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In this age of skeptics and relativists, Mr. Justice Hugo Black stands firm as a self-professed absolutist. His absolutism is especially strong with respect to the freedoms of Amendment I which, he argues, are stated in terms that are as clear and unequivocal as a stop light.[1] He maintains that the Framers of the Constitution wanted it that way, for "[n]othing that I have read in the Congressional debates on the Bill of Rights indicates that . . . the First Amendment contained any qualifications."[2] In the face of these declamations, however, Justice Black is now in the forefront of those who would limit or withdraw constitutional protection from dissenting minorities who engage in varieties of protest demonstrations, invoking their constitutional rights of free speech and peaceable assembly to do so.

I. THE SHAPE OF THE THEORY

The absolutist position taken by Black is that many of the liberties and procedures specified in the first ten amendments are of unequivocal and precise meaning and that their meaning is to be applied by the Court without any modification or compromise. As it applies to Amendment I, Black stresses that the prohibitions placed on limitations of free expression are to be read literally. That Amendment explicitly guarantees rights of freedom of speech, press, and religion, the right peaceably to assemble, and the right to petition the government for redress of grievances, and it affirms these with the specific words "Congress shall make no law abridging" them. Thus, according to Black, the Framers intended no partial or diluted protection, no weak-kneed idea that they are merely admonitions. He believes that the Court is obliged by the Framers "to enforce the First Amendment to the full extent of its express and unequivocal terms."[3]

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1 Black & Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549, 562 (1962).

2 Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 880 (1960).

3 *In re* Anastaplo, 366 U.S. 82, 97-98 (1960) (dissenting opinion).

Quite apart from the Framers' intent, Black believes that this literal interpretation of the words of the Amendment should be employed in the interest of the very survival of democratic government. He believes that Amendment I is "truly the heart of the Bill of Rights"[4] and that it should guarantee unrestricted communication of ideas in order that truth might have the best chance to emerge through discussion.[5] He rejects all the various "judicially created tests"[6] which are designed to find a way to limit or to curb the absolute operation of Amendment I in the name of some notion of the public interest. Thus, he rejects even Justice Holmes's "clear and present danger test."[7] But most of his recent critical effort has been directed at the so-called balancing test.

The term "balancing test," as used herein, refers to a general specie of judicially created formulas which posit the question of determining valid restrictions on free expression by considering the best adjustment of conflicting social and individual interests.[8] Precise structures of balancing tests may vary. "Balancers" may disagree as to the exact procedure to be followed, but such tests generally purport to "weigh" the interest in free expression against opposing interests, such as national security, order, or public convenience, as those interests appear in the circumstances of each case. The goal of a balancing test is to achieve the highest possible fulfillment of all competing interests involved. Obviously it assumes that Amendment I is not absolute.

Black deplores the balancing test as a "Constitution-ignoring-and-destroying technique"[9] which greatly erodes vital freedoms. He complains that the test itself is ill conceived because it assumes that the Amendment is not absolute, and he suggests that even when such a test is used, the majority tends to employ it in a haphazard fashion which fails to take a careful, well-reasoned account of the real interests in free speech in any particular case.[10] He complains that the Court uses the test to provide a convenient theory to justify at any

[4] Black, *supra* note 2, at 881.

[5] Martin v. City of Struthers, 319 U.S. 141, 143 (1943).

[6] Braden v. United States, 365 U.S. 431, 442 (1961) (dissenting opinion).

[7] Black, *supra* note 2, at 866-67.

[8] The source of this theoretical approach is Dean Roscoe Pound's philosophy of social engineering. He suggested that courts might arrive at policy decisions by surveying relevant interests of society involved in a legal question and attempting to reach the best accommodation of all of them, taking account of their relative importance. Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1 (1943). But most balancing theories of today only roughly resemble Pound's method.

[9] Time, Inc. v. Hill, 385 U.S. 374, 399 (1967) (concurring opinion).

[10] Konigsberg v. State Bar, 366 U.S. 36, 71-75 (1961) (dissenting opinion).

one time whatever a majority of Justices believe is a desirable abridgment of Amendment I.[11] He believes that the "balancing test" and other tests of a similar character constitute a special danger because apparently rational means of limiting free expression will be used to destroy free expression altogether in time of public stress and hysteria, such as the anxiety of the anti-Communist reaction to the Cold War.[12]

Black's Amendment I absolutism is a strong plank in what might be called his jurisprudence of certainty. He believes that there must be an effort at achieving a constitutional law of sweeping, unambiguous rules.[13] But the goal of certainty is believed to be thwarted by various balancing tests because the Court makes the application of important provisions depend upon vague formulas which reflect little more than a judge's subjective "natural law" concept of what is a "reasonable" curbing of vital freedoms. Black ceaselessly deplores the "unlimited breadth" of the tests which can be "used to justify almost any action Government may wish to take to suppress First Amendment freedoms"[14] based upon the obscure, unpredictable assessment of what is a good law "on balance." He believes that one great strength of the absolutist alternative is to eliminate this plague of uncertainty about whether free expression will prevail. His absolutism purports to eliminate the vexing, dangerously uncertain business of "weighing" one interest against another by simply ruling out the whole balancing operation as illegitimate. Thus a *certain* Amendment I will be a *strong* Amendment I.

A. A Simplistic Theory?

Advanced as a flat and unqualified proposition, absolutism has some unfortunate implications as a theoretical position. It appears simple-minded. It looks simplistic beside the arguments of those who proclaim themselves to be of a more subtle intellectual vintage by saying that any sophisticated person knows that there are no absolutes in this world and that constitutional guarantees cannot be taken literally. Unfortunately Black himself occasionally invites a snobbish reaction by employing blunt methods of self-expression. In an interview on constitutional absolutes with the late Edmond Cahn, he began the defense of his Amendment I analysis: "[B]eing a rather backward

11 Black, *supra* note 2, at 879.

12 *Id.*

13 *See* Howard, *Mr. Justice Black: The Negro Protest Movement and the Rule of Law*, 53 VA. L. REV. 1030, 1049-52 (1967).

14 Scales v. United States, 367 U.S. 203, 262 (1961) (dissenting opinion).

country fellow, I understand it to mean what the words say"—hardly a satisfactory response to one who sees intellectual problems in shades of gray. He continued:

> Now, I have read that every sophisticated person knows that you cannot have any absolute "thou shalt nots." But you know when I drive my car against a red light, I do not expect them to turn me loose if I can prove that . . . it was not offensive to the so-called "universal sense of decency." I have an idea there are some absolutes. I do not think I am far in that respect from the Holy Scriptures.[15]

I quote this statement to make the point that I think it entirely unfair to evaluate Black's theories purely on the basis of blunt comments such as this. Though tough and unpolished arguments may occasionally be expected from a colorful, outspoken, former Senator from Alabama, Black's credentials as a careful thinker are well established. His theory of Amendment I absolutes is thoroughly thought-out in opinions and writings that better satisfy a penchant for academic argument, and it is to these that I will attend for an elucidation of his theory.

B. Evolution of the Theory

Only in the last twenty years has Black been readily identifiable as a free speech absolutist. In the earlier part of his career it was more typical for him to write or to join in opinions which expressed the idea that Amendment I was a "preferred" freedom rather than an absolute.[16] In some cases dealing with national security problems of World War II, Black took some positions severely restrictive of free expression, and it is doubtful that he would cite them among his favorite opinions now.[17] But with the Court's split in the 1950 case of *American Communications Ass'n v. Douds*,[18] Black adopted

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[15] Black & Cahn, *supra* note 1, at 562.

[16] Marsh v. Alabama, 326 U.S. 501, 509 (1946); Martin v. City of Struthers, 319 U.S. 141, 143 (1943); Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943); Bridges v. California, 314 U.S. 252, 263 (1941); Milk Wagon Driver's Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287, 301-02 (1941) (dissenting opinion); Schneider v. State, 308 U.S. 147, 161 (1939). *See* McKay, *The Preference for Freedom*, 34 N.Y.U. L. REV. 1182, 1193-96 (1959).

[17] Black had the dubious honor of writing the Court's opinion in the Japanese Relocation Case, Korematsu v. United States, 323 U.S. 214 (1944). *Cf.* Knauer v. United States, 328 U.S. 654, 674 (1946) (concurring opinion); Viereck v. United States, 318 U.S. 236, 249 (1943) (dissenting opinion). *See generally* Berman, *Freedom and Mr. Justice Black: The Record After Twenty Years*, 25 MO. L. REV. 155, 162-66 (1960); Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 683-84 (1963).

[18] 339 U.S. 382, 448 (1950) (dissenting opinion).

the absolutist position that a loyalty oath requirement for union officials was a "compromise" of freedom of speech in "a field where the First Amendment forbids compromise." This embodied the basic position that would continue to be his during the Cold War period of the 1950's and down to the present day. By 1960 his New York University lecture "The Bill of Rights" presented a fully articulated absolutist position.[19]

In this well-known lecture Black said, "Nothing I have read in the Congressional debates on the Bill of Rights indicates that there was any belief that the First Amendment contained any qualifications."[20] But Black has nevertheless found it necessary to delineate several qualifications that actually justify governmental restrictions on free expression, even to the extent of endorsing a balancing test in certain classes of cases.[21] He was perhaps impelled in this direction if only because some of his earlier opinions had explicitly stated the need to balance interests where Amendment I was being applied.[22] But the more compelling reason for a careful restatement of the theory is his position on a number of recent cases in which he favors considerable contraction of rights of free speech and assembly for dissident minorities who demonstrate to express their ideas. Although these stands have placed his stature as an absolutist in some doubt, Black has recently assured us in his Carpentier Lectures at Columbia University that his basic "Constitutional faith" has never changed.[23] In these lectures he elaborates the rationale by which he believes some kinds of restrictions on free speech, press, and assembly are legitimate because they do not directly impair the absolutist operation of Amendment I.

I shall organize my discussion around three central topics. First, looking to the general problem of making any Bill of Rights provision an absolute, I will comment on the problem of defining the *scope* of a particular provision. Second, turning specifically to Black's theory on Amendment I liberties, I will examine his qualification that the "freedom of speech" specified in the Amendment does not include "con-

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19 Black, *supra* note 2.

20 *Id.* at 880.

21 *See, e.g.*, Konigsberg v. State Bar, 366 U.S. 36, 64-69 (1961) (dissenting opinion); Barenblatt v. United States, 360 U.S. 109, 141-42 (1959) (dissenting opinion).

22 Marsh v. Alabama, 326 U.S. 501, 509 (1946); Martin v. City of Struthers, 319 U.S. 141, 143 (1943).

23 Lectures by Justice Black; Lecture I, March 20, 1968; Lecture II, March 21, 1968; Lecture III, March 23, 1968 [hereinafter cited as Carpentier Lectures, indicating lecture and page numbers from a copy furnished by Justice Black's law clerk]. The lectures are to be published soon by Random House under the title CONSTITUTIONAL FAITH.

duct" and that "conduct" might be constitutionally regulated. Third, I will examine his related qualification that only "direct" abridgments of Amendment I freedoms are absolutely prohibited, while "indirect" restrictions on free expression may be approved subject to a balancing test.

What I intend to show is that Black's theory of Amendment I absolutes, even though it has some admirable features, is nevertheless to be found wanting when judged by his own criteria of assuring a strong and certain set of freedoms. It is deficient when judged by the criteria of certainty of application because of the vagueness of the standards he constructs. It is deficient as to the results he reaches because it contributes to the severe restriction of some vitally important means of free expression in the contemporary era.

II. A Preliminary Comment on the Problem of Defining the Scope of the Provisions of the Bill of Rights

The workings of an absolutist jurisprudence may, for the sake of convenience, be divided into two distinct elements—first, the definition of the provision itself (for example, the definition of "freedom of speech" in Amendment I), and second, the application of that meaning in an uncompromising fashion. The initial problem, then, is to determine the exact meaning of the provision, including the scope.[24] Only if the meaning of each clause of the Bill of Rights is clear and certain can there be a clear and certain application of absolute rights.

This immediately leads to the crucial problem that the scope of constitutional guarantees is not at all clear. The very ambiguity of words, as well as the vagueness of the Framers' original intent, gainsay any claim that the Bill of Rights provides any exacting formulas for determining the sweep of its provisions, and this uncertainty is present in Amendment I just as in other Amendments. Current disputes on the Court show this quite adequately. While Black believes that the term "freedom of speech" does not extend to "conduct," it is clear that

[24] In this study I use the terms "scope" and "definition" with a shade of difference. "Scope" is taken to be an aspect of "definition." The definition of a right may be said to be a statement of its basic character. For example