection of the stance you took, what you advised them?
- Burnstein: We talked about what the constitutional requirements were. At that point, it became fairly clear that the students' position was not only defensible but quite modest given the constitutional standards that apply to the university. The university can enforce time, place, and manner rules about speech. But it can enforce no rules about the content of speech. Now, there are current Supreme Court cases that say public institutions may sometimes ban all non-academic speech. But that wasn't the case then. Of course, the university wasn't trying to ban all non-academic speech, only some political speech.
- Rubens: They had finally ended, just a few years before, the ban on a Communist speaker coming to the campus. Wallace couldn't speak on the campus.
- Burnstein: Right. I wasn't here in '48, but my understanding was that the big rally for Wallace was at the edge of campus, but not on the campus.
- Rubens: He stood on a flatbed truck. One of my professors, Leon Litwack, introduced him. There is a current Supreme Court ruling that says—

Burnstein: There are several Supreme Court cases that have come down, often in the context of religious organizations. A public school has been forced to allow religious clubs to meet on the school grounds as long as they allow other non-academic groups to meet on the school grounds. The reverse of that is that if they ban all non-academic groups, they can ban the religious groups; therefore, they can ban political groups too, but only if they ban all non-academic groups.

Rubens: I didn't know about that. It might be useful to have an appendix of key court rulings. For instance, a few years ago, the Supreme Court ruled on the side of a university student body organization—either Wisconsin or Michigan—saying that student body funds can go to any organization they want to give to, as long as there's some basis on which they allocate money.

In 1964, were you aware that your prepping the students had an impact?

Burnstein: I not only prepped them, I was present with them. I was there for the meetings of the committee.

Rubens: Impressive. Do you remember the first meetings? Who was there?

Burnstein: I remember the meetings, but I don't think I can separate one from the other; nor can I remember how many there were. I know the first fight was over the composition of the committee. The [university] administration allocated to itself the appointing power, and they appointed some students, some faculty, and some administrators. The students said, "Wait a minute. We're us. We're the ones who are fighting for these rights. We're the ones who get to pick our side." So what happened was the administration partially relented and allowed the students to select some members of the student group.

Rubens: By now, a Steering Committee of FSM had been formed, and also a more select governing committee.

Burnstein: Well, but we're talking now only about the student negotiators. They also allowed, I believe, the Academic Senate to appoint some faculty members. It soon became clear to me, and I think to the students, that the administration was not acting in good faith. They had a specific plan, and they would accept nothing else. There was no negotiation. We now know that some of the administrators were, essentially, FBI informants and engaged in a grand scheme to discredit Clark Kerr. To them, these negotiations were possibly a means to an end far removed from the merits of the student's position.

Rubens: Do you remember the plan?

Burnstein: Yes, I think I remember the plan. [laughing] I mean, everything thirty-five years ago is subject to some brain editorializing with lack of cells that used to be there. My memory is that the administration's position—they had gotten

advice from the General Counsel's Office—agreed that the students could advocate legal off-campus activity and raise money for legal off-campus activity on the campus. It was definitely a concession.

Rubens: Do you remember, by the way, if their legal counsel was present?

Burnstein: It was not present.

Rubens: Would that have been from the university itself or someone from the Regents?

Burnstein: I can only speculate. I can't tell you because I have no personal knowledge. My speculation is that it was John Sparrow, from the Regents' Counsel's Office. We used to call him John Vulture. He was appointed to the bench later on. He was probably the worst judge that Alameda Superior Court ever had. He was an awful judge.

Rubens: Was there a lawyer on each campus then?

Burnstein: Back in those days, the Regents' Counsel Office was right across the street. Then there was a guy in the Regents' Counsel Office, who may have had something to do with it. I can't remember his name. They became, or they attempted to become, the arbiters of what's legal and what's not legal. That's not the role of the university. That's a classic example of what we call prior restraint in First Amendment law. The university would then be censoring speech on the basis of what it believed was good content or bad content. You can't do that. The Supreme Court made that very clear. People who say things that are questionable or criminal can be punished for what they say, but you can't censor them before they say it.

So we said, "No, you can't do that, that's not right. The university can not arrogate to itself that power. Let the courts do that. If the students incite to riot or defame somebody or whatever, that's actionable and they're responsible for what they say in a civil court or a criminal court, whatever. It's not the job of the university to deal with that." But I have got to tell you that the university caving in—even that much—was very attractive. I don't think I fought very hard with my clients to get them to reject that position, but they did, all by themselves. They rejected it as being not the appropriate function of the university. After about a month of meetings, this committee reached pretty much an impasse.

Rubens: Do you remember if the students actually led the argument? Were you there as a counselor, and maybe to intervene, but they were the ones who were talking?

Burnstein: They were the ones who were doing the talking. I don't remember ever saying anything publicly, although I may have. The students may have said, "We'll let Burnstein say X or Y."

- Rubens: Do you remember where these meetings took place?
- Burnstein: No, I don't. I have no recollection.
- Rubens: Do you remember meeting Mario Savio?
- Burnstein: Oh, sure. Yes, I had met Mario.
- Rubens: Was he one of the first ones coming to your office?
- Burnstein: He may have been in that group, but I have no recollection that he was there. I know Bettina was there.
- Rubens: Did you have an opinion by then of these students? Had you characterized them, particularly Mario? Did you have a sense of who the leader was at that point?
- Burnstein: There was no leader. There really was no leader. There were a number of articulate students expressing opinions that were shared by a huge number of students. Don't forget, this was just after Mississippi Summer. A lot of young people had gone down South. This was the same time that we had large numbers of sit-ins and other civil disobedience kinds of things in northern California. We had picketing on Shattuck Avenue, at the department stores, at the banks, at grocery stores. We had shop-ins at grocery stores here, where we, including me, would fill up carts and just wheel them up to the check out stand and then just walk away from them, leave them there.
- Rubens: Were you actually a member of CORE?
- Burnstein: Absolutely. I was a member of CORE, and I was one of its volunteer lawyers. Absolutely. We had eat-ins at Jack London Square. We had pickets at the *Oakland Tribune*. Very shortly thereafter, you had black bank tellers, black sales people. Hinks Department Store was the first store to cave in. Mr. Hinks—the old Mr. Hinks—came around first. His lawyer, Henry Elson, was someone I knew. Henry—or at least Henry's firm—. I think Fred Howell in that firm was the Hinks' lawyer. He said that their policy was wrong, and they were going to change it, and they did. They started hiring black people as clerks, just like white people as clerks.
- Rubens: Did it have a domino effect?
- Burnstein: Yes. It really started the process going. I choke up even now because that which we take for granted now was not a common sight then. [voice full of emotion]
- Rubens: That was a major achievement.

- Burnstein: You know, we all felt a tremendous victory. This is all at the same time. So you can't talk about a few leaders taking a bunch of followers and getting them to do things that they didn't want to do. That's the common view of young people. Certainly, it was the often-expressed view of the Free Speech Movement. It is so far from the truth; I can't begin to tell you. The writings of the defendants tell you that. If nothing else, go to the Bancroft [Library] and read the letters the students wrote to the judge on sentencing. Six hundred and some letters exist. Those letters will tell you what every one of those students shared all by themselves. Those letters were not dictated. They're all different. They're all personal. Those letters will tell you that every one of those students had an independent reason for being exactly where he or she was when he or she was there.
- Rubens: Would you just specify, for the record, what those letters were? You said that the judge had requested them. Could you elaborate on that just a bit?
- Burnstein: After the big sit-in, and after the trial and the conviction, the judge asked each one of the defendants, before sentencing, to write him a letter explaining his or her position. My sense is that the judge expected to get letters saying, "Gee, we acted impulsively. We're sorry. We'll never do it again." Instead, what the judge got was 600 and some letters saying, "We saw a real problem. We believe in freedom of speech and the Constitution. We thought the university was interfering with our rights. We tried every other way to obtain redress. So, reluctantly, we did the sit-in. We'd do it again under similar circumstances." So the judge ignored those letters. He did not file them in the court files, as far as I can tell. All the sentences were uniform. Despite the differences in every one of those letters, the sentences were absolutely uniform between the groups of people.
- Rubens: Why don't we go back and look at the initial trial strategies and the decisions that were made. How long was the trial?
- Burnstein: The trial was eleven weeks. I've had two eleven-week trials against Lowell Jensen. That's how I remember that.
- Rubens: What was the other one?
- Burnstein: The other one was the Oakland 7. I won that one [laughing]. [I] lost the FSM trial, but won the Oakland 7 trial. I learned some lessons.
- Rubens: But the FSMers didn't go to jail for another couple of years?
- Burnstein: Because of the appeals. I think there was a year delay after the trial was over. Because the appeals were never given any serious attention by the courts, they didn't take all that long.

- Rubens: I never understood that those letters came before the appeal. I thought they had to do with the appeal.
- Burnstein: No, the letters came first.
- Rubens: The judge asked them to each write a letter, and it was your office's responsibility to see that they were written?
- Burnstein: No, no. I know that we passed the word out. You know, I don't even know how I got copies. I think that we got copies of most of the letters because the defendants had, by that time, been trained to give us copies of everything.
- Rubens: Those letters are now in The Bancroft Library FSM collection. They come from the files that you contributed and I guess they were preserved thanks to Kathy Frank, who had been a legal assistant, who was legal central during FSM.
- There are some other papers that include instructions from your law office, but not specifically what to say. The instructions said something like, "Send this to us, or send a duplicate." I don't know if you have a memory of literally filing them at the court, but you were pretty clear when I first met you that you don't think the judge ever read them.
- Burnstein: I'm quite sure he paid zero attention to them because of the sentencing pattern. There was no differentiation in sentencing based on what one letter might have said or another letter.
- Rubens: I'd like to come back to the fate, the history of the letters. Would you tell me some more about your involvement in CORE?
- Burnstein: I was a member of Berkeley CORE, and I was one of three lawyers in northern California that did CORE legal work until we—white people—were kicked out of CORE later on.
- Rubens: And the Ad Hoc Committee to End Discrimination, in which Tracy Sims and Michael Myerson were so involved, and which organized so many civil rights demonstrations in San Francisco in 1960-64. Did you have any legal involvement with that? I believe Mario met Jack Weinberg when they were both jailed over the Sheraton-Palace demonstration.
- Burnstein: Yes, I was involved [as a participant and as a lawyer]. No, I didn't know Mario then. I didn't know Jack then. I was one of the volunteer lawyers. [As a matter of fact, Beverly Axelrod (another lawyer) and I were told on the day of the last sit-in on San Francisco's Auto Row that we would be arrested that day. We went into the show rooms anyway, but the dealers gave in that day and the sit-in was ended with no arrests.]

- Rubens: Volunteer?
- Burnstein: All this is volunteer. You didn't think we got paid to do this stuff did you? [laughing] Sorry to disabuse you of that notion.
- Rubens: Was there a modest amount given, though, at some point?
- Burnstein: When the FSM arrests were made. There was some talk about raising a defense fund. There were expenses. We finally got a trial team of five lawyers. But no one did any serious fund raising, and so the lawyers very quickly concluded that they weren't going to take fifty or a hundred or three-hundred for their work. They were just going to donate their work—period. So, all the money that was raised was used for whatever costs. We rented a little office near the courthouse. It's now a bail bond place.
- Rubens: Just to have a place to meet?
- Burnstein: Oh, it was small. Not to meet, necessarily. I mean, it wasn't big enough for the defendants to meet. It was just a tiny little store. But an office, because we had a huge logistic job of keeping track of our clients, getting out mailings to them, and then collecting information, and so on.
- Rubens: I think, for the record, it is important to say that you weren't using personal computers then, and there weren't even Xerox.
- Burnstein: No, of course not. I mean, this is back in the days of the Thermofax, and we didn't have one of those. Although, I had one in my office.
- Rubens: A Thermofax is?
- Burnstein: A Thermofax is a machine that pre-dates the Xerox form of copying. It had this paper on which a copy was made, but the paper disintegrated. It got brittle and cracked. And it was hard to read in the first place. It was not very useful. It was a little bit better than carbon paper, but not much.
- Rubens: Otherwise, if people wanted to get out notices to 800 people, 600 people, how would they do it?
- Burnstein: Mimeograph. You typed on stencils. And we did mimeographing. Oh yes, that's the way you did things back then. But now, on my computer now, where I can zap out as many as needed, and with e-mail, you know. Boy, what a godsend that would have been.
- Rubens: You said you had to rent this tiny office just to keep track of files and what stage you were in, and so forth. I wanted to ask you if you thought there was a

relationship between the scale of protest that was starting to take place and the trials? Ann Ginger claims that Sheraton-Palace and Auto Row were the largest mass trials that had taken place in the country to date.

Burnstein: They weren't mass trials. They were individual trials in groups.

Rubens: Would you explain that please?

Burnstein: Yes. I represented one group of Sheraton-Palace people. There were a lot of volunteer lawyers that represented groups—groups of ten or fifteen.

Rubens: Was there some decision about this? I mean, was there an issue of strategy?

Burnstein: That's how the D.A. charged them. The D.A. had control. And that's what happened in the FSM also. The D.A. charged in groups [of] ten.

Rubens: Was that a precedent?

Burnstein: That was nasty is what that was.

Rubens: Oh, to bankrupt you? Why is it nasty?

Burnstein: Well, if you have a group of ten defendants, you have one trial for those ten defendants. That's fine. It's not a particular problem. It can be a somewhat complicated trial. But if you have a court which—at that time we had two judges.

Rubens: What court are we speaking of?

Burnstein: The Berkeley Municipal Court. These are misdemeanor charges.

Rubens: Vis-à-vis the FSM occupation?

Burnstein: That's right, vis-à-vis the FSM. Sheraton Palace and Auto Row were in San Francisco, where the municipal court had many more judges, and so it was much easier to cope with from a logistic standpoint, trials in groups of—I think it was fifteen in San Francisco. I'm pretty sure it was, since I tried one of the groups. But Berkeley had only two judges.

Rubens: And that was Rupert J. Crittenden and who else?

Burnstein: [mumbling] We'll get it, but I can't remember. He's a really nice guy.

Rubens: Nice guy, but you didn't get him for the FSM trial.

- Burnstein: Well, at that point he wasn't doing criminal court, he was doing civil. Crittenden was doing the criminal, and the other judge was doing the civil stuff, such as unlawful detainers and lawsuits of less than—I think the jurisdiction of the court back in those days was \$5,000 in civil suits. Whatever it was, that's what the other judge was doing.
- Rubens: You say it was just nasty. What was the effect of that?
- Burnstein: Well, the effect of that is, if you try them in groups of ten, and you have 780 people arrested, you have seventy-eight trials. If each trial is going to take even five weeks—you can do the arithmetic. It's going to take a long time before some of those groups get tried. Most of these people were students. They had other things that they needed to do with their lives instead of hanging around waiting for two years to get tried. It just didn't make any sense. So, we proposed a mass trial, which wouldn't have taken much longer. We would have stipulated to people being there and all that, so they wouldn't have had to produce a cop to say that so-and-so was there.
- Rubens: In certain ways it made it easier on them?
- Burnstein: That's right. But, they wouldn't do it.
- Rubens: "They" meaning Crittenden?
- Burnstein: No, "they" meaning the D.A. Crittenden ruled that the D.A.'s office controlled that aspect of the case.
- Rubens: That's Lowell Jensen.
- Burnstein: But, more important, is also his boss Frank Coakley. Lowell, at that point, was not the D.A. He was an assistant D.A.
- Rubens: Let me just clarify one more thing: Ann Ginger wrote an article for the National Lawyers Guild. She argued that the trials from the spring of '64—have great impact on how the FSM trial was structured.
- Burnstein: Oh, sure. I think that's right. I don't remember Ann's article, but my sense is that the Alameda County D.A.'s Office saw that in San Francisco they were losing some of the trials because there were jury trials in San Francisco. So they refused to agree to one jury trial in Berkeley. They insisted on the seventy-eight trials. And I believe they did that specifically to force the defendants to waive jury because that's what eventually happened.
- Rubens: There were many negotiations. How much room do you, as the attorney, have for pressing this position?

- Burnstein: Very little. I mean, negotiation is one thing, but pressing it—. Well, I suppose we could have tried taking a writ, but I think we would have lost.
- Rubens: What does “taking a writ” mean?
- Burnstein: Going to a higher court, asking a higher court to order a lower court to do something different. But I believe we would have lost. It’s hard putting myself back thirty-six years, but that’s my recollection.
- Rubens: I assume that a judge ruled.
- Burnstein: But the judge clearly ruled because we made a formal motion for a mass trial. Then we made a motion for a representative jury trial.
- Rubens: What does that mean?
- Burnstein: A trial of, say, a hundred, a hundred and fifty people before a jury. Then, if they were convicted, we would submit to the judge all the other cases on the same evidence. If they were acquitted, we would do the same thing, so that if there was an acquittal in the jury trial, everyone would be acquitted. If there was a conviction, everyone would be convicted.
- Rubens: They wouldn’t go for that?
- Burnstein: The D.A.’s office refused. They did not want a jury anywhere near this case.
- Rubens: Do you have any other speculations of why? For instance, did San Francisco seem to have a lot more wins?
- Burnstein: Well, there were a lot of losses in San Francisco, but there were some wins too. It was not an across-the-board win.
- Rubens: They wanted to nip this political action in the bud? I can’t believe that the court system didn’t think that the administration had acted anything but precipitously. I mean, there were many different ways this thing could have been handled ultimately if you look at it.
- Burnstein: Well, I think this was a godsend for Rupert. This made him a superior court judge.
- Rubens: He became one after FSM?
- Burnstein: Right after.
- Rubens: Who appointed him then?
- Burnstein: Pat Brown.

- Rubens: I have another question that came to mind, when you mentioned that Elson's office represented Hinks Department Store. Was Elson picked to be among the appeal lawyers?
- Burnstein: No, he was one of the trial lawyers.
- Rubens: Hadn't he been a partner with Crittenden?
- Burnstein: No, that was Stanley Golde.
- Rubens: I'm sorry. You're absolutely right. Stanley Golde is the first person I called when I started. I talked to him very briefly; soon after, he passed away. Where was Elson?
- Burnstein: He was in Berkeley. Dick Buxbaum was also an FSM attorney and was a law professor at Boalt. I think he was encouraged to be one of the trial lawyers by the University.
- Rubens: So the court ruled you could not have a representative trial. What finally came to be?
- Burnstein: Well, the court ruled that the D.A. would not have to agree to any kind of trial that we had other than the seventy-eight trials. What finally happened was that we were granted a representative trial of about a hundred and fifty people, but to be heard by the judge, not a jury.
- Rubens: Ah, that was the ruling.
- Burnstein: Well, it wasn't a ruling. That was the agreement between the parties because the judge had ruled that the D.A. controlled the charging process. Therefore, if the D.A. refused to consent, there would be seventy-eight jury trials.
- Rubens: You brought news of that agreement back to the FSM group?
- Burnstein: We had a lot volunteer lawyers.
- Rubens: Would most of the defendants come to these meetings?
- Burnstein: It's not a question of meetings. We arranged to make sure that every defendant met with a lawyer, unless they absolutely refused. We had lots and lots of sessions with defendants, one-on-one meetings. These were not mass meetings. I mean, you had a meeting of a group with a lawyer, and then each individual defendant could meet with a lawyer separately.
- Rubens: How was the group decided upon? Was that a group of seventy?
- Burnstein: Oh, I don't remember. I have no recollection.

- Rubens: Do you remember the names of some of these initial lawyers that met with the students? Can you sort of reel off some names that you know?
- Burnstein: [pauses and sighs]
- Rubens: Or—let's put it this way—about how many lawyers? Basically, these were all volunteers?
- Burnstein: Oh, yes. Everybody was a volunteer. When the arrests happened, we had lots and lots of lawyers from around the Bay Area volunteering, including Joe Alioto [former mayor of San Francisco].
- Rubens: Joe Alioto? What did he volunteer to do?
- Burnstein: He volunteered to help out with the defense. He never showed up to a meeting.
- Rubens: [laughing] He saw this as a political opportunity?
- Burnstein: I won't say that. The point is he did volunteer, but he didn't do anything. There were over a hundred lawyers who volunteered. We didn't use them all, but we used a number of lawyers to meet with defendants.
- Rubens: You're coordinating this?
- Burnstein: I was doing the coordinating.
- Rubens: The groups were formed for the purpose of transmitting information more efficiently; rather than individual meetings with people, information was passed on to people in groups. But ultimately, all 720 were also able to meet with a lawyer individually?
- Burnstein: Seven hundred eighty, 770—something. But basically it was close to 780.
- Rubens: So 780 met with an individual lawyer?
- Burnstein: Or could. I'm not saying that everyone did, but they all could. They were all given the opportunity to. If they had their own issue they wanted to talk about without anyone else being around, that's what this was all about. We wanted to make sure that they had that opportunity.
- Rubens: And I just want to clarify, the kind of negotiations that went on between you, Crittenden, and the D.A.'s office—the final decision was—?
- Burnstein: The defendants.

- Rubens: The defendants made the decision? It's what they all agreed they would accept?
- Burnstein: That's right.
- Rubens: But there must have been some debate and hotly contested opinions? Can you just say a little more about that?
- Burnstein: Well, the first decision was that they decided that they had gotten into this together and they would make one joint decision. In other words, one group wouldn't do one thing, and another group do another thing. So basically, it was going to be a majority rule. They all agreed to be bound by a majority rule decision because nobody could force them to do it otherwise. But they agreed to that.
- Rubens: You're pointing out how consensual this was, and that seems to be the style of the whole movement.
- Burnstein: Right, it was.
- Rubens: But was there anyone in the legal area who particularly stood out and played a role similar to the one that Mario played in relationship to the whole Free Speech Movement—as a figurehead, a spokesperson, and someone who was admired by many? And what about law students? I know Mike R. Smith, a third year law student and friend of Mike Tigar's was arrested. I wonder how many more law students were arrested?
- Burnstein: I don't remember. I don't recall if any law students were arrested. A number of pre-law students were arrested, I know that. But, I don't remember if any law students were arrested. What I can tell you is that no one student defendant, in my recollection, stood out. Maybe Kathy Frank would be a better source for that.
- Rubens: Would you mention who Kathy Frank was and what your relationship was?
- Burnstein: Kathy Frank was one of the arrested people. She was not on the Steering Committee. But if it weren't for Kathy, we wouldn't have been able to run the defense because Kathy, and a few other people—including her then husband, David, and a guy named Albert La Tooka—made a big difference.
- Albert, who I've lost track of, unfortunately because he was just a wonderful young man, a really nice guy. And there was Mike Marcus, who's now a judge up in Portland. And it's Mike Marcus who had ended up with the letters in his garage. Kathy tracked the letters down in Mike Marcus' garage. Mike was a help. There were a few students who helped us in doing the logistics, doing the mailings, doing the phoning, following up, trying to get a hold of people. We took it upon ourselves—and I suspect this was a bad mistake—but

we took it upon ourselves: the coordination of the defense and to try to keep track of everyone, to get them to court when they were supposed to be there, and so on. It was a lot of work, and if it weren't for people like Kathy—especially Kathy—it would never have happened.

Rubens: I've read numerous letters that your office sent to defendants say which included statements such as: "Be sure to be on time;" "Don't talk in the courtroom;" "Dress appropriately." It's so obvious that you're dealing with young people, students.

Burnstein: And of course, these are things I'd never do now. I learned some lessons. For example, I let my clients dress naturally now, not in uncomfortable suits and ties. They feel more at ease and act more naturally.

The interesting thing to me is that no one stands out in arguing for a mass trial without a jury. But several people stand out for arguing to not do that and to hold out for a jury trial.

Rubens: Explain just a little bit more what the argument was for holding out. What does the holding out mean—refusing to accept the other position?

Burnstein: Refusing to accept the other because only with the jury was there a chance of getting acquitted, and that getting acquitted was the right thing to do because the university had forced the students into this action. It was not an act of civil disobedience that should be punished, and therefore, they should be acquitted. The only way to do that was with a jury.

Rubens: Would you review the main charges, please?

Burnstein: There were three charges: failing to disperse from a place of unlawful assembly, trespass, and, for those students who went limp, resisting, delaying, or obstructing a police officer in the performance of his duty—section 148 PC of the penal code.

Rubens: Didn't most of them go limp?

Burnstein: About half of them. I mean, I can pull the book and look. But I think it's about half.

Rubens: When you said that the students were forced into this action, what do you mean?

Burnstein: They had tried every other means to get the university to recognize their constitutional right to take part in peaceful, political activity on the campus. And it was a constitutional right; and it was eventually recognized as such. The university, on December 8th, gave them their right. Basically, on December 8th, the academic senate voted for it, and thereafter it just happened. The regents didn't interfere with that.

- Rubens: I thought, also, that there was some debate, or some kind of end-run, that said, in the end, the students weren't asked to disperse properly.
- Burnstein: They were acquitted of that charge. Crittenden acquitted them of that particular charge.
- Rubens: Trespass or disperse?
- Burnstein: No, failure to disperse. The trespassing he convicted them of.
- Rubens: And then half were convicted on resisting arrest.
- Burnstein: Yes, those people who went limp were also convicted on the resistance.
- Rubens: There was an articulate set of students who are holding out for—
- Burnstein: They didn't hold out for it because they had agreed to be bound by majority rule.
- Rubens: But they argued to hold out, and they were outvoted.
- Burnstein: They were outvoted. They were right [laughing], but they were outvoted.
- Rubens: Why do you say they were right?
- Burnstein: Look at the result. We told the students that we had a chance of getting a fair trial from Crittenden. We were wrong. We didn't get a fair trial from Crittenden. The only way we could have gotten a fair trial was with a jury. And we might have lost that, I don't know. It's always a crapshoot. But at least we would have had a fighting chance with a jury. I'm convinced that with Crittenden the ink was sealed long before the trial started. The verdict was written before the trial started.
- Rubens: You endorsed this position when the debate was going on among the defendants?
- Burnstein: What I said was I thought that we had a chance at getting a fair trial from Crittenden. I thought we had a reasonable chance of getting a fair trial from Crittenden. I had appeared before him many times in criminal cases. I thought he was a reasonably decent judge. The majority agreed with me. The majority of the students agreed with me and with the other lawyers. All the lawyers said the same thing.
- Rubens: Go for a mass trial?
- Burnstein: Yes. There was maybe one lawyer, Peter Franck, who didn't. I'm not sure if Peter did or didn't. But he was a young lawyer, and he tells me that he really

wasn't saying much then. He's now quoted in David Goines's book as being a leader of the reject-the-non-jury-trial forces. But that's not what Peter tells me.

Rubens: And it's not what you remember.

Burnstein: No, I don't remember Peter at all back in those days, if you want the truth. I just don't remember him then, which doesn't mean anything. He could have been very active, but my memory now just isn't up to the task.

Rubens: I'm sorry if I'm dense. I don't quite yet get what happened at the last stage. You said everything was consensual. I imagine you as a lawyer, and an articulate group said, "We should hold out for a jury trial."

Burnstein: No, I didn't say that. What I did, and I think what most of the lawyers did, was say, "Look, here are the options: you hold out for a jury trial. The chances of acquittal are probably better but, because of Crittenden's ruling, you could be here waiting for your trial for three years. If that's what you want, great. There are only two courtrooms in Berkeley. It's just a small jury pool, relatively speaking. It's going to take a long time to get these cases tried. We can't tell you how long it's going to take, but it's going to be awhile. And you could get different results between trials: one jury convicting, another jury acquitting. Those are things that you need to think about. But you make up your mind. You tell us what you want to do." I did not argue against the jury trial, but in hindsight, I probably should have argued for it.

Rubens: How was it that the decision was made not to hold out? You did two appeals. You got two moves—

Burnstein: The defendants made a practical decision based on their future. They didn't want to spend a lot of time with this case hanging over them, possibly years, before it was tried.

Rubens: The day comes. Are you in court to receive the decision, bringing all the defendants or as many as possible?

Burnstein: No, no. The decision of the defendants is made. Crittenden had already said that he wasn't going to allow a mass jury trial.

Rubens: Right, I understand that. The decision then was to have what—a representative trial group?

Burnstein: A representative, which was the only thing the D.A. would agree to.

Rubens: And it would not be a jury trial, but Crittenden himself would decide? That's what I'm asking. Once he had made his decision about all three charges, were the defendants asked to come to court? And how did they receive that news?

- Burnstein: They weren't happy about it.
- Rubens: Naturally, but I mean—
- Burnstein: Oh, you mean literally. The defendants who were in the trial group were in court. Now, the court was the Berkeley Memorial Veterans Building, on Center Street.
- Rubens: You said there were two courtrooms. What was the other court? Was it in the same building?
- Burnstein: No. The courthouse was on what was then Grove Street, but no courtroom was in that building. There were only two courtrooms. No courtroom there was big enough to hold a hundred and fifty defendants. So, the city got the Veterans Building, a half a block away, to use as a courtroom for this trial. That's where the trial was.
- Rubens: Then there was an announcement to your office: "Crittenden has ruled"?
- Burnstein: No, we were all sitting in court when he ruled.
- Rubens: How long did he sit on this case before he made a decision?
- Burnstein: I don't think it was very long at all.
- Rubens: I'm just curious about the mechanisms leading up to the decision.
- Burnstein: We had the testimony, we had closing argument, and then he set a date.
- Rubens: At that point he set a date?
- Burnstein: Yes, he set a date for a decision. Now, whether it was the next day or what, I don't know. I have the tapes. I suspect the tapes will tell us.
- Rubens: Are the tapes, then, of your arguments in the courtroom?
- Burnstein: I haven't listened to them. I just found the box. I suspect that they've got everything.
- Rubens: The 150 to be tried first—how were they picked?
- Burnstein: The D.A. insisted on some people, for instance, those they considered the leaders, and we picked the rest. They were particularly interested in people who they felt had what they considered damaging evidence on.
- Rubens: How many lawyers argued in the courtroom?
- Burnstein: There were five of us.

- Rubens: But those are not the same five that went on to do the appeal.
- Burnstein: Oh, yes. The same five, plus Sig Hesse, who wrote the brief; plus, Doug Hill's name got on the brief.
- Rubens: But five of you literally spoke in the court?
- Burnstein: Yes, five of us presented evidence.
- Rubens: How was it decided who would present what?
- Burnstein: Well we decided amongst ourselves who would do what. There were more than three issues that were the charges. There was the question of witnesses: who would present which witnesses, who would cross-examine which witnesses. There certainly is a tape of most of it. Now whether the tape has disintegrated or not, I don't know.
- Rubens: I believe you said you don't remember any Boalt law students? There were several who were great speakers and agitators: Mike Tigar, Ken Cloke.
- Burnstein: No, I don't remember anyone from Boalt except for Buxbaum, who was taking part in the trial. I don't remember any students from Boalt being defendants. I know that Mike Tigar was later red-baited out of being a clerk of Justice [William J.] Brennan. In fact, I was just looking at my letter from Brennan. I wrote him a letter when he retired.
- Rubens: And he answered you?
- Burnstein: Yes, just a short note.
- Rubens: What did you find admirable about Brennan?
- Burnstein: He was a very progressive justice, an anchor of the good guys on the court.
- Rubens: Are there decisions of his that you particularly remember, or that we should just point to?
- Burnstein: Not now, but there is a lot of good First Amendment stuff. An awful lot of good First Amendment stuff came from Brennan.
- Rubens: Did you, or do you, have other heroes?
- Burnstein: Well, I grew up idolizing Franklin Roosevelt. Rightly or wrongly, one did that in my milieu in the Detroit Jewish community.
- Rubens: Let's make sure we have your specific lineage.

- Burnstein: I was born in 1933, in Detroit. My parents were Ben and Esther Burnstein.
- Rubens: Were they immigrants?
- Burnstein: My mother, born in Russia, was taken to England when she was a very small child and came to the United States when she was nine or ten. My father was born in Detroit and his father was born in Russia.
- Rubens: What did they do in Detroit?
- Burnstein: My mother was an office manager of a small medical clinic in Garden City, Michigan. It was the kind of clinic, where, during the Great Depression, the doctor wouldn't charge people. He was the guy who delivered me.
- My father and his father started out with a wrecking yard. And then, in the Depression, that fell apart. My father got a job on the loading dock of a department store and became a truck driver, and then the assistant buyer, and then buyer. And then he went out as a salesman. He died very young—at fifty-six.
- Rubens: Had he been a union man?
- Burnstein: No. And neither of my parents was very political. I had other relatives who were in the sit-ins in Michigan, in the auto plants. But my parents were not very political.
- Rubens: Do you remember when you started becoming political?
- Burnstein: I remember very well. In 1947, when a young black boy in Detroit was shot in the back by Detroit police. I went to demonstrations about that.
- Rubens: That must have been horrifying knowing that this is what the police did.
- Burnstein: Yes, well, Detroit in the war—the Second World War—had received a big influx of Southerners—both white and black—who worked in the defense plants. And after the war, the white guys became cops. The Detroit police force was a terribly, terribly racist police force back in the forties. And this incidence was simply one of many. We had a race riot in Detroit in 1943, which I remember. Detroit was a powder keg city. It was not an easy city.
- Rubens: Did you belong to any particular groups?
- Burnstein: In 1948, I joined Youth for Wallace—Henry Wallace. After that, I was very active in the Democratic party in Michigan. I was active in the election campaigns of G. Mennen “Soapy” Williams for governor. I did work on a recount; I think it was the 1952 recount.

- Rubens: For the city or the state?
- Burnstein: Well, the statewide recount. But I was active in Wayne County, which is the county in which Detroit is located.
- Rubens: What kind of election was the recount for?
- Burnstein: For the gubernatorial. But it might have been 1950. I just can't remember the years—'50 or '52. By '54, I was already in Los Angeles. So it was one of those two years. And I was also active in the congressional campaign of a woman who was running on the Democratic Party, Martha Griffiths. She became a congresswoman later on. I think she's dead now. So, I did not have a terribly exceptional history. But in those days, most young people in the fifties were not active in any way. But to me, that was what interested me.
- Rubens: Is there anything more would like to say to explain the development of your political interests.
- Burnstein: You can't have been raised as a Jew in the thirties and forties without understanding about oppression and intolerance. It just didn't happen. So it didn't make any sense to be opposed to intolerance and oppression when you saw it in Germany, and not be opposed to it when you saw it in Detroit. It just didn't make any sense. So you did what you could. At least, that's the way I was raised.
- Rubens: You were raised that way even though your parents weren't active?
- Burnstein: No, they weren't at all active.
- Rubens: Did they oppose what you were doing?
- Burnstein: No, they certainly didn't oppose what I was doing.
- Rubens: Were they concerned for your reputation, what might happen later?
- Burnstein: If they were, they never said anything to me about that.
- Rubens: Were they particularly observant as Jews?
- Burnstein: No, they were not observant at all. I was never bar mitzvahed.
- Rubens: Had you or your parents had a personal experience with discrimination?

- Burnstein: Yes, for me. I mean, my parents, I'm sure, had it. But, the most vivid experience I had is at a swimming pool near our house with a sign on the wall: Jews, Niggers, and Dogs Keep Out. Then, having a knife pulled on me when I was at Wayne University.
- Rubens: To me such incidents are shocking. I mean, I know about Washington, D.C. having signs into the late 1950s that said "For colored only."
- Burnstein: So, when I took a bus ride down to Miami to visit a friend whose family had a place down there—. I had one wealthy friend. His family had a place on Miami Beach. But I took the bus down there. And I rode through the South and saw the Colored Only and White Only signs. That was 1952. It was pretty shocking.
- Rubens: What brought you to Cal law school? How did that come about?
- Burnstein: Oh, that's very simple. I was at UCLA, and I came up for a football game one autumn weekend to watch Cal and UCLA play. It was a gorgeous weekend in the fall here in the Bay Area. I looked around and I said, "Why would anyone want to live anywhere else?" So I applied only to Boalt. And I've never basically left, except for living in Europe a couple of years.
- Rubens: So, you traveled through the South. You very much must have followed the decision of *Brown v. the Board of Education* in '54?
- Burnstein: Oh, yes.
- Rubens: In terms of your fellowship, and then your professor taking you to Europe, did that just preclude going South? You seemed like you might have been someone who would have gone to Mississippi Summer.
- Burnstein: I would have loved to have gone in '64. There was a lot of debate about whether I should go in '64, but there was a lot of CORE activity here in California, and so I stayed. CORE needed legal representation. To some extent, I regretted not going, but I was able to do stuff here. I represented Oroville CORE that summer. Oroville's a small village in the Valley. It's hotter than hell, and going up there in the summertime is not a lot of fun. But, Oroville CORE had a fight with a local supermarket in the black community. It wouldn't hire black people, and they started picketing in 1964. The market got an injunction, and the Oroville CORE needed a lawyer. So I was the lawyer, in the summer of '64.
- Rubens: I didn't know there were black people up there.
- Burnstein: Oh, yes. The black people lived right outside the city limits. The city limits refused to extend to the black community, and so the sidewalks were not paved and the streets were not always paved.

- Rubens: The dam had been built there, or was in the process of being built. So maybe that drew a lot of workers?
- Burnstein: Yes.
- Rubens: Fascinating story. Having talked about seeing these incredibly bigoted signs in Detroit, did you feel a different climate at UCLA when you went there? What got you to go to UCLA, by the way?
- Burnstein: It was as far away from Detroit as I could get. I didn't think about the state of Washington or I probably would have gone up there. [laughing] But I had family in Los Angeles. I had an aunt and uncle that I was closer to than I was to my parents, and I have a grandmother there.
- Rubens: So that was very logical.
- Burnstein: At nineteen years old I didn't want to totally leave everyone I knew, so I went to Los Angeles, which was as smoggy as hell. Oh it was terrible. It was awful.
- Rubens: In the fifties?
- Burnstein: In the early fifties. I mean, I graduated from UCLA in January, '55. In '58 I graduated law school. Westwood wasn't so smoggy, but I worked down at Cheli Air Force Base, down in the southern part of L.A. county. I have no idea if it still exists. I was a temporary fiscal and accounting clerk. I can't even remember what I was doing. This is before law school. This is after I got out of UCLA and before law school. I got out of UCLA in January, and I didn't start law school until September. So I had a bunch of months to make a living.
- Rubens: Were you aware of how segregated L.A. was? Did you encounter that at all?
- Burnstein: I was aware of it because you couldn't help but be aware of it. I mean, South Central was South Central. It was there then. Pasadena was all white then, unlike now. The San Fernando Valley was all white. So sure, sure you noticed it. But the racism wasn't quite as in-your-face as I had seen it in Detroit. The anti-Semitism wasn't as blatant. California was a little more laid back as far as anti-Semitism goes. All and all, it was more moderate back in those days.
- Then HUAC [House Un-American Activities Committee] came to Los Angeles in '54 and it stirred up all the anti-Semitism again.
- Rubens: And I think that also the Smith Act trials were going on then too. I know Frank Wilkenson was tried.
- Burnstein: Right, but I didn't follow that particularly.
- Rubens: I understand. You were up at Oroville.

- Burnstein: Right. But I remember HUAC because I went to the hearings in L.A. I'm not sure why, but I remember doing that. Then, of course, HUAC came up here. Well, they said they were going to come up here in '59, and they did come in '60, which was the real beginning of the re-awakening of political action in northern California.
- Rubens: Yes. I think that the hosing of the students down the stairs—
- Burnstein: Yes, I was there.
- Rubens: Were you really? Were you hosed down?
- Burnstein: No. That's a funny story. I was clerking on the Cal Supreme Court at that time.
- Rubens: For White?
- Burnstein: That's right. Another lawyer, a friend of mine, Marshall Krause, was working for the state judicial council. He and his wife, Charlotte, and I were going to go over to watch HUAC on Friday afternoon, Black Friday. I'd been there the day before. But we were going to have lunch together and then go on over and watch HUAC. Well, the lunch plans fell through, so we were just going to go and meet over there at the HUAC hearings. I got delayed. So, when I got to the [San Francisco] City Hall, the first thing I see is two cops leading Marshall Krause down the city hall steps. I said, "Marshall, what's going on?" And he flipped me his car keys and he said, "I've been arrested. Go get Charlotte, tell her that and give her the car keys."
- So, I go inside, and there's a sea of blood and water coming down the steps. It was the most startling sight I've ever seen in my life because at that point no one had yet been arrested, other than Marshall. The stairs were filled with bodies, and there was a lot of blood and water. It was just total chaos. Charlotte was down at the bottom of the stairs soaking wet. I grabbed her. I took her to my office. I started making phone calls.
- Rubens: Where was the office then?
- Burnstein: Just in the state building—where the state supreme court was—just kitty-corner to the city hall. So, I started making phone calls to try to get a lawyer to go get Marshall out of jail. I was a graduate from a law school, but I was clerking on the supreme court. I didn't have a clue as to how you got someone out of jail. The first lawyer I actually reached, who wasn't representing a witness at HUAC, was Charlie Garry. So I called Charlie, who I knew from the guild. I said, "Charlie, Marshall Krause has been arrested. Go get him out." Charlie goes down to the jail, and by that time, the cops had arrested sixty-seven other people. Charlie gets to the jail and there are sixty-eight people arrested. He bails them all out [laughing], which HUAC used to show

that this whole thing was a Communist conspiracy. In their film *Operation Abolition* they talk about Charlie Garry bailing all these people out as evidence of the Communist conspiracy. Gerry would go on to be the Black Panther's lawyer. I'm the guy who called him and got him there only for Marshall.

Rubens: Was this part of the general tarring of liberal people, or was he known to be in the Communist Party?

Burnstein: Oh, I'm sure Charlie was known to be in the Party. Marshall was never in the Party.

Rubens: What a great story.

Burnstein: Oh, it's a wonderful story, except it was pretty serious back then. I thought it was amazing.

Rubens: It's eleven o'clock.

Burnstein: We need to stop.

Rubens: We need to do another session. We need to do one more session because there's a little more background, particularly in terms of civil rights, and then flash forward because I don't think the Free Speech Movement was the end of your political support, defense, et cetera. You went on to do quite a few other things. I'm just very impressed.

Burnstein: Didn't know I had so much to say.

Rubens: Yes. You have more to say too, I think.

[Interview 2: August 22, 2000]

[Tape 3]

Rubens: Mal, I am so pleased that you have contributed your files to The Bancroft Library because they really chronicle a life confronting the law, and involved in politics certainly from '62 way, way into the late eighties. It may have gone up to the nineties, but I think the bulk of the material that you contributed, was the sixties and seventies. Just for the record, and then we must get back to the trial of the Free Speech Movement. But before Free Speech, as we talked about in our last interview, you were involved with representing civil rights demonstrators and you were very active in Democratic Party politics in the Bay Area. You had a name for your club?

Burnstein: Boatrackers Democratic Club, a 7th congressional district club.

Rubens: Were you particularly active with legislative actions? I also want us to talk about The Convention of New Politics in Chicago and then in Oakland in 1967.

Burnstein: Well, it wasn't legislative actions, I mean, it was political actions. The most important things we did were work on the school board recall in Berkeley in 1964. The conservatives tried actively to stop the Berkeley School Board which had integrated the Berkeley Schools, and we defeated that recall. Then Berkeley City Council had a year earlier passed a fair housing ordinance, which the conservatives put on the ballot by referendum, and they won. We lost that fight, but we got ourselves well enough organized so that when the State Fair Housing Legislation made it on the ballot in the fall of 1964. We were able to win that fight in Berkeley.

Rubens: That's the point that I think is so key as contextual for the Free Speech Movement. Berkeley was a conservative community politically, electorally.

Burnstein: It had been. It had been, that's right. I mean up until the sixties, Berkeley had been very political, and all the members of the Berkeley City Council were Republican. There was a really complete separation between town and gown, all that changed. All that changed in the late fifties. The country changed, you know. We came out of the gloom and depth of McCarthyism into really a wonderful, by my standards, a wonderful decade of opening, and people taking part in things and trying to change the world, making the world a better place. These are all cliches now, but that's the way it was. Everything changed—we changed things considerably. The face of Berkeley changed dramatically; the face of Northern California changed dramatically in that period of time.

Rubens: Say specifically what you mean.

Burnstein: For example, in the civil rights area, when all this started, there were no black tellers in banks, there were no black clerks in department stores; there were no black clerks in grocery stores. You know, things that you take for granted everyday now. That just changed, and it changed because of a lot of street action, a lot of legislative action, but mostly it was because of people organizing. We picketed, we did sit-ins, we did eat-ins, we did shop-ins. And those of us who were fortunate enough to be lawyers, represented the people who did all these things.

Rubens: You also were able to get the Berkeley Schools integrated.

Burnstein: Oh, yes.

Rubens: That was one of the first school districts to do so?

Burnstein: That's right, in the north, and in this case, Berkeley would be considered north or non-south.

Rubens: You wrote quite a bit for the liberal democrat in those years, and I'm particularly interested in your point of view about issues of direct action versus political action. I think you basically conclude that direct action is what really pushed forward these great changes.

Burnstein: Oh, I think so. Take the Vietnam War. Insofar as the United States policy changed about Vietnam, that change started in the streets. It started on the campuses. It was, as a matter of fact, a direct result of the Free Speech Movement opening the campuses, opening Berkeley to the first Vietnam teach-in. But it was the mass demonstrations that got people thinking about Vietnam. And it was the trials of those people arrested that got people thinking about Vietnam. In 1969 we won the Oakland 7 trial in Alameda Superior Court by taking a jury that started off supporting the war, and by the end of that trial, every one of those jury members opposed the war. And they acquitted the defendants.

Rubens: How long was that trial?

Burnstein: Eleven weeks.

Rubens: You were a lawyer for the defendants. In eleven weeks there was that kind of turnaround?

Burnstein: Oh yes, it was a wonderful opening because we had a good trial judge, George Phillips, who allowed us to educate the jury by having the defendants being able to tell the jury why they did what they did, and by having other people tell the jury how and why the war was immoral, as well as illegal under international law. Like I say, by the end of that trial, we had solid jury support.

- Rubens: Who was the judge?
- Burnstein: George Phillips, died some years after the trial.
- Rubens: Was he part of the same court level as Crittenden during the FSM?
- Burnstein: He was a superior court justice. Well, Crittenden was a municipal court judge at the time of the FSM trial. He got elevated to superior court, many of us are convinced, as a reward for the way he mistreated the Free Speech Movement defendants.
- Rubens: Maybe this is the segue, I have some questions about how you educated the public during FSM, even if you failed to convince the judge. Perhaps when we conclude today we can go back to a few other post-FSM and Vietnam activities that you were involved in. Certainly a longer oral history of your life and activities should be done.
- I think we left off in the first interview at the appeals process. When I looked through your files on the case, I saw in addition to all the other aspects of the trial, elaborate and detailed file folders of press contacts, how you were spreading the news beyond California, and some files on publicity posters. The publicity posters were not densely worded; they were attractive, and they had a lot of information: Come see the trial at the Veterans Administrations, See how Free Speech has been abused, Learn the history of the FSM, and the like. Do you remember if the publicity had an impact, and if those trials were at times fairly well attended?
- Burnstein: At some times, they were packed. The early stages of the trial were jammed, for instance when we had Chancellor Strong on the witness stand, and people like that--the court room was filled.
- Rubens: Both sides, would you say?
- Burnstein: Hard for me to remember back. I remember the court room being filled, and I remember it not being so filled later on. But beyond that, I have no real memory of who was there.
- Rubens: This was the first trial?
- Burnstein: This was the only trial. The FSM was only a single trial.
- Rubens: The appeal did not involve face-to-face courtroom procedures?
- Burnstein: Well, there was only one appeal in which we got to say anything, and that was the appeal to the appellate division of the department of the Alameda Superior Court. We got to argue the case, as did the district attorney, but we got a very, very short, curt affirmation of the judgement. There was no going into any

detail of why the judgement was being affirmed, unlike any other public decision, where you see the court going into reasons for what they did. In our case, the court just said, “We affirm it, period.”

Rubens: Would you explain how the appeal process works? What might be the parameters of, for instance, a plea bargain? Did the failure to give justification for the denial of appeal reflect the politics of the court?

Burnstein: Well, any appeal in California—and I’m sure this is true anywhere in the United States—is based on what you claim to be in error of law occurring at the trial, not that the judge or the jury made the wrong decision. You can’t appeal on that. You can appeal on not having sufficient evidence to support the verdict, but that is a legal claim. Most legal errors are somewhat complicated questions of law. In our case, we raised many, many legal questions challenging the constitutionality of the statutes on their face, the constitutionality of those statutes as applied to the facts of our case, challenging the way the court trial was conducted. Under normal circumstances, and in every other case, the appellate court would write an opinion saying, for instance, “Yes we’re right,” “No we’re wrong and here are the reasons.” In the FSM case, the appellate division of the superior court simply said, “No you’re wrong, good bye.” We had, as you’ve seen, written a voluminous appeal. Sig Hesse wrote a really tremendous document. The district attorney’s brief, on the other hand, was reasonably short, but at least it addressed the legal points. The court didn’t, and that’s the problem. The court didn’t address the legal points.

Rubens: Nothing to be done at that point?

Burnstein: Well, we then tried to ask a higher court to take the case. We were unsuccessful. We went all the way to the U.S. Supreme Court, and we were completely unsuccessful.

Rubens: So the only judgment or decision was based on Crittenden at municipal court?

Burnstein: That’s right.

Rubens: Did all you lawyers support the first appeal?

Burnstein: You know, I don’t even remember. Sig Hesse was primarily responsible for the brief. I don’t remember who argued it. I may have, I may not have. I just have no recollection.

Rubens: Sig’s interview is a part of this project.

Burnstein: Sig is more likely to remember that than I am.

- Rubens: Perhaps. What I'm most concerned with is your memories and your assessments, how you looked at the whole thing then, and now. Do you remember the judge?
- Burnstein: There were three judges, I don't recall their names.
- Rubens: How do these judges come to power? Are they appointed, or elected?
- Burnstein: Every year, the Alameda County Superior Court chose three judges to sit on what they call the appellate division, which was a division of the superior court that reviewed appeals from the municipal court. Now that there is consolidation of the courts, I assume that doesn't exist any more [as of 1998].
- Rubens: Explain just briefly consolidation of courts.
- Burnstein: In Alameda county, and in a number of other counties, by state legislation, the counties have been allowed to consolidate municipal and superior courts, so there is simply one court now. In Alameda county, it's called the superior court, and some of the departments have limited jurisdiction. In other words they hear what used to be municipal court cases, but they are still superior court departments. So I'm not familiar whether there is an internal appeal.
- Rubens: But in that period, the municipal court judges were elected weren't they?
- Burnstein: Well, all trial judges are technically still elected. But as a practical matter, almost all judges are appointed in California. Judges die or resign, or retire in the middle of their terms. The governor then gets to appoint a judge. Very seldom is the judge elected for the first time. Once a Superior court judge is elected, they serve for six year terms and then they come up for election. But it is almost impossible to successfully challenge a sitting judge. Although it's been done a few times, it is very rare. [Judge Sparrow's defeat was one of those rare instances. He was so universally disliked and disrespected that he was defeated for re-election.] So with the FSM case, they didn't choose the judges for this case, they chose them for that year, so I mean, that wasn't the selection for this case.
- Rubens: Yes, I understand that. But these were conservative times. The reaction within California's legislative and judicial structure was very conservative and they must have reflected that conservatism.
- Burnstein: Well, they certainly didn't want to deal with the issues, They didn't want to take the time or whatever. They didn't deal with the issues that our brief raised.
- Rubens: Given this history that we've talked about, given your support of mass action, and your belief in direct political action, do you remember advocating direct

action? Or do you remember hearing discussions about that there should be demonstrations over the close-mindedness of the local court system?

Burnstein: No, I don't and I don't think those kinds of demonstrations are effective. That's not what I'm talking about by mass action. Mass action to me is action directed at changing public opinion, not directed at a judge. I consider that almost improper, to try to put public pressure on a judge to make a particular decision on a case. I think that borders on unethical, if you are a lawyer, and I think it is unproductive as well.

Free speech is something that we ought to have demonstrations about from time to time. How a particular case is decided, is not. Although I don't have any objection to people showing support for one side or the other, but I don't think it should get to the point of a judge feeling threatened by making a ruling.

Rubens: Legal procedures seemed to go very fast at the beginning and then slowed down on the way to the U.S. Supreme Court. By the time the case came back to the [Alameda County] Municipal Court and sentencing began, it was now April 1967.

Burnstein: Well, some people elected to serve their sentences early, not wait for the appeals. Their life was such that they wanted to be through with everything by a certain date. And if they had had to come back and serve sentences, say in '67 or '68, nobody knew at the time where they might be. They didn't want to take the chance that they'd have to come back to Northern California, so some people served their sentences before the appeals. A few did not. A few did.

Rubens: Of course, Mario did not. Mario waited.

Burnstein: I believe that Suzanne served her sentence first because she was pregnant, but I'm not sure.

Rubens: That would be interesting, I have to ask her in follow-up. I am wondering, how much contact did you have then with people from FSM during the trial procedures? I know you had a close relationship with Kathy Frank. Between 1964 and 1967 there is not question from you record, that your life was dominated by the FSM.

Burnstein: Well, for a year, I had basically nothing but the Free Speech Movement. And I'm extremely grateful to my then-partners for letting me do that. After the trial, we then had sentencing, I was involved with that. Other lawyers were also involved with that. Sig Hesse bore the brunt of the appeals process, as I said. But after the case was over, then all of the lawyers had a lot of contact with the defendants, because we're talking about very bright people with good educations, people who wanted professions. Many of them wanted to become teachers, and in the sixties, once you had that conviction, it was difficult to get

your teaching credential. So we had a lot of hearings in Sacramento about this. I attended a number of them, and as did many of the lawyers involved, hearings for FSMers who were having trouble getting their credentials. Far as I know, we won all of those.

Rubens: Art Goldberg said he went into law was because he couldn't get his credential. He might have decided not to challenge it.

Burnstein: Yes. I don't remember any specific case, but I know I was up to Sacramento a number of times. I have no recollection of losing those, and not meaning just me personally, but any lawyers—but I could be wrong about that. My memory certainly is not perfect.

Rubens: Regarding the trial then, there were five lawyers?

Burnstein: For the trial there were the five. We all signed the brief but you know, to give credit where credit is due, Sig Hesse wrote it. I remember reviewing it and making editorial comments and suggestions, but Sig was the guy who did the overwhelming work on it.

Rubens: So for that trial, do you remember that the lawyers were in general accord-- despite great passion about the fact that there was nothing to do but segregate into those three different groups and have one trial group? I'm talking about the political compromise that had been made to not have a mass trial.

Burnstein: Yes, but the overwhelming majority of people went through either the trial or submitted their case on the trial record. Then there was a significant number that pleaded *nolo* [*nolo contendere*]. Their position was we did commit civil disobedience, that they should say that to the court and get it over with. I don't know of any third group. I know one woman who didn't want any part of the trial process. And of course the minors were a totally different story.

Rubens: What I don't have a picture of is how did it come down to those five lawyers? I would think others wanted to be involved.

Burnstein: Well, in the meetings of the lawyers, I don't think there was voting. I think in the lawyers' meetings there came to be a decision-making process whereby the five lawyers were selected, partially self-selected given the amount of time that the trial would involve.

Rubens: Somebody said to me every lawyer in the area wanted to have a piece of this, especially if you had some politics.

Burnstein: We had a huge number of volunteer lawyers, and many lawyers were willing to help out. But when it came time to the full time trial situations, without money, very few people were willing to do that.

- Rubens: Well, Bob Treuhaft and Doris Walker already had a reputation as being part of one of the most radical firms.
- Burnstein: Yes, we were the East Bay radical law firm.
- Rubens: Was Norm Leonard, from San Francisco, also part of the five trial lawyers because his firm had such a visible reputation as a left labor union?
- Burnstein: He had a son who was a defendant, but Norman was a longtime radical lawyer and the students trusted him. Partly, this wasn't just the lawyers making the decision, it was a joint lawyer-student decision.
- Rubens: You made that very clear, I think, in the first interview.
- Burnstein: That's why I was there, because I was involved with the students from before the sit-in, from the beginning of October, and many of them knew me. I'd been to lots of meeting, so I was a known entity, and some of the lawyers were not, so I think that's why I was elevated to lead attorney.
- Rubens: Richard Buxbaum was there because he was a known sympathizer from the university.
- Burnstein: You know, I have no recollection of why, but boy, he is sure a wonderful guy, and valuable help.
- Rubens: I'm going to interview him next.
- Burnstein: Good, because I have no recollection of the process by which Dick got involved, but, I'm sure he will.
- Rubens: Then there was Crittenden's former partner.
- Burnstein: Stanley Golde, and he was a criminal lawyer. Now I did criminal law, but Stanley did nothing but criminal law. I did other things, as well as criminal law. And then there was Henry Elson.
- Rubens: Where had he come from?
- Burnstein: Henry was also a Guild lawyer, so he was also sort of left-wing.
- Rubens: Had you worked with him before?
- Burnstein: We knew each other very well, but I don't remember working with any of the lawyers before. I certainly knew Norman from the Guild. I knew Stanley Golde from criminal law. I knew Henry from the Guild. I don't know if I knew Buxbaum before this happened or not. I think I did because I had kept ties with the law school and I knew a number of the faculty. So I believe I

knew Buxbaum, but again, Dick can probably tell you that. I think I knew Dick and his then-wife Wiebke.

Rubens: In your memory, then, there was a winnowing process—the students had almost the greatest hand in shaping this?

Burnstein: Well, they certainly had a significant hand, but part was who was willing to commit the time. Now, nobody knew it was going to be eleven weeks, but it was clear it was going to take a fair amount of time. No question about that. Now, without the student help, it would have been impossible.

Rubens: Including Kathy Frank.

Burnstein: Absolutely. She was there before and during the trial, in order to keep in touch with the defendants, and after the trial. We lawyers relied not on our own secretaries, but on student help. Kathy was one of the main people helping. There were others, but I frankly, since I kept in touch with Kathy all these years, I just know Kathy better. And I hope by not mentioning other names, I'm not insulting anybody by forgetting their enormous help--but Kathy is the one who I remember best, Kathy and her then-husband David. And then there was Albert La Tooka who helped, and I know from time to time Mike Marcus helped.

Rubens: What about Mike Tigar, did you have any particular encounter with him?

Burnstein: I knew Mike, but I don't remember Mike being involved. I think he was in Washington, D.C. by then.

Rubens: How was it that Kathy Frank and you kept in touch with each other?

Burnstein: Well, we worked together on a day to day basis, and we became friends. It's very simple.

Rubens: Yes, others speak of strong bonds being forged during that time. I understand that you and Kathy will write a book about the whole trial process?

Burnstein: I hope to.

Rubens: I'll look forward to reading it.

[End of Interview]