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University of California
Berkeley, California

Siegfried Hesse
Free Speech Movement Oral History Project

Interviews conducted by
Lisa Rubens
in 1999

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[Interview 1: April 28, 1999]

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Rubens: You were telling me that you think sometimes lawyers of your generation are different? How so?

Hesse: Next month I'm having a meeting with a few of my classmates from Boalt to set up our fiftieth reunion. Most of those people, when we started law practice it was much more genteel. I mean, a lawyer's word was good. If an opponent said such and such, he would live up to it. Today you have to get everything in writing, confirm it, and all this sort of stuff. And people have all these nasty tricks of trying to inundate you with lots of paper. It's much more aggressive and hostile, I think is what it is.

[tape interruption]

Rubens: At the time that you wrote the appeal brief for the nearly 800 arrested FSMers, were you an active trial lawyer?

Hesse: No, I was not an active member of the California Bar. I was a member of the Washington State Bar, where I had practiced for several years.

Rubens: Where did you go to school?

Hesse: I went to Boalt Hall, graduated in 1950. I was, I guess, one of the younger members of my class, which is beginning to tell now! [chuckles] I went through college, straight through during World War II. I was in the Navy V-12 program and went to USC under that auspices and graduated in '46. Started in '44. It shows you how accelerated it was.

Rubens: What was that program?

Hesse: The Naval V-12 program. During the war, they went around to all the high schools and asked the top ten percent of the boys to apply for V-12 or A-12--army or navy--training programs. And then you took a two-day exam, and those that they found passed that--I don't know what the criteria was--then you had to choose between the army and navy. I chose the navy just because I'm from the Bay Area and was put into a pre-med program.

I started in March of '44, I was discharged in the fall of '45, after the atomic bomb was dropped. I decided not to go on--I had been accepted to med school at that time. We had three semesters a year, no less than eighteen or normally twenty-one units a semester. They were full semesters, plus labs and that sort of stuff. So it was a real grind.

After that, I took a B.A. in political science in two semesters and then graduated and took a year off.

Rubens: Then you graduated from USC.

Hesse: Yes, in '46. And then I applied to two law schools, Yale and Boalt, depending on whether I was going to get the G.I. Bill of Rights, which was an open question at that point. But I think very sensibly they said people in my category shouldn't get the G.I. Bill of Rights because we were going to college all during the war. So I went to Boalt. I would have gone to Yale if I had gotten the G.I. Bill of Rights, but I could not afford to go to Yale, so I went to Boalt.

Most of my classmates were returning veterans, so they were four or five years older than I, most of them. I mean, there were a few that were--I don't know whether I was the third or fourth--something like that--youngest in the class.

Rubens: How did you choose law over medicine?

Hesse: I chose law over medicine, and the thing that changed my mind about medicine--I had been planning to be a doctor most of my life--I don't know. I can't remember exactly when, seeing and reading war news, where they blew up so many people wholesale, I figured it was kind of futile to be dealing with individuals on a single basis. I thought it would be more important to look at policy questions. That's why I went into poli sci, to find out what's going on politically, and then I decided that law was probably the best profession in order to effectuate social change.

I was also fairly radical at that time. This was just the beginning of the government's repression. This was '47. I started law school in '47. It was just about the time that they started arresting people, the Smith Act and so forth. So I spent four years, roughly, in Seattle.

Rubens: After you graduated from Boalt?

Hesse: Yes. Then I went to Seattle to practice. I took the bar up there. Was admitted in '51, and then left, I guess, sometime in late '54. Mainly, I found I really didn't like the business of law practice, particularly since I was doing mostly political stuff--immigration, defense. Also there was a Smith Act case up there. You get tired of having your name on the front page every day and reporters following you around.

Rubens: What do you mean by the business of law, literally?

Hesse: Yes. I mean, the fact that you're in a business. In those days--I don't know what they do today--they certainly didn't tell you how to run an office or

anything like that. I had the good fortune of working with a lawyer up there who was a very good craftsman, so I learned how to write well and research well. But it was very hard financially because your clients were very poor and harassed by the government and so forth. Also, my wife couldn't stand the climate, [chuckles] having been from Los Angeles as a child, and up there--we were up there for I think about nine months before we realized we had a view of Mt. Rainier from our front window. It was the first clear day.

Rubens: You were telling me earlier that you came back to Berkeley with a family?

Hesse: Yes, I came back--our first was on the way. So I came back here, and I worked for--at that point there was a serious oath problem. I couldn't take the bar without some considerable jeopardy. If I took the bar, they wouldn't have admitted me. So I worked for a publishing company for several years--I guess three and a half, at least. And then I bumped into a gentleman who was running the Continuing Education of the Bar [CEB], University Extension, in a summer camp.

Rubens: Had you known this person before?

Hesse: No. I had written an article on immigration law, and I was reading this, proofreading it. And he heard me mention something about the law and got interested, and we started talking and chatting. So when an opening came, he called me, and I took a job with the university [University of California] and was working for the university at the time of the FSM case.

Rubens: When did you take that job at the university?

Hesse: I guess probably '58, '59--somewhere in there.

Rubens: Because of the nature of your position, you could elude the loyalty oath controversy? The conflict over that was just about coming to an end then.

Hesse: It was getting--right-wing politics was getting tamed. Also, as I recall--this again--my memory is a little faded, but I think the state bar oath was a little more onerous than the university's.

Rubens: But also the nature of your job--you weren't a professor, and you weren't a lawyer representing the university.

Hesse: No, no, no. I was doing legal editing, which is what I had been doing--legal writing for the publishing company, and this was just another version of that.

Rubens: Would you like to name, to give a plug to the publishing company?

Hesse: Bancroft Whitney, which is now extinct. The whole legal publishing world has changed so much since then. Now I think every law publishing company,

except for maybe Matthew Bender, is owned by either a Dutch or English company. And a few big competitors when I was there were a good group called Lawyers Co-op, which Bancroft Whitney was a part of. And then there was West Publishing Company. They now both belong to the same company.

Rubens: I think there are always so many fascinating side stories to follow; alas I have to exercise discipline not to pursue too many. You joined the Continuing Education of the Bar as a legal editor in '58, '59.

Hesse: Somewhere in there.

Rubens: Was there anything distinctive about the institution, or cases you worked on? For instance, were there any loyalty oath cases?

Hesse: No, no. CEB put out books for lawyers and programs for lawyers. Actually, the books were the important part; the lectures were not so significant, although it's now reversed. I guess because of my background, I was quickly put in charge of the books and was in charge up until 1970. I was basically running the book part of the program. We had another guy running the oral part, and then there was a director.

Rubens: Were you involved with any political activities before the Free Speech Movement?

Hesse: No, I really wasn't. I became aware of the Free Speech Movement. I remember walking across the campus when [Mario] Savio was up on top of the car, the police car. I can't remember how one got all the details, but it was well known, and there was a lot of agitation and so forth, so it was pretty hard not to be aware of what was going on.

Rubens: The scale of it was so much bigger than other conflicts.

Hesse: Yes, right. Then, when the arrests came along, I guess a day or so after that, I was contacted by--I can't remember who. Some lawyer said that there was going to be a meeting for attorneys interested in helping defend these kids and would I be interested in coming and so forth. I volunteered because I, by that time, had heard enough of the rough details of what was going on that I offered to prepare a short memorandum on the charges. They were being charged with trespass, failure to disperse, unlawful assembly, and some, if they didn't walk out, they were also charged with resisting arrest.

I don't even remember how long the memo was, but it was unfortunate I did that, actually, it turned out later, because some of the kids--there were I think eight or nine, somewhere around that neighborhood, I think it was eight--juveniles who were separated from the other group, and they went into juvenile court. And the attorneys who represented them took this very crude memo, which was just basically asking a bunch of questions, pointing out the

legislative history of each of the provisions, what they appeared to mean, and why they didn't appear to cover the charges filed.

Rubens: Is that memo still around?

Hesse: Probably. I do not have it. I looked for it. I do not have it.

Rubens: Okay. Maybe at Ann Ginger's--we'll look for that later.

Hesse: It's possible. But that was one of those things that probably was not saved. It was just worked up, and I brought a stack of them this high [indicating a couple of feet] at the meeting, and people took them. The lawyers who represented the juvenile kids--they were separated and their cases were dealt with very quickly. Their attorneys took an appeal, a case called Bacon. Bacon was the name of the case. They basically just took that memo and used it as an opening brief, which was really unfortunate because the court then wrote a very, very unreasoned, I would say almost stupid opinion, rejecting all of these arguments without any real thought.

So we had that hanging over our heads in the main case as a possible precedent.

Rubens: That happened right away?

Hesse: Yes, it happened very quickly. So I say in that sense, looking back, it would have been fortunate if I had not done that because then they would have not raised all the issues ultimately raised in the main case.

Rubens: On the other hand, did you expect that those defense lawyers would have used that as the basis of their defense?

Hesse: It was prepared just to sort of orient the lawyers who were interested to see what the issues were, mainly so they could help decide whether they wanted to get involved in the case or not. This meeting was--I don't know--I have no idea how many were there. It could have been a hundred; it could have been two hundred. It was a very large turnout of people who were very interested in being involved.

Rubens: Do you know where this first meeting took place?

Hesse: It was, I think, at one of the church units near campus.

Rubens: But near campus.

Hesse: Yes, one of those places where they had a large basement place. It was near campus. As I say, it was a huge turnout in terms of attorneys interested. Then that was about the stage where people were beginning to develop some kind

of control over this because we had seven hundred and something defendants. I had been working with Ann Ginger, actually, on a criminal book. No, I take that back. I was working on another book on federal civil procedure. And in the course of that--

Rubens: Was the civil procedures book with Ginger?

Hesse: No. One of the parts of a chapter was how the federal courts were dealing with what they called protracted or complicated cases, in which you have, like, a mass tort: an airplane crashes and you've got hundreds of people, plaintiffs, suing. How do you handle this? The federal system had developed a way of having everything assigned to one judge and trying to weed out the issues, and that sort of stuff. It's called the "big case" procedure.

At that point, the kids were arguing that the university had no right to determine what their positions were--legally, their legal position. The courts were the ones that were entitled to determine what's constitutional and what's unconstitutional, and what's lawful and what's unlawful. They had no quarrel with the court system as such. There had been bizarre results in earlier sit-ins in the city.

Rubens: Right, I think that's what Ginger's essay in the local Lawyer's Guild journal at the time was about.

Hesse: Yes. And if you play hardball, you get eighty or ninety trials. In this case, they arbitrarily assigned people to complaint groups of ten, the prosecution did.

Rubens: "In this case," you were referring to the civil rights cases.

Hesse: I'm referring to the FSM cases. They were saying there was going to have to be eighty trials. Of course, eighty trials--you'd be spending huge amounts of effort and time, and also there weren't that many--at least we didn't feel there were that many--competent attorneys who could provide really adequate representation. There were a lot of complicated questions, particularly in terms of the constitutional issues.

So the leadership of the lawyers--and that included people like Mal Burnstein and I don't know who else. But they began to figure out how they were going to handle this. I suggested that one of the ways to approach this--if the defendants were interested in it--would be to seek to get a situation where we could have one trial and not have a whole bunch of trials. So we ended up filing a motion, which I drafted, for pretrial procedures and filing copies of this federal procedure manual. I don't know how many documents I drafted, but that was one of them.

It was supposed to be a motion to simplify the issues and figure out how the hell to handle the trial and to avoid, if possible, what had happened in San

San Francisco during the previous year's civil rights sit-in trials, where you had mostly convictions but some acquittals, which really looked stupid from the point of view of the legal system. It's the quirks of the jury. And also it denies people equal protection because, depending on which judge you got and which attorney you got, you either can get acquitted or you could get a huge fine, or the punishment would be different, and everybody did the same thing. So you ended up with people doing the same thing who were then punished differently, and some of them even acquitted.

In fact, I think in one case, I was told there was a husband and wife and they got separated because they were different sexes. One of them got acquitted, and the other one got convicted, and they were sitting next to each other when arrested. So it was that kind of bizarre thing we felt probably should be avoided. We also wanted to see if we could provide a way for the court system to handle these large sit-ins, which were at that point extremely popular ways of protesting.

Rubens: This was the largest mass arrest to date?

Hesse: It probably was.

Rubens: That was the direction political action was going--clog the courts.

Hesse: It was going that way at that time. And it seemed to me that this was a good opportunity with intelligent people to work out with the court a system that would permit handling these things without totally shutting down the court system for other people. In San Francisco, the Commonwealth Club put out a report afterwards, pointing out how this basically stopped all civil litigation, and they had to bring in judges from the outside. And, of course, everybody is mad as hell at the kids because it created a hostile environment, which is another dimension of hostility of the establishment, because these cases were clogging the courts.

We had mostly defendants. Although I happened to be talking to Art Goldberg just a week ago in Los Angeles, where he's now practicing law, in which he says--now, he says it was the greatest mistake possible to have done what we did, which was to go for a single trial. But the majority--and he admitted the majority of the executive committee of the defendants wanted to go for the single-trial approach, because they didn't really have any quarrel with the court system as such until after the trial. [chuckles]

And also we had a judge who was new, fairly new, on the muni bench, who had been a very, very thoughtful criminal defense lawyer.

Rubens: And this was?

Hesse: Rupert Crittenden. We thought that there was a guy that would be receptive to innovative ideas and would understand what we were talking about. He turned out to be a great disappointment. Stan Golde, who had been his partner, was picked deliberately to be there to remind him of his past. As a matter of fact, I knew Rupe because he had written for the criminal defense book which I mentioned earlier. He wrote a very thoughtful introductory chapter for CEB about the nature of being a criminal defense lawyer, and I knew him quite well through that experience. So we had a certain amount of illusion, an attitude that this guy would be open.

I knew him because he wrote an introduction to that practice book. But he was well known. In fact, he was considered the most thoughtful criminal defense attorney in the county, and then he got elevated--he got appointed to the muni court bench.

Rubens: Who appointed him?

Hesse: Brown. That's Pat Brown. The governor appoints everybody--I mean, virtually everybody. Very seldom does a person get elected to be a judge. That's a whole different question about how we pick the judges and who they are.

Rubens: Right. You were saying how Rupert Crittenden turned out to be a--

Hesse: Big disappointment, to put it charitably. I don't know whether you read the brief or not, but one of the points--we can get to that when we get to that part of the story.

So what happened was basically it boiled down to the defense had an executive committee, and the attorneys began to--certain attorneys--I guess Mal Burnstein was probably the critical centerpiece because he was the most closely associated with more defendants than anybody else. As a consequence, they began to pick out who they were going to try to have represent these kids. And you have to make decisions, the large decisions first, before you can decide what you can do anyway.

So I think by that time--

Rubens: Now, when you say "large decisions"--whether you went as a group or had separate trials--?

Hesse: Yes. This was following my suggestion which, I have to say, was my mis--well, I don't even think, historically that it was a mistake. I think it was important to have tried this. In fact, even Art Goldberg admitted that in fact it was important to establish that even if you tried to be cooperative in the legal system, when you're involved in a political dispute, the system won't adapt to it.

The lawyers presented this idea to the group, and the great majority of them thought it was a good idea, so we filed a motion for pretrial procedures. The judge just said, "Okay, we'll have some informal proceedings." So what he did, he in effect interpleaded the prosecution and the defense people. By that time, it had gotten down to--I don't know how--I can't remember exactly how the membership of this inner group of attorneys got established, but I suspect it must have been by the defense. I was not formally part of that in the sense that I was not going to be trying the case, but I was basically the person that offered them intellectual backup.

Rubens: When you say that the judge "interpleaded the prosecution," I don't know that term.

Hesse: It means he said, "Here, you two go fight." Interplead is a procedure by which you can--

Rubens: Okay, I think I understand it. So this was part of the pretrial motion?

Hesse: Yes. So we wanted a formal pretrial, where you actually have hearings. We submitted a potential list of issues, and we wanted them to have to reply to those issues. And the court would then say, "This issue is--" he could have made a lot of preliminary rulings which would have eliminated a lot of need for evidence, for example. That sort of thing is what we could have probably stipulated to ninety percent of the facts because no one was denying what they did, except the prosecution. They would not admit that what they had done, precipitating the whole damn business.

Rubens: Why did Crittenden wanted this interpleading to take place?

Hesse: He wasn't willing to say no, but he wasn't willing to do anything formally. He behaved very lazily. I was surprised how lazy he seemed to be. I don't know whether he was politically ambitious; I suspect he was. I mean, that's what I eventually ended up--well, I didn't ever accuse him of that, but I suspect he was hoping to be elevated. He didn't want to do anything that was going to make the governor unhappy.

And, of course, the governor was in this up to his eyeballs, and very illegally. He had absolutely no authority for doing what he did. The case became extremely political precisely because the governor was involved, and later on, I was told by somebody in the higher court's staff that that's the reason we never got a hearing in the California Supreme Court because the liberals were mad at these kids for having caused Pat Brown to not get reelected.

Rubens: You were saying that the governor acted illegally, he was up to his eyeballs in getting the defendants arrested. You were saying that part of the whole political climate was tinged with politics, or political ambition and that Crittenden would not act assertively.

- Hesse: He was very passive.
- Rubens: He would behave lazily.
- Hesse: Maybe passive is better than lazy.
- Rubens: Okay.
- Hesse: I'm not trying to--
- Rubens: Characterize or demean him.
- Hesse: No.
- Rubens: You're just going to describe--
- Hesse: Yes. I liked Rupe very much, but I was very disappointed in him.
- Rubens: And you're trying to explain it, account for it?
- Hesse: I was very unhappy. He died before the brief was filed and he had not had a chance to get our views on his behavior.
- Rubens: You mentioned that lawyers wanted to be associated with the defense of the students.
- Hesse: Oh, yes.
- Rubens: Almost everybody, I assume, who came to that original meeting. And then you are raising the issue of how does Mal Burnstein become the central figure.
- Hesse: He can tell you that better than I can.
- Rubens: Sure. And then I think it became ultimately six major lawyers involved: Mal Burnstein, Stanley Golde, Richard Buxbaum, Norman Leonard, two more-- Hill, and Henry Elson.
- Hesse: Hill was a minor player. He came in later. I don't know how quite he got in. He also unfortunately was a guy whose later life was not very happy. He ended up in jail on drug charges.
- Rubens: Norman Leonard has done an oral history for ROHO. He states that he was representing labor and the Communist Left, and of course he wanted to be a part of it because his son was arrested.
- Hesse: Well, no. Actually he was invited, I think, mainly because--well, see, the defendants--there were different groups or political factions among them. There were real lefties, like Bettina Aptheker, whose father was a famous

Communist. And then there were guys who were just liberal. So the lawyers were picked, to a certain extent, as I understand it--Henry Elson, I think, can give you a better view of that--so that all the defendants had a sense that their political view was being represented.

Norm, who had a radical background, like I did, was there, I think, to represent the people who were in that category. We wanted Dick Buxbaum because we wanted somebody who was liberal and who was on the faculty, the law faculty at Berkeley. He could lend a certain, you know--

Rubens: Prestige?

Hesse: --prestige or panache. We wanted everybody to remember that the university faculty basically supported what the kids had done. Burnstein probably represented the largest group. Let me see--Stan Golde was there for obvious reasons. Henry Elson, who is now no longer a practicing lawyer but is a mediator, was very critical. I think he was the glue that kept all the disparate views all on the same track. I don't know how Henry would remember it. He seemed to be very uninterested the last time I talked to him about it. You'll have to find out what his views are.

Rubens: I'm trying to get at whether or not it was a hard fought struggle to narrow the lawyers down to these six. A lot of people were interested, but given--

Hesse: Ultimately, when they had to waive their jury rights, of course these other people did play an important role because to get seven hundred and some people to waive their jury rights is quite--that's physically a lot of work, which six or seven people cannot do adequately.

Yes, there were a number--I don't know how many, but I know there were some unhappy people who did not get to participate in the trial. I think that's mainly because lawyers like to have publicity. It was a big case. It was going to get a lot of publicity and a lot of press, and so to be part of that would be interesting, exciting, important, and so forth.

Rubens: In trying to remember, were there any particularly outstanding snipers or lawyers with bad feelings because they weren't included?

Hesse: No. No, I don't think so. There were people who were coming in and making suggestions, and some of them were a little bit annoying because they would cause more work. But I would say that by and large everybody accepted the fact that once you decided to go the one-trial route that you couldn't have all these people doing this sort of stuff.

Rubens: I am particularly wondering why Robert Treuhaft wasn't involved?

- Hesse: No, he wasn't involved. In fact, I have no memory of why that would have been--whether they decided Norm was the better attorney than he. I can't comment on it. It was very interesting: He was arrested so he couldn't give legal advice.
- Rubens: Oh, right, but is that a satisfactory explanation?
- Hesse: And Alex Hoffman, who was outside, was not allowed in to give legal advice at the critical time, which is a very interesting fact.
- Rubens: Want to say a little more about that? Was Hoffman a lawyer at the time?
- Hesse: Yes, he was a lawyer. I don't know. Alex was a lawyer who I don't think ever really became a serious lawyer in the sense of running an office and that sort of stuff. He liked to dabble. He liked to have coffee and talk a lot. A very intelligent young man, but--
- Rubens: But he wasn't let in, you're saying? They wouldn't let him in?
- Hesse: I don't know about that. I don't remember anything about him or Treuhft being excluded, whether they excluded themselves or--
- Rubens: Oh, no. I don't mean in the selection of the lawyers but at the time of the arrests, were you referring to the Hoffman--
- Hesse: Well, somebody called for help, I guess. That's not clear from the record, and I wasn't there, but I know that Treuhft was in the building, and then when he wanted to start--he came in to give legal advice, and they arrested him. And then Savio protested, and they arrested him--out of order. I don't know how Hoffman got down there, but he was outside, and they wouldn't let him in. [pause] I think Mal Burnstein might be able to give you more information on that.
- Rubens: About the process?
- Hesse: Yes, how that worked out. I was not there. All I can comment on is what was in the record.
- Rubens: Did you have a particular interest in federal procedure?
- Hesse: Yes.
- Rubens: That had been going on vis-a-vis the civil rights cases in the spring of '64 in San Francisco. And then I guess in terms of what you were writing--
- Hesse: Well, those were state cases. They weren't federal cases. No, the federal courts were doing this in large civil litigation. But then they also had been

advocating that--there were judges who said, "We should apply this to criminal cases as well." See, sometimes a corporate crime could be very complicated, with huge amounts of documents and so forth. One idea is you can authenticate exhibits in advance; in other words, you can all agree these exhibits are valid; these aren't. Or you're going to argue about these, but not these. There's all kinds of ways you can expedite the actual trial by spending a little time in advance, and that was the whole theory of this thing. It's standard practice now.

I also was a professional writer. A lot of lawyers can't write their way out of a paper bag. There are very few lawyers that are both good talking lawyers and good writing lawyers.

Rubens: Those are two distinct skills?

Hesse: Yes, basically. There are very few lawyers that are really good at both. Most appellate lawyers don't try cases.

Rubens: What do you think that has to do with, personality?

Hesse: Well, part--it's just a matter that they're two different skills. They're two different ways of communicating. I mean, there are exceptions, but the only one I can think of at the moment is a guy named Moses Lasky, who was an antitrust lawyer in San Francisco, who was a very good writer and also an extremely good trial lawyer.

Rubens: Vince Hallinan is a trial lawyer?

Hesse: Yes, right.

Rubens: I just wanted to make sure I wasn't going to miss any assessment you had of how these particular six lawyers came together.

Hesse: I really can't say. I had nothing to do with how those were picked.

Rubens: Did one of these particularly ask you? Were you closer to any one of these than any other? Were you close to Burnstein?

Hesse: Yes.

Rubens: Had you worked with him in the past?

Hesse: You know, I really can't remember. I knew Henry very well. And I knew Norm Leonard, and I knew Buxbaum. Mal, I don't remember exactly when I met him.

- Rubens: All right. So these major decisions now have been made in terms of how to proceed.
- Hesse: Yes.
- Rubens: And you were then what? Assigned the job of writing the brief?
- Hesse: Well, that's a long time later. There was a lot more letter writing before that. No, so we filed this motion for a pretrial. We wanted a formal pretrial, and by formal, meaning the other side had to come in and respond and so forth. The judge said, "Well, we'll have informal talks," and then--"You can't say anything about what is discussed outside," so we were basically gagged. What it amounted to, boiled down to: anything we could talk the prosecution into, he would do--the judge would do. Otherwise--so, it became pretrial by stipulation.
- I remember a critical meeting, where we were arguing the question of whether a single jury trial could be had. They were saying, "Oh, it's impossible. There's too many people." I was saying, "Well, look, there's no reason why we can't have a representative jury trial." Finally, it was pushed to the point where I said, "Look,"--actually, it was to Lowell Jensen, who's now a U.S. District Judge. I said, "Look, Lowell"--he'll probably deny this, but--"what we'll do is you pick the number of defendants you think could be constitutionally tried with a jury." He was saying it's too complicated; a jury can't keep everything in mind. "So you pick the number, and then we'll split it down the middle. You can pick all the crazies"--because there were some crazies in there--"and we'll pick ours, and then we'll have a jury trial." And he wouldn't do it.
- I said, "Why won't you do it?" He said, "Because I might lose the first one. I might lose it." He said, "I know I'll win most of them if I try eighty, but if I have only one, I might lose it, and I don't want to do that." And so I looked at the judge and said, "Well, why don't we go ahead?" And the judge says, "Anything you guys agree to." So that's what--
- Rubens: Now, that's interesting. So these discussions are going on in front of the judge.
- Hesse: Oh, yes. In this sort of informal--
- Rubens: I understand that, but I didn't realize--I thought you were literally--
- Hesse: No. No, no. Then, see, [Ed] Meese was also one of the prosecutors, who was a critical player in respect to the facts. Lowell was not there at the time of this sit-in, but Meese was. My impression is the university didn't know what they were going to do, so I assume that they contacted the D.A.'s office, and the D.A.'s office alerted the cops and so forth. And they got everybody together,

ready to go because they were downstairs and they had prepared arrest tags and all that sort of stuff, for identification. They were following a manual which the A.G.'s office had published on how to take care of mass sit-ins when you're arresting people.

So that was all the pre-preparation which the D.A.'s office would not have done unless the university was contemplating possibly moving these people out.

Rubens: Yes, that's an important point to follow up, yes.

Hesse: Now, it's pretty clear, however, that Kerr--from what I've read--decided that this would be a silly thing to do. It would be much better to let them just wait it out, and he convinced enough Regents so that they decided that they wouldn't go ahead. In fact, politically it had been good to bring in coffee and sandwiches. [chuckling]

Rubens: Like Mrs. Roosevelt at the second Bonus March.

Hesse: At that point, Meese, who was on the scene, called the governor. We were never able to prove what he told the governor, but I've heard rumors that he said that they were breaking up the toilets and destroying property. And also Kerr said the following day that they had broken into Sproul's office, which was not true. So obviously, some lies were transmitted to the governor, presumably by Meese. We'll never know unless Meese is willing to confess.

The governor then decided that he would order these people to arrest them. He had no statutory power to do this, particularly since the Regents had already decided they weren't going to do anything.

Rubens: Now, he sits *ex officio* on the Regents.

Hesse: Yes, but an individual Regent can't do that. It has to be a collective decision.

Rubens: Right. That's what you mean, in part, by being up to his eyeballs in it.

Hesse: Oh, he was up to his eyeballs.

Rubens: Besides other things, that's one part of it.

Hesse: He announced the next day that these kids were all guilty, and he had done this thing because they were committing crimes. He was proud of it and so forth and so on.

Rubens: You know, Kerr is coming out with his memoirs. He's just about through with the first volume that I think goes through the Free Speech Movement.

- Hesse: That would be interesting.
- Rubens: Yes. Marion Gade, who has been his secretary for years and is helping him finish his work, claims that Kerr, himself, was being sniped at and under a lot of attack by the Regents and political factions within the state.
- Hesse: Oh, he was. I don't think there's any question about that. Not only that, he was removed shortly thereafter. I think they were unhappy about what happened. I'm not sure this was the only thing they weren't happy with him about.
- Rubens: No, no, not at all. I'm saying that in part the governor may have come in or Regents who were unhappy with Kerr might have persuaded the governor to act this way; thus, speculation is because it would make Kerr look even worse. Kerr did want to ride it out.
- Hesse: That's an interesting theory. It's the first time I ever heard of it. But whatever the reason is, we know that Brown had to have been misinformed because there was no evidence whatsoever of any destruction or vandalism in the building. They had removed the windows to let in air, but they got permission to do it from the campus police.
- The governor was obviously heavily implicated. See, in advance they decided to charge them with trespass under a statute which had never been interpreted before, "failure to disperse from an unlawful assembly." If they refused to walk out of the building after they had been arrested, they were going to be charged with resisting arrest.
- Rubens: How did it come to that this was a new statute that had never been interpreted?
- Hesse: Just that it had been enacted recently. It was a statute the terms of which were obviously designed to permit a janitor to remove somebody who didn't want to leave the library when it was closing time, that sort of stuff. If you read the statute, that's what it was designed for. But to be a trespass, you have to have a person who owns the property tell the person to leave, and the University had decided not to do that. See, they were there. They went in before closing. They were told, "The building is going to be closed--the closing is at seven, and if you leave thereafter, the doors will be all locked." So obviously, it was not saying, "Get out" at that point.
- Rubens: In fact, I understand kids were saying, "Come in."
- Hesse: Actually, they apparently had a rope ladder from off of the balcony, and people were coming in anyway--going in and out.
- Rubens: Yes, some were getting out.

Hesse: The only person turned back was a woman with a baby. They were allowed to bring in sleeping bags, blankets, food--all that stuff was going on.

Rubens: The university considering this trespassing?

Hesse: Well, they had had sit-ins before, and so at that point there was implicit consent. And until the University decided it didn't want them anymore, there could be no trespass, and if there's no trespass--unless there was an unlawful assembly, which would have to be something which was riotous and so forth, which it was not--.

Now, obviously, I think Meese must have lied to the governor and told him it was a riot going on, that they were destroying public property and that sort of stuff, so that he stepped in--but without any authority. See, I don't know why Meese had to go to the governor except I guess they couldn't get anybody locally to do anything. I mean, the sheriffs and the chief of police weren't going to do anything unless the University asked them to.

Rubens: Right. Kerr wasn't going to ask them.

Hesse: They had no jurisdiction because the University is a separate, autonomous unit within Berkeley.

Rubens: With its own police.

Hesse: It has its own police. So unless they're asked, they have no statutory right to come in. And I think that's why Meese probably went to the governor.

So anyway, we wanted Kerr to testify as to what the actual decision was. The judge said, "Irrelevant, immaterial." We wanted to get the governor to testify as to what he had been told. We tried to get Meese to testify what he had done. Each time, this was declared irrelevant and immaterial, although the critical issue was consent. You can't have trespass with consent, without a person--the owner--wanting to get you out. So all those things were terribly relevant. But the judge just said, "Irrelevant," and he wouldn't let it in. So we never were able to prove precisely what happened.

Rubens: It's so obvious, and I never thought to ask that question: How come Kerr and Brown and these weren't--because the judge simply ruled.

Hesse: He didn't want to rule. Well, if he started admitting that stuff, then the governor, as I say, in his position, he'd have to say, "I was misinformed. I did something wrong." He was not about to want to do that at that point.

Rubens: That part, though, was within in purview. He can determine what is irrelevant.

- Hesse: Well, the trial judge can do that, but he's supposed to be reversed if he's wrong. Of course, he wasn't reversed, I think for obvious political reasons.
- Rubens: Right. But right away, you're asking for those things; he's saying, "Irrelevant."
- Hesse: Yes.
- Rubens: You tried to cut this deal with Jensen.
- Hesse: Yes, Jensen was--well, theoretically, it was [Frank] Coakley, who was the D.A. at that time, but Jensen was the leader for this trial.
- Rubens: When you told that story, "You pick your number of defendants--"
- Hesse: Yes.
- Rubens: "And we'll cut it in half." Yes. And that's not allowed. He won't do it because he might lose. What else? These are all these pretrial--
- Hesse: What happened was that they finally the kids decided, "Okay, we'll go for a non-jury trial; but we'll waive our jury rights under protest." The judge did everything he possibly could to make it appear that they were waiving--absolutely waiving, with no conditions--which is when we realized that it wasn't going to be a very pretty picture.
- But they still didn't want to go for eighty trials, so they then had to get everybody to waive. That meant a lot of lawyers came into the act at that point, advising these various complaint groups. I think they divided the complaint groups up, and then they would talk to the kids. And they all waived, and so what they did was we had one group which pleaded *nolo* from the beginning and therefore were waiting for their penalty. They waived their right to a jury trial--they waived their right to any trial, and any appeal because when you plead *nolo*, you can't appeal.
- And then the largest group, the bulk waived their right to a jury. The overwhelming majority of them agreed to submit to the decision based upon the evidence and so forth in a single trial. So you had three groups--
- Rubens: And that would be the last group. The last group was the trial group.
- Hesse: Yes, the trial—I think it was a hundred and fifty-five, or something like that, stood trial. This included people who were nuts. There were a couple of nutty people. And all the leaders of the FSM and so forth. Then they tried the case. There was no dispute about who didn't leave; there was no dispute about who did not walk out; there was no dispute about what the police said to them. I mean, most of the stuff was not disputed.

The big question was whether or not there was an unlawful assembly--besides the fact whether the Regents had ever actually asked the people to leave. The judge just wouldn't allow any evidence on that at all. The critical issue on trespass was just basically he wouldn't allow the defense to prove it.

The trial took a long, long time because they had to go through and identify each one of these defendants. Even so, it was a fairly short trial. It did simplify things tremendously.

Rubens: Now, I may be a little dense here, but I want to get this clear. The basic decision to go for a non-jury trial--how would you boil that down to a nutshell? Because these other issues weren't allowed in?

Hesse: No, no. The issue was to have a single trial or a whole bunch of trials. They decided they were not going to go for a whole bunch of trials, and so finally it basically came down to the point where the only thing the prosecution would accept, which was a fairly large group of people in a non-jury trial.

Rubens: That's what I'm asking. Why settling for a non-jury?

Hesse: Because they only wanted to have one trial. They didn't believe in putting the courts to all this trouble.

Rubens: I was wondering why that can't be a jury trial.

Hesse: Well, that's what we argued.

[Begin Tape 2, Side A.]

Hesse: The theory of the prosecution was that is that if you get too many defendants, too many individual variations of what their situation is, it becomes almost impossible for a jury to keep track of all this information. We argued, and I think correctly, that Look, there was no difference: all these people are the same. There was a handful of variants where somebody got violent or somebody did something. So we argued that you could have a very large jury trial because there really wasn't--it's just a matter of bookkeeping, fundamentally. Everybody did the same thing, everybody was charged with the same thing, so you take the evidence and they could decide. But the prosecution would not consent to that because they feared they might lose. See, Berkeley juries, as you know, are fairly--they're much more likely to acquit in bizarre situations than in most--

Rubens: Do you think that held even then? What so many people don't realize is that the city government was pretty conservative in those days. The city, the city council.

- Hesse: Yes, right. I don't know. Maybe it didn't. I'm just trying to give the prosecution the benefit of the doubt.
- Rubens: How kind of you! But ultimately, whose decision is it, then? The judge?
- Hesse: The judge, absolutely. The judge made the decision because he would not agree to anything that the prosecution wouldn't agree to. That's why I say that he basically just said, "You go fight and work it out, and let me know what you want to do." He would not take any affirmative responsibility, which is totally contrary to the idea of this "big case" procedure, where the judge is supposed to take over and say, "Look, you guys, shape up. We're going to simplify this thing." And the trial could have been simplified tremendously.
- And it was perfectly practical to have a jury trial. There was absolutely no reason why it shouldn't have been possible, particularly when we said, "You name the number and we'll divide them down the middle. You can pick yours, and we'll pick ours." With that kind of situation, there was absolutely no excuse not to agree to a single jury trial. And the only reason against it was they were afraid they might lose. And I think it's possible they might have worried that in Berkeley it would be more likely they'd lose it or the chances of losing it would be more than in most communities, particularly in that environment. This was a pretty liberal time in the mid-sixties. We're talking '65.
- Rubens: By then, yes. April was when the trial starts. So it was at that point then that you start preparing the brief?
- Hesse: No. They went through the trial.
- Rubens: Oh, the brief is the appeal. The brief that you wrote is the appeal.
- Hesse: Yes. I'd been working on motions and things like that. They filed a number of motions during the trial for various things, like subpoenaing the governor and then having motions, memoranda as to why this was important and so forth. I didn't do all of those. I was also working for the university at the time.
- So then, finally, the case came down to where the judge ruled, and he ruled that there was no unlawful assembly, which of course was really the only reason the university was supposed to ask them to get out! So there was a contradiction in the findings. He found there was no unlawful assembly, but on the other hand, he found there was trespass when the reason for asking them to leave was that they were conducting an unlawful assembly, which is one of the things we argued that these were really inconsistent decisions on his part.
- We tried to get him to write findings of fact and conclusions of law, which he refused to do, which made it impossible to really determine exactly what was

the rationale--I think mainly because he ruled in so many ways that were legally erroneous that he really couldn't justify himself in writing. So he just said, "To hell with it." In criminal cases, it's usual not to have findings. In civil cases, the judge has to make them on request. So we said, "Look, in this situation you really have to do it because we have to know what was your reason for saying this was not--" because on appeal, you cannot be convicted on appeal if the judge's findings are inconsistent. [telephone rings]

[tape interruption]

Rubens: But you're arguing, however, that because there was a contradiction in the findings--

Hesse: Well, there was a contradiction in the rulings. We were raising serious constitutional questions, different ones, and when you take an appeal, if you can't determine what the basis of the decision is, there's a danger of a conviction being affirmed on a ground which was not found. In other words, on appeal, you've got to reverse if it is possible that the decision was based on erroneous grounds. But, of course, the appellate court didn't go along with that argument, although that is the law.

Rubens: I think that's maybe the part we'll save for next time, the appeal. What seems so amazing to me is that each of the fundamental criteria you're trying to establish are being taken away.

Hesse: A little while ago--a couple of years ago, I guess, the ten Broek Society had a reunion or something, in which they were talking about the Free Speech Movement case because [Jacobus] ten Broek had filed a motion to dismiss the action in the interest of justice, where the faculty came down and filed this motion. I read in the newspaper that Jensen was there, and he talked about it, and he was criticizing the students that they should have just gone for eighty trials, and they were, in effect, stupid to do what they did. I wrote Lowell a little letter, saying, "I don't know why you're badmouthing these kids for trying to do something constructive." In effect, that was my question. He never answered my letter. I suspect that his memory of what happened will be quite different from mine.

The ten Broek Society is a group of people who had ten Broek for classes. He was a very popular, very outstanding guy.

Rubens: Very moral, persuasive--

Hesse: Yes. And pretty impressive, since he was blind.

Rubens: Yes, a common observation of FSMers is that after the faculty had voted to support the students, and then they walked out of Wheeler, ten Broek put his cane up in the air, as if in a formal kind of victory salute. It kind of gives me

chills now as I say it because I remember how people looked at him for leadership and this was such a public gesture.

Do you have the note to Jensen?

Hesse: Yes, probably.

Rubens: Why don't you look for it, and we can put it in the appendix of your interview?

Hesse: I can look for it. Yes.

Rubens: You said recently you were talking to Art Goldberg.

Hesse: Yes. He was saying how the defense had made a big mistake in going for a single trial; they should have just made them have eighty trials. He predicted they would have given up after four or five of them, which I don't think is true, but because they did go through the whole thing in San Francisco, they tried them all. They didn't let anybody off. Everybody was tried.

The San Francisco experience, which was the only analogous thing we had at that point. There were Cadillac Row and Palace Hotel cases. That's, again, the same issue, the same issue is whether or not what they should have done. My view is, and I think the majority of the defendants, at least in the leadership, felt that it was worth trying to see if they could come up with a rational resolution. If you read the brief, you'll see that if he had done what we were asking, having sensible pretrial procedures and had allowed for a single jury trial, it would have been over just as quickly and everybody would have felt a hell of a lot better about it.

Rubens: At that time, were there any of the student leaders that you particularly talked to or had discussions with that you remember? Did you at that time have more of an affinity with Art Goldberg, for instance? Or does anything stand out that way?

Hesse: No, no. I used to attend their meetings, at least some of them. Mario, I think, was probably, I would say, the most moral of the group. I think he was really interested in--well, I shouldn't pick him out particularly because I really can't remember much about the other people.

Rubens: That's all right, just your impression of--

Hesse: No, I don't remember anything about Art Goldberg at the time particularly.

Rubens: Impressions of Mario?

- Hesse: Very moral and very sincere in his belief in attempting to have a just result without having to screw up the court system.
- Rubens: Many, many people say this.
- Hesse: He was very sincere, I think. There's no question about it. And very bright. Unfortunately, apparently--Art Goldberg told me he has just discovered, too--that he had apparently a permanent heart problem. He died recently from that condition.
- Rubens: Yes. Was Golde an experienced trial lawyer?
- Hesse: Oh, very. And a nice guy, a real nice guy. Oh, yes, yes. He had a great sense of humor. I remember when we decided we were going to subpoena the governor, and so--I forget--he asked somebody--we had to get somebody to deliver it to him; we had to get somebody who would be able to get to him. I remember there was a lawyer, whose name I can't remember. Stan said, "How about you doing it?" He sat there for a minute and said, "Okay, I guess I don't want to become a judge anyway." And Golde says, "You'll make a beautiful witness," since he'd have to testify that he'd subpoenaed him.
- Rubens: But in fact this is in all the strategy. Then, of course, he was never subpoenaed.
- Hesse: No, he was subpoenaed, but they had to quash it. They had to move to quash the subpoena. The government moved to quash his subpoena because otherwise, we would have brought him into court. So we subpoenaed him, and he had to respond to the subpoena one way or the other, and so he responded by moving to dismiss on the grounds he had nothing to say, he had nothing relevant to say. And the judge did it.
- Rubens: Upheld that? But that's just a little episode about how people had a good sense of humor within a small group.
- Rubens: Right. And it further fleshes out what I didn't quite understand, that you did go through many of these motions and efforts.
- Hesse: Oh, yes.
- Rubens: And in the end, the judge said "No," yes. People's ambitions, their future was at stake--they knew that.
- Hesse: I have great respect for Lowell. I think he was a very good prosecutor, and he tried the case well from his point of view. He was also a very honest guy. But obviously, he wasn't going to be able to give up what the D.A. [Coakley] wanted. We had good relationships with him. And later on, when I was working on that criminal book, I had good relationships with Meese when he

became the governor's clemency secretary. We were working on a chapter on clemency, and he was very cooperative.

Yes, even though you are political enemies, you could be civil and help each other out when it wasn't something that was--and that's the way lawyers tended to behave in those days.

Rubens: Do you have a vitae and a list of publications?

Hesse: Yes.

Rubens: Good, those will be very useful in the appendix.

What happened once the movement became more violent and all the issues over the Panthers and then the COINTEL program began?

Hesse: Well, there were also subsequent things like the Filthy Speech Movement, which I had no sympathy with at all. I don't see any reason to upset people. And then the People's Park was a real, I think, a total stupid disaster, and we're still living with it. You know, a guy got killed over that.

Rubens: Yes. The thing that's so striking about--everyone observes also about the Free Speech Movement is how polite and nonviolent it was. It was very civil.

Hesse: I think part of the reason for the subsequent violence is that the things we were trying to do were ignored. In fact, we said so--that this was going to make it worse in the future. If you turn down this effort to be rational and polite about these things, things were going to get more unpleasant. And they did.

Rubens: I look forward to our next interview.

[End of Interview]

[Interview 2; May 4, 1999]

[Begin Tape 3, Side A]

[While setting up for the interview there is a discussion about Clark Kerr's insistence that he did not call in the police during the Sproul Hall Sit-in and that he was not told that the police had been called.]

Rubens: I was told that on the night of the December 2nd sit-in, Brown and Kerr made a deal over the telephone. It was about six o'clock at night and Kerr said he was going to allow the students to spend the night and that Brown would fly up from L.A. in the morning. Brown was attending a Democratic Party dinner in

L.A. Kerr and Brown agreed to enter Sproul Hall together and ask the students to leave.

Hesse: Where did you hear this?

Rubens: From Clark Kerr's secretary, Marion Gade.

[tape interruption]

Rubens: Brown was sitting next to the chancellor of UCLA at the dinner, and another person. Both alleged that Brown only received two phone calls at the function: one from Kerr; and no one seems to know who the second phone call was from.

Hesse: It could have been a call, "Do you really want to do this?" I mean, he could have already made the order, and they were saying, "Is this what you want to do?" I don't know.

Rubens: Yes, who knows. I tell you this story, because to me it adds weight to something I said earlier: Kerr felt there were forces out to get him in many different ways.

Did you ever have anything to do with the university system legal staff? John Sparrow was the assistant attorney to the Regents.

Hesse: I know John, yes.

Rubens: He was on campus a lot throughout those heady days. He and Strong and a couple of other people met every single day to discuss what they would do regarding the FSM. Sparrow and Strong backed each other up in that neither of them had called Brown to say the students were out of control, or that the troops were needed. But Sparrow was more of a hard-liner than--

Hesse: Politically, he was, sure. He was very conservative.

Rubens: He wasn't the main counsel. He was the assistant counsel. How did you know him?

Hesse: Yes. See, I worked for Continuing Education of the Bar. We were doing a book on condemnation. I don't know exactly when, but it was long before this time.

Rubens: Condemnation is?

Hesse: Condemnation is when the state or somebody authorized by the state takes property, and pays just compensation. The university does that all the time.

Rubens: Is that eminent domain?

Hesse: Eminent domain, yes. Same thing. We--meaning the Continuing Education of the Bar, which is part of the University Extension--were doing a book on that, and John Sparrow--I was a university employee, and I worked with John. I can't remember whether he was an author or a consultant, but I know that we met a number of times and knew each other quite well. I was on a list--I guess, later on--to be gotten rid of because they had received misinformation that I had written the FSM brief on university time. I remember when they asked me to resign. Well, actually, they started to fire me, and then a number of people in the university intervened--Frank Newman and John Sparrow were among them who supported me.

Rubens: Oh, really?

Hesse: Yes. Later on, when he became a judge, he was even interested in my becoming the dean at San Francisco Law School. We had lunch once to discuss it. So, I mean, we were friends, although we were politically on opposite sides of the fence.

Rubens: Sparrow did not do you in, rather he was defending you?

Hesse: Oh, no. I don't think John had any reason to do me in. No. What happened was I had a grant to do some work in immigration law, and I was supposed to have a leave of absence for six months.

Rubens: This was during the--

Hesse: No, this was before. The head of the organization, a guy named Felix Stumpf, didn't want me to be gone full time for that long a period, so we made an agreement that I would work on my grant. I forget whether it was two days a week and work in the office three days a week, whatever--but then later on I would take the time to do that. He owed me time because I was being compensated on the grant, not by the university.

I consider myself primarily responsible for the one-trial strategy of the FSM, and since the dear judge had really screwed the students, in my opinion, I felt sort of a moral obligation to at least try to help them out. That's why I agreed to write the brief. So then I called in my chips and said I was going to need that time under my agreement with Stumpf, to write the brief. That's why I was able to put in the time.

Rubens: So you called in your chips.

Hesse: And I wrote the brief, on my grant time, on the time that I was owed. By this time, there was also some dispute going on politically inside the organization,

so certain people erroneously told higher-ups in the university that I had written the brief on university time.

Rubens: Dispute within the CEB?

Hesse: Yes, yes. This doesn't have anything to do with FSM, though.

Rubens: But it is interesting. I had another question about the CEB, so if you wouldn't mind let's flesh this out.

Hesse: Right after the Free Speech Movement, we had the Filthy Speech movement, and then we had the People's Park which--God forbid--is still with us. I didn't support the Filthy Speech movement people. I thought that was unnecessarily pushing people--you know, like waiving a bloody finger at somebody who faints at the sight of blood. Of course, People's Park I thought was an absolute sham.

But in any event, we were then located right at the corner of Channing and Telegraph, and would sometimes be actually trapped by the National Guard and police forces. I saw one case--some stupid kid on the second floor of a building, with a big hunk of concrete, trying to crush some policeman's head. Fortunately, he did not do it. This is something we were witnessing because we were up in the third and fourth floor, and obviously we couldn't work very much when these kinds of things were going on. Tear gas was coming in through the windows and all that sort of thing.

The effect of this was to literally drive the head of the organization over the wall. He became convinced that the world was basically coming to an end, and the economy was going to go to hell, and so the organization split into two camps because of day-to-day decisions that were based on the view that the economy was going to collapse. He and I used to be very close; then we had a dispute because he wanted to basically--in fact, he ultimately did try to dissolve the whole organization, giving everybody ninety days' notice.

Rubens: What was his name?

Hesse: Stumpf. He's fine now. He went on to become the head of the school for trial judges in Reno, and he's now retired. Of course, at the time we had a very serious dispute, and I said, "Look, I don't disagree that the world is coming to an end, but you can't make day-to-day decisions on that perception." That road leads to insanity. But he did.

It was a time when it was hard to find people who were competent, but who didn't want to practice law--unlike today, where there's a huge glut of competent attorneys. So we had some marginal people on our staff, who were--they would work and do things, but they weren't really brilliant people. CEB was very successful economically because we put out really high-quality

work, and Stumpf concluded that we couldn't afford to do that anymore; we had to put out cheap things. I said, "Over my dead body," in effect. I said, "If you're really right about the economics, then the answer is to cut back the staff to the point where you can survive and continue to put out quality." Of course, that meant all the marginal people as well as the competent people got scared, and some of these people ran to the university and said I was a son-of-a-bitch. In fact, even someone said--even went so far as to say that I drove Felix crazy. I wanted to take his job--which is absolutely bullshit.

Rubens: That's when Sparrow then came in.

Hesse: Yes. But that's way far--

Rubens: Yes, yes, yes. Just very briefly--

Hesse: The only thing relevant to the FSM is the fact that I got on their list because of this misinformation that was given to the university concerning the writing of the FSM brief.

Rubens: Well, I think the other thing, though, that is relevant is that you were commenting somewhat on the character of Sparrow. You're saying that he was politically a hard-liner and yet probably a man of character who wouldn't stab someone in the back.

Hesse: Oh, yes. That's right.

Rubens: He didn't make the phone call to Pat Brown.

By the way, was your work on eminent domain related to the university acquiring more property--for instance along Telegraph Avenue--?

Hesse: No, no. We were putting out a book for attorneys.

Rubens: Okay. And regarding the CEB, was Ann Ginger already there?

Hesse: Yes, she was working there.

Rubens: Did you know her before you went to work for CEB?

Hesse: Yes.

Rubens: How did you know her?

Hesse: Through the Lawyers Guild.

- Rubens: I have been meaning to ask you a few questions about your family background. What was your mother's name--or the one she used when she worked for the Marine Cooks and Stewards?
- Hesse: It's a good question. Phyllis Edmonds. She was Earl King's secretary.
- Rubens: You mentioned to me that she wrote a novel. Is that at The Bancroft?
- Hesse: No, I don't think the novel is there. I mean, I have a copy of it, and I'll probably give it to them. But there are, in the Earl Warren papers, some of her stuff--actually a lot of her stuff. When King was indicted, she then became chairman of the defense committee, the King-Ramsey-Connor defense committee. She left her position as secretary at the Marine-Firemen.
- Rubens: Was her novel actually published?
- Hesse: No, no, it never was. It was quite well written. It was considered a couple of times, apparently, by agents, but--it's a great story, actually, based upon those times.
- Rubens: You also told me that the novel was written under a pen name. What was that, and did she use that penname for any other kinds of writing?
- Hesse: I don't know whether she did the book under that name. That was the name she used on the waterfront. She was married several times, so she's had lots of names. Her maiden name was Walker. Then she married my father, and my father got killed when I was about two and a half, and then she had I don't know how many other husbands. She lived with us the last three years of her life. She died a year ago.
- Rubens: What a long vigorous life. My condolences.
- Hesse: Yes, she died in March of '98.
- Rubens: I'd also like to ask you about this genealogy chart you have on the wall. Is that of your father?
- Hesse: No, my grandfather.
- Rubens: Grandfather on your father's side?
- Hesse: Yes.
- Rubens: Were they all German immigrants?
- Hesse: Yes.

- Rubens: Now to get back to your particular role in FSM and that of other lawyers, you mentioned that Mal Burnstein became the central lawyer, you believed, because he had the most rapport with the students. What was it and or why did he have more of a rapport with the students?
- Hesse: I don't really know. Mal was I think a member of the Treuhaft firm. Bob Treuhaft, of course, was the lawyer that was down there at Sproul Hall who got arrested. But I'm not sure exactly.
- Rubens: Okay. Yes, I wanted your observation.
- Hesse: Actually, I got to know Mal through that case more than anything else. Norm Leonard I knew because I practiced law in Seattle, and we did some work on a couple of cases for the Marine Cooks. I remember I represented the individual workers in one case, and Norm represented the union, and we argued a case up in the Supreme Court of Washington together, so I knew Norm before through that connection in *Arnold v. Marine Cooks and Stewards* in 1954 or 1955.
- And of course I knew Dick [Richard Buxbaum] through the law school, CEB's law school connection. And Henry [Elson] I knew from way back, when I was in law school. In fact, I used to play handball with Jensen and Elson. They were two years behind me. We three used to play handball together. The fourth guy, I can't remember now.
- Rubens: In our last interview, you talked about your sense that Jensen was taking orders from higher-ups.
- Hesse: Meese was the district attorney under Jensen. Jensen was his superior. As I recall, there was a real rabid reactionary D.A. at that time, Frank Coakley. Jensen replaced him when he retired and was quite a good D.A. Meese, at that point, hooked up with Reagan when he became governor, and he went back East, and then Meese brought Jensen back as an assistant attorney general.
- Rubens: In fact, before we went on tape, you were saying that you do have copies of a letter you wrote Jensen.
- Hesse: Yes, yes, because he made a comment about he didn't understand why the students went for one trial. Never could understand. It's just unbelievable to me. So I wrote him a little letter, trying to be polite.
- Rubens: Reminding him--
- Hesse: But he never--and I asked him to respond. I said, "I'd like to talk to you about it," and he never responded.
- Rubens: You had played handball with him?

Hesse: Well, in law school. That was years before. And I didn't know Doug Hill, who also worked with us in the trial and Stan Golde I knew through CEB. We did a criminal book. So I guess I knew all of them except Hill and Burnstein before the case.

Rubens: I'd love to know more about the criminal book. We need to have a list of your publications.

For now, let's focus on how you came to write this appellate brief. We have talked about a variety of threads and issues that were in it. Let's elaborate that, and then I think we should just start from the very interesting point you made just earlier in our discussion. Of course, you had been the advocate for one trial.

Hesse: Yes.

Rubens: And therefore felt a moral obligation?

Hesse: More or less, to see the thing through because the judge had the opportunity to have done something which would have been, I think, extremely politically savvy, which would have been to come to the right decision and not make these crazy rulings, preventing them from putting on a clear defense to the trespass charges, which in turn would have made the resisting arrest charges fall by their own weight. And I think personally, the only rational explanation I have for it is exactly what I charged him with in the brief, that he was ambitious and wanted to protect his politics with the governor--and was rewarded. He was elevated very shortly thereafter, five months or something like that. Which also is obscene. I don't know why the hell Brown did that. The whole thing just looked like a political stunt.

Rubens: Five months he went from the--?

Hesse: Muni court to the superior court. I think it was more than five months, but it was well within a year, or a very short time--short enough that the students' memory was [chuckles]--you know, everybody was pretty clear on the idea that this was a political problem. They had no quarrel with the court system, and so I felt that this thing should be made clear to the public as much as we could. We agreed that we'd write a brief, which is not a typical brief. Really, it's a history.

Rubens: That's what I thought.

Hesse: A real brief would be very short. But it was deliberately written to present the whole thing politically: what they were trying to do on campus and what they were trying to do in the courts and how they got screwed, in both cases. I was told by somebody at CEB who was working on something and talked to the research attorney for the superior court's appellate department. With a muni

court decision, you don't go to the court of appeal; you go to the superior court, appellate department. And only if the superior court, appellate department thinks the issue should go upstairs or if you can convince the higher court to transfer the case--which is rarely but sometimes done--the case ends in the superior court.

If you read the brief, you'll see that we were worried about that problem because there's no obligation to write an opinion of any sort. So we had no findings of fact and nothing in the way of conclusion of law in the trial court, and we got no opinion, no explanation at the appellate court.

[tape interruption]

Rubens: We were talking about someone you knew the research--

Hesse: Oh. I didn't know him, but this other guy who worked for CEB was doing something and talked to the research attorney for the appellate department. He said he had this case and he had read the brief and was extremely impressed, and he was going to recommend that they reverse. And of course they didn't.

And then later on, we petitioned the court of appeals to take it up. They turned it down. Then we went to the [California] Supreme Court, and they sat on it for a long time. And then later I was told by guy that worked up there that the [Judge Roger] Traynor court finally decided they didn't want to do anything about it because they felt that--now, this is all hearsay, obviously.

Rubens: Okay. We're talking that the California Supreme Court sat on it.

Hesse: Yes, sat on it. We petitioned them to take the case. They have an extraordinary writ power, and they actually extended the time to decide that, and then they turned it down. I was told at a party by a guy that was there, behind the scenes, that they decided they wouldn't take the case because they were angry because Brown lost the election and that Reagan got elected. This issue had become part of the--so they sort of felt that these kids really deserved it.

Rubens: This issue had become part of the election campaign?

Hesse: Yes, yes.

Rubens: That Reagan was going to bring law and order.

Hesse: The thing is that it's an outrage that the case wasn't reversed, based on the merits. But, again, it was a political case.

Rubens: You're so clear about that! And then, just to continue the narrative here, on April 17th, '67, an appeal was filed to the U.S. Supreme Court.

- Hesse: Yes. That got turned down.
- Rubens: And that was turned down.
- Hesse: We went the whole way. We went the whole distance.
- Rubens: Yes, yes.
- Hesse: I'm not saying that it was impolitic about the Supreme Court--of the United States turning us down because they have other issues.
- Rubens: But it's interesting how long the correspondence is going on, from December of '64, when this 571 or so--
- Hesse: No, seven hundred and something.
- Rubens: Seven hundred.
- Hesse: 793, I think it was. Seven hundred and something were arrested.
- Rubens: Through '67 there's communication. It's a long process. So you were saying that the brief was written as a historical--
- Hesse: As a political document. This is not a typical brief. It's probably the most significant brief I've ever written. But in terms of its historical value--I've had a number of successes in my time--but this is the one I think I put more soul into than any of the others.
- Rubens: I want to start going through a few parts of this.
- Hesse: Sure.
- Rubens: I noticed also that then you chose--and it must be for these reasons--or is this the reason you chose to include in the appendix the Byrne Report and then the Student Education at Berkeley, Part II?
- Hesse: Yes. Now, Kathy Frank, whom you talked to, was responsible--I mean, I told her what I wanted, and I don't know whether she did it herself personally or whether she prepared, but she prepared all these statistical tables and stuff in the back, Appendix A, the ones about all the various sentences, and who were the leaders and who weren't leaders, and all these--you know, proving that he punished people for not pleading *nolo* [*nolo contendere*]. Which is totally illegal. I mean, that part should have been reversed just like that.
- As a matter of fact, a number of these issues--I can't give you the case names anymore--that is, questions we argued, were later established in subsequent litigation, in other cases that had nothing to do with politics.

- Rubens: Oh, that would be interesting to trace that, wouldn't it?
- Hesse: You know, like multiple punishment particularly is one I remember. Because there was just one act; they were doing one thing. They were sitting there. And they got charged with two crimes. And the statute says flatly you can't do that.
- Rubens: And then there was such a disparity between how much money, how much time, et cetera.
- Hesse: Yes. I mean, I guess you could say there might be some legitimate reason for saying a ringleader should be--if you're going to punish people--might be punished for more. But to say because a person didn't plead *nolo* but submitted to the judgment was in any different position from the ones who did not plead *nolo* is ridiculous. He wanted to be--I think Crittenden was insulted because he thought that he should have been trusted. I don't know. Maybe that got him angry. I have no idea. Because he was a liberal guy who had had a very good history of being pro defense. I know he was very anxious that everybody submit a *nolo*. And the kids wouldn't do it because they wanted to put on their defense. They didn't think they were guilty of anything.
- It's one thing to get guilty pleas from a person who did it; it saves the government a lot of money. But it's a quite different thing if the guy doesn't think he's done it and doesn't think he's committed a crime.
- Rubens: Well, maybe that's the point to go in. Where was the ground most gray? I believe you were saying on the issue of trespass. At what point?
- Hesse: There's a big argument whether not getting up and walking is resistance. They were being told this is resistance, not that it's a delay or obstruction. Later on, they get charged with being--they say, "Well, we can justify this under delay; we can justify it under obstruction." If you're told, "We're going to arrest you for this if you don't do this," that's obviously unfair. That seems to be a very clear-cut legal error.
- The basic issue was whether or not this was a trespass, and it wasn't a trespass if the university wasn't going to ask them to leave. Now, it may have become trespass later on, if what you say they were planning to come in the morning afterwards and ask them politely to go. My guess is they probably would have because I don't think they wanted to stay there forever.
- Rubens: Right.
- Hesse: The method is obviously effective, but I think the real shame was, about this whole FSM experience--I think the loss was a social loss. It didn't hurt the kids particularly, in the long run, although it may have looked very alarming

to some of their parents at the time. The real loss was the fact that it would have demonstrated a rational way to deal with mass political cases.

I can't prove it, but I have a feeling that a lot of the violence took place afterwards. Some of the more fringe elements did go on to Filthy Speech and People's Park. A guy got killed in People's Park.

- Rubens: But if you had completely thought you, because there was never a--
- Hesse: I always have felt that if the courts had been receptive to our attempt to get this thing handled rationally in a single trial, fairly, with a jury trial, that a lot of the subsequent violence that took place might not have happened. I mean, I think it would have cooled things down. Instead, because the kids came away feeling that it was a real injustice. And that's something that people don't forget.
- Rubens: Exactly. And it just played into that whole escalation of conservative--
- Hesse: Yes. I can't prove that, but that's sort of my feeling.
- Rubens: Now, Ann Ginger writes that article in the Lawyers Guild, the local Lawyers Guild, about jury trials. But as I recall--
- Hesse: San Francisco, so it's not--
- Rubens: That's right, exactly.
- Hesse: Those are the ones that we used as a model as something not to do.
- Rubens: Right, right. When I talked to her originally, I thought that she had suggested to me that she had written something on the outcome of this.
- Hesse: She could well have, she writes an awful lot. [chuckles]
- Rubens: Yes, she does.
- Hesse: I'm not aware of it.
- Rubens: All right. Now, you had stated--and I'm not going to be able to play that back to you immediately--that most of this you wrote yourself.
- Hesse: Yes.
- Rubens: Do you feel more strongly about certain issues--the trespassing issue--. But you were able to include just up to the date--here you had the Miranda opinion that had just come down.

Hesse: Come down, which we relied on because it was confirmatory of our position. It came down just as we were putting the thing to press, so I didn't have time to redraft the argument in light of Miranda. So I just said so and—
[interruption]

I think what I said was I was unhappy that the judge died before he had an opportunity to read the brief so he would know what I thought of him, because he died before the brief was filed.

Rubens: Is that right?

Hesse: Yes.

Rubens: God, I didn't have that.

Hesse: Well, somewhere it's mentioned. He died.

Rubens: So what was the direct impact on that?

Hesse: The fourth point is addressed to the fact that he quashed the subpoena of the governor, to protect the governor from having to come in and testify, even though the governor was saying publicly that these kids were guilty, and he was happy with what he did, and blah blah blah. Kerr had also misstated the facts about what was going on. So obviously, somebody had been misinformed, and it could only be somebody at the scene. That's why I'm pretty sure that Meese is your villain if you're looking for the villain because Kerr wasn't there, Strong wasn't there, Sparrow certainly wasn't there. None of those people were there on the scene except Meese and the cops.

Oh, I had something else I want to show you. Last week's *Berkeley Voice* had some reminiscences of the People's Park thing, of the police captain, who also says in this article how the University asked them to remove them from Sproul Hall. I clipped it for you to show you that this myth that somehow the university made this decision rather than the governor. The cop was stating that he was asked by the university, and not the governor, to remove the students from Sproul Hall.

Rubens: I meant to tell you earlier that an assistant in Kerr's office at the time of the mass arrests had a car accident going home very late that night. He was one of the few uninvested, if you will, observers, but he was never able to remember what happened that night--especially discussion of who called in the police. I think there was also a representative of the department of education in the building at the time, and there was a reporter who made a direct call to--

Hesse: Camera people were there, too.

Rubens: Yes. Let's get back to our narrative of the FSM case. Were there any direct or indirect repercussions as a result of the judge dying? Did some other judge then hear the case?

Hesse: No, the three-judge appellate department is the court that heard it. His death was long after the trial. He was finished with the case. Then he got elevated to the superior court, and then he died shortly thereafter. I think he was only on the superior court bench a couple of months.

Rubens: Let me get clear on a point you're making. In part, the trial judge made mistakes, particularly the political manifestations of not ruling, but are you also saying he never read this brief?

Hesse: No, he never did. And I've always regretted that. I mean, obviously you expect him to read it; you're required to deliver a copy to the trial judge when you file a brief on appeal. The rules require you to serve a copy on the judge.

Rubens: I'm not a lawyer, and I think that's why I have to repeat or get clear on your main points. Also, my rationalization is that I'm assuming it will not be lawyers going through this archival material, including these oral histories.

Now the judge was not going to split the difference; he wasn't going to uphold Jensen, he didn't read the brief. I think that at the time of the Free Speech Movement--and certainly it was true for my friends and the people I heard who supported FSM--there was a mystique about the law. We are a nation of laws; the judge does his utmost to be even-handed; he is above the manipulation of politics. Certainly the clarity with which you are that this was politically motivated, is something that fueled and fit into this growing distrust and animosity of students of "the system," including the courts.

Hesse: Any lawyer that handles political cases knows that the courts do not pay attention to niceties when politics are involved. I had learned that long before this case, in work I did in immigration and also representing unions, particularly unpopular unions. But I think it was a shock to the kids. It wasn't a shock to the attorneys.

Rubens: Of course. And that was a political awakening for so many of us.

Hesse: Right. I think none of those kids, I think, came away with the feeling that they still had this idea that justice was always done.

Rubens: Absolutely. Kathy Frank--who served as the keeper of Legal Central long after the case was over--recently told me she had recently completed a master's thesis that in part is a personal memoir illuminating her political awakening; but also, she had in mind addressing the claim that she thinks is still pervasive, that the defendants were not politically astute or did not make decisions on their own; that they were being dupes, that they were directed by

the lawyers. I think if anything, you've mounted an argument about how these students were very adamant about issues that were important to them.

Hesse: Yes, absolutely. No, they were a very, very unusual group of clients. But in these kind of cases, whenever you have a case involving the First Amendment or something like that, it's usually somebody who is pretty determined that they have an issue they want to present. Sometimes the client can be very difficult to handle. Sometimes they want to do things that the lawyers don't want them to do, that the lawyers think it's not a good idea, but the client will do it anyway.

Rubens: I would like you to identify the constitutional issues in this brief.

Hesse: Well, I'd have to look at the table of contents again. [looks at the brief] Yes, sections 12, 13, 14 are the constitutional questions.

Rubens: They were on due process--

Hesse: Yes, due process being denied the right to have a fair trial. But the issues should have been won on the trespass charge, and certainly the punishment issues were clearly wrong. In other words, particularly in the probation, the idea of having to refrain from participating in unlawful demonstrations is--that's very Kafkaian.

Rubens: I was going to say Catch 22, but Kafka is a better reference.

Did you go through several drafts of this? I mean, I'm sure in your own writing you did, but then at some point was this your draft reviewed by students and lawyers?

Hesse: Well, the fact statement was gone over very carefully by--I'm just trying to think--I think mainly Mal and Henry. I would write sections of the fact statement. And you know, the theme of it is administration. I don't know whether you caught that or not, but if you look at the fact summary, it starts with administration of the campus and administration of the building and the administration of justice.

Rubens: I didn't catch that.

Hesse: And each of those sections were reviewed and commented upon, and I would modify it if I thought it was justifiable and fact-supported. But as far as the arguments were concerned, I was pretty much on my own on that because by that time I was finishing it, the thing was getting close to being due, although we were given lots of time, I must say. The courts were very generous, giving us adequate time to write it.

I can't remember now whether I showed much in the way of the arguments, but I possibly did. I can't remember. Mal would know.

Rubens: How do you literally submit the brief?

Hesse: The rules require you to serve and file so many copies, so we served a couple on Jensen, and we filed one in the superior court for the judge, and we filed I forgot how many numbers in this [appellate department of the superior] court.

Rubens: Are you literally driving this around?

Hesse: Oh, no. No, it doesn't have to be. I mean, the lawyers often do that. Appellate lawyers often do that. And then you file a statement of proof of service in the court, and that triggers the time for the response. It goes on. This is the only one that's printed. I have upstairs a pile about this high [demonstrating floor to waist]--all the subsequent stuff that was done.

Rubens: What were you thinking about in terms of the case making its way up to the state supreme court; and what about the judges there? Roger Traynor was known as a liberal of sorts, wasn't he?

Hesse: Oh, yes. He was also very thoughtful. I'm sure he recognized there was a serious legal question involved. But you have to have four votes, and maybe he couldn't get four votes. I don't know. Unlike the Supreme Court of the United States, a minority can compel a hearing; it takes four votes out of nine in the U.S. Supreme Court, but it takes four votes out of seven on the Supreme Court of California, to get a hearing.

Rubens: Going over Burnstein's papers, I see that at one of the lawyers' meetings, Mal sent a memo to the defendants regarding the Bendich proposal. There was also the Jacobus ten Broek brief.

Hesse: Ah, yes. Well, Al [Albert] Bendich wasn't a practicing lawyer. He was like Alex Hoffman. He was a guy that liked to be involved in political issues; he was never really a serious practitioner of law, at least then. I don't know what he went on to do.

Rubens: He was in the speech department [now rhetoric] at that point. So was ten Broek. Ten Broek went to the political science department, and of course had an appointment, also, in the law school.

Hesse: Yes, he was in the speech department, that's right. He came up with a theory which I cannot repeat because I felt it was untenable then. We had a big argument about that. Mario liked it, and so he wanted to include it in the brief, and I said: "Well, Mario, I can't write it because I don't agree with it." I forget the specific issue. Essentially, ten Broek had a rhetorical argument that said that it was impossible for them to proceed, that the court couldn't try this

issue, something like that. It was a philosophical argument; it was not a legal argument.

Finally, a decision was made that we would put it in the brief if Bendich would write it. I said it had to be in my hands, in my office, by two o'clock on a certain day because it had to go to the printer the following Monday. I think it was two o'clock on Sunday afternoon. And he never showed up.

- Rubens: And that's why it's not there. That's why I didn't know about it?
- Hesse: That's typical of those kind of lawyers, who love to be in the action but don't want to do any work, to do hard work.
- Rubens: What was the ten Broek brief?
- Hesse: The ten Broek brief was a very serious thing that ten Broek wrote, and that was filed. It was a motion, a memorandum, supporting--I don't have a copy.
- Rubens: Perhaps there's one in the Meiklejohn collection.
- Hesse: And I'm sure Mal has one. That was something ten Broek wrote and got about four hundred professors to co-sign it. Ten Broek was not lazy.
- Rubens: Yes, anything but. There were some letters sent to students in the beginning of the case, signed by Barry Jablon and [Michael] Abramovitch. Did you know them? There were also some other lawyers who sent out letters to defendants.
- Hesse: No, Peter Franck is probably one of them.
- Rubens: Yes, Peter Franck is one. Is there a Hoffman?
- Hesse: Well, these are the people that actually sat at the trial, the six trial attorneys.
- Rubens: Do I understand that you were willing to include the Bendich proposal?
- Hesse: Well, I was reluctant, but I just said, "Look, I can't write it because I don't agree with it, and I don't even understand it, basically." But he didn't get it to me to be incorporated.
- Rubens: And Mario was also insistent regarding its inclusion. It seems to me, in the parlance of today, that there was a lot of process in terms of how this brief was constructed.
- Hesse: Oh, yes. It was interesting. See, normally you have a client and it's easy to deal with a client; but when you have a committee, it's quite a different problem. Our clients were the whole 570, so we had representatives of all 570. My position was this was not a tenable argument. It was going to make all the

other arguments look stupid or silly; or it would be the one the opposition would focus on. But the majority of the client committee, which is what we had to deal with--it was physically impossible to talk to 572 people--but the majority of them thought that they wanted it in, so I said okay. I was pretty sure Al wouldn't write it.

Rubens: [laughs] You felt confident.

Hesse: Between us, that was pretty much to be counted on.

Rubens: So you could appear to be generous and say, "Sure, why not?"

Hesse: I knew that he was probably not going to want to spend the time.

Rubens: Is he still alive, by the way? Is he around?

Hesse: As far as I know. He became quite well off because he represented--he got involved with Fantasy Records, worked there through Burnstein, as I understand; that's my impression. I shouldn't say that because I don't really know for sure. He was representing Creedence Clearwater. That's where he got his start in making big bucks.

Rubens: Would you tell me about John J. Dunn, he's listed on the brief.

Hesse: John J. Dunn was the guy that served the subpoena on Brown. He's the one whose name I couldn't remember. He said, "I guess I don't want to be a judge." There was also Howard Jewel, who was a classmate of mine. He was also a labor lawyer in Oakland and a very respected and impressive one. He argued--I think it was a motion--one of the motions; I can't remember which one it was. But at the beginning there were a number of people who were involved. There was so much to do. But when it came to preparing for trials, we had to cut back to a small group.

Rubens: What happened to Jewel? I hadn't heard that name before.

Hesse: Jewel is now living in Guatemala. He's long since retired.

Rubens: Here's another name: Joseph Landesman.

Hesse: Joe Landesman was a local lawyer, liberal. I don't know whatever happened to him.

Rubens: Of course, there's Norm Leonard. And Milton Nason.

Hesse: Milt Nason was a Berkeley lawyer, who's now dead. I don't remember what his role was. But, as I say, there could have been two hundred lawyers milling

around, doing something. I don't remember the names of the lawyers who represented the juveniles.

Rubens: I haven't come upon them yet. A black reporter was also separated out?

Hesse: Jeter. He was some kind of a kook. He wasn't a student.

Rubens: Correct. Howard Jeter. Apparently, he was on leave; he was doing sociological observations, but he had a separate--

Hesse: Trial. So did Treuhafft.

Rubens: That's right. The reason I mentioned Jeter because it was over him--and the only time--that an issue of race seems to be raised. There are a few names and people that we've tried to pick out to make the story of FSM as comprehensive as possible; for example, to pursue the Asian names; there's one Hispanic name; to ask if there were African Americans in any of the activities. But I don't think race was in any way--

Hesse: I can't think of a black defendant that I personally remember. I'm sure there could have been.

Rubens: There were a few.

Hesse: I talked to the entire group only once, when they were being advised on the nature of the charges against them. That was an interesting story you might want to know about.

Rubens: Okay.

Hesse: They needed a place to have all 570 meet at one time. They figured that was the easiest way to talk about the overall view and what their problems were going to be and whether to waive jury trial--and so they settled on--they got a Unitarian minister, who had a church somewhere in Kensington.

Rubens: The big Unitarian one at the top of Arlington Drive?

Hesse: Unitarian. Yes. It used to be the one on the corner of Dana and Bancroft.

Rubens: Right. Was that Unitas House then?

Hesse: That's a dance theater or something, I think, the last time I went by there. It's right on the corner of Dana and Bancroft.

Rubens: Oh, I'm wrong. I'm thinking of the Maybeck building, on Dana at Channing, I think.

- Hesse: Well, it's not Maybeck, but it's a Maybeck style. That's where my wife and I were married, actually. Anyway, so the Unitarian minister, with the big church up in Kensington, offered to let us meet there. Raymond Cope, who was the very liberal Unitarian minister, said that we could use his church. He opened the gathering by saying, "Pursuant to the law of California," to maintain his tax exemption, only religious services and related business could take in this building, "I hereby declare this a religious event."
- Rubens: That's great.
- Hesse: Something to that effect, anyway. That's the only time I ever saw all of the defendants at once, and I frankly wasn't looking for people who were black or white or--so I have no idea--
- Rubens: I was asking for an impression. I think similarly there were no lawyers of color that came forth, is that correct? I don't want to overlook anyone. I should ask Don Hopkins.
- Hesse: None that I'm aware of.
- Rubens: Ann Ginger has told me that she would like me to interview a black man who left the South, who had been doing legal work in the South--
- Hesse: Oh, Ed Dawley?
- Rubens: Yes. I don't think he was involved particularly with FSM.
- Hesse: No, but an interview with Ed's a great idea. There was Clint White, and other defense lawyers, but none of them volunteered. If Clint White had volunteered, I would be aware of it. There were not too many black lawyers.
- Rubens: Who is Clint?
- Hesse: He's a retired judge, an appellate judge.
- Rubens: And he was a lawyer at the time in Berkeley?
- Hesse: Well, in Oakland. He was a criminal defense lawyer. Let's see who else was around. Tom Berkeley--but none of those lawyers were with FSM. I mean, if those guys were around, I would have been aware of them because I knew all of them.
- Rubens: What about women? Where was Doris [Doby] Walker? Ann Ginger was not a practicing lawyer because--
- Hesse: No. She didn't take the bar exam until after FSM, as was also true of me.

- Rubens: Yes, I wanted to finish up with your passing the bar in a minute. But Doby Walker wasn't around for this.
- Hesse: Probably wasn't inspired by it. I don't know.
- Rubens: We can look into that or suggest that students do that. The other thing is, of course, about the political changeover that was taking place in the city of Berkeley in the 1960s. I was trying to probe a little bit, because you said Jensen and Meese were so convinced that they would lose; that's why they didn't want to take--
- Hesse: No, no. They feared they might lose the first one.
- Rubens: Right.
- Hesse: They knew that if you had eighty trials, they figured the odds would be, particularly in Berkeley, that you would get some juries who would acquit. And so they didn't want to run the risk of having one trial in which they might lose. I guess they were worried that their boss would really be unhappy.
- Rubens: Right. But I was arguing with you slightly, saying it's just the transition period of when Berkeley politics is becoming more liberal. It was still very Republican, and there was no black on the city council, and Jerry Rubin, I think, ran for mayor against the druggist.
- Hesse: Oh, yes.
- Rubens: Do you remember that? It was a crazy campaign.
- Hesse: The guy whose store was down on San Pablo and Solano.
- Rubens: Were there any other names that might just sort of surface in terms of this period and that they were around but not necessarily part of FSM or the defense per se?
- Hesse: Well, most of these kids--as far as I could tell, the bulk of the defendants believed in the issue, and they participated in the event, but then they went on with their lives. They were involved in the case, but they didn't have to be around all the time. It was a small group of the executive committee, and people like Kathy Frank, who remained--basically, she worked for us. She became sort of what would be now called a paralegal, and kept track of everything. She was the bookkeeper of all these people.
- Rubens: When she finally left, then Sue Strohman took over in terms of keeping track of things.

Hesse: Could be. I don't know. That was after my time. I mean, once I wrote this brief, I was basically through. I continued to write stuff, the other stuff on appeal, but I was not attentive to the people who had been involved in FSM. But anyway, even while I was writing this, I really wasn't connected with the kids at all.

Rubens: Well, to wrap up your story, tell me at what point [you] were admitted to the bar in California?

Hesse: Well, we had this management dispute, when the boss, Felix Stumpf, called everybody together and said the lawyers could no longer afford to buy CEB's books, and therefore he gave everybody ninety days' notice. This was in November or December of 1969. By the way, for about two years we were trying to get the university to come in and give us some help. The only person who responded was Dean [Edward] Halbach, of Boalt, and he really tried to do something.

But the University Extension--I could not get anybody to do anything about it. I went over Felix's head and said, "Look, this guy is not behaving rationally, and you've got to do something about it." They said, "Oh, thank you very much." And never did lift a finger. So finally he said, "We're closing down shop." Well, he can't personally close down an ongoing university activity. And so then the university finally stepped in, put him on medical leave and brought in a temporary head. First they said we should elect an acting administrator, and given the politics by this time, of course, you can imagine that was a pretty terrible idea. And so, I decided that I would not run for acting administrator. I didn't want to be the administrator, really, anyway, but I said, "If you don't bring somebody here from the outside, then I think I'm the most competent person to be administrator. But I'm not about to split the organization down the middle by having a big election now, which would be a popularity contest about me," when I knew that the thing was pretty split.

But they did have a split vote anyway, and it came out a tie.

[Begin Tape 4, Side A.]

Hesse: So UC Extension hired an outsider as an acting administrator, a retired businessman, to find out what was really happening, they also hired a management consulting firm. I was told by the guys who were doing the consulting--they wanted to keep me in the organization because everybody agreed that I was the person who knew the most in the organization; but half of them were scared to death of me because they figured I'd fire them. I guess they believed that the thing was going down the tubes when it wasn't.

So they came up with some cockamamie organizational structure which gave me a position which made absolutely no sense. I would have been a figurehead of some sort. The acting administrator told me--I mean, I talked to

the management people, and they said, "You really should go for this." And then I talked to the acting administrator. His name was Harrison Meyers. I remember that for some reason.

Harrison said, "You should do this." I said, "Well, Harrison, would you do it if it were you?" And he said, "No." "So why the hell are you asking me to do it?" So then he fired me the next day.

Rubens: Not Bill Carroll.

Hesse: No, Bill Carroll was the guy who, after Harrison left, became the administrator they ended up hiring full time. And the CEB went down like this [hand demonstrating a nose dive] as a result.

Rubens: This was not tenable for you, so you left?

Hesse: Yes, that was like May of '70. At that point, I didn't know what the hell I was going to do. I had no idea of practicing law. I'd been going through this management dispute for about two and a half years, and I was sick of it. And I had concluded that no matter who won, I was not going to stay. I had already really decided I wanted out because even if I had become the administrator, I didn't want to have to deal with all these marginal people. It was a really difficult position to be in.

So I said, I think I'll just study for the bar. It's a good time. I was only going to take two months' pay, which is severance pay, which is what we gave traditionally when people were asked to leave. That's what I expected, but they decided to fire me, so I said, "The hell with that. I'm going to challenge it," because they had no business firing me. They ended up anyway giving me over half a year's salary; I had time to do something and think and relax. I said, Well, this would be a good time to take the bar. This is sort of a therapy. It would focus me away from CEB and all of those problems. I didn't expect to pass. So I finally called up the State Bar, and the bar exam was going to be that August or September, and the bar review courses were starting the next week, so I took--

Rubens: Signed up.

Hesse: Signed up for the bar exam, of course. And I originally applied to type the test because I composed on a typewriter, but I found out in my first practice exam that I basically disgorge my idea on the typewriter. So I couldn't really type my exams, I didn't have time to edit. I had to take them in longhand. Anyway, I passed the bar. I still wasn't planning to practice law at that point, I was sort of fed up with working for an institution, but nothing else had come along.

Then Harrison Meyers told me what was going on. He said, "I was told to get rid of you." I said, "By whom?" He said, "By the University Extension

people.” So I went up and asked them, “Why do you want to get rid of me?” They said, “Well, you wrote the FSM brief on company time.”

Rubens: Ah!

Hesse: I said, “Who the hell told you that?” So he told me who it was. I said, “Well, he’s a goddamn liar. He doesn’t know anything about it.” I said, “You can ask Felix. That was my time. It was my grant time.”

Rubens: Yes, and that’s when the Regent’s lawyer, John Sparrow also defended you.

Hesse: Yes, yes. So that’s how I became a lawyer again. I finally decided, Well, I’ll try becoming an appellate lawyer--because I didn’t want to be a trial lawyer. And so, I set out to do that. And when I was about to be forced to go look for a public agency job again, which I didn’t want to have, I bumped into Bernie Witkin and I worked with him. He was at that point angry with his publishers. So I worked for him half time writing text for his summaries of California law, and that kept the beans on the table until I was able to develop a practice.

Rubens: Then you had your own practice?

Hesse: Yes. I actually retired a little early because of my mother. It was getting too hard on my wife to take care of her. I was planning to work at least until I was seventy and go on, but I quit early, in late 1995, being very disillusioned by the appellate process anyway.

Rubens: What had changed that you were willing to take the bar?

Hesse: There was no oath, for one thing.

Rubens: Had Ann Ginger left before you?

Hesse: No, she was fired the same time I was.

Rubens: Was there a general housecleaning?

Hesse: He [Harrison Meyers] had the impression that we were a cabal, yes.

Rubens: Who was the other woman?

Hesse: Harriet Thayer. She and I were working very closely. I was the assistant administrator in charge of publications, and when Felix Stumpf became so negative about everything and had no sense of what to do in the future, I proposed: “Let me become--”and I made up a title for myself; I called it research and development because that, by nature, is something that’s looking forward. And so that gave me an excuse to proceed, to look forward, and try

to convince people that there was a future for CEB and that Stumpf was wrong.

In the course of that I began to start working with automatic typewriters and computers. Harriet was also interested in that, so we became quite close. In fact, I had come up with an idea for a tax book (which never was done), which would have been a really tremendous piece. It posed a game where you played twenty questions about how to analyze cases; they do it now on computers, but this was long before that happened. Of course, I was considered crazy and all that. Everybody said, "This is all bullshit." Now all the publishers are doing it.

Harriet and I got canned--along with Ann Ginger--I think just because Harrison Meyers thought that she was also in a cabal with me. But Ann, you've got to understand, can be a very abrasive personality. She does things that irk people. I was really mad at her when the students surrounded the police car during FSM, and she participated. There were all these speakers on the car. She loves to be part of the action, so she got up and made a speech on top of the car, even though she was a university employee. And it had nothing to do with the students. She wasn't a student. That's the kind of person she is. She's a charming woman in many ways, but she has her abrasive qualities.

Rubens: She's smart.

Hesse: Very smart.

Rubens: I recently saw her at the Southwest Labor Studies Association in San Francisco. She was on a panel of lawyers remembering the Cold War. Doby Walker was there, and Norm Leonard was supposed to be there. Treuhaft may have been there.

Hesse: Possibly. There may have been political reasons why Harrison Meyers would have wanted to get rid of her.

Rubens: Did Thayer move into another area, what is she doing, if anything?

Hesse: Harriet is now a mediator. She set up the Group Legal Services program for the Co-op [a central Berkeley grocery and community institution, now defunct] and then--I don't know why she left, but she did. She went into mediation, which is the same thing that Henry Elson is in.

Rubens: I think we're going to have to wrap up now. But I look forward to having your interview transcribed and going over it with you--especially after I interview some more of the legal people involved.

[tape interruption]

Hesse: And if you can get Meese and Jensen to participate, it would be great. I think if you go through Boalt, I think both Meese and Jensen might respond. Meese is getting pretty old. So is Ed.

His practice, I believe, was Jordan, Dawley and Holt; they were a law firm--black law firm--in Norfolk, Virginia. Both Holt and Dawley came to Berkeley. Len Holt is around here, but he's politically more of a loner. Ed is extremely intelligent, can quote aptly Shakespeare on almost anything and so forth. He's a great guy.

[End of Interview]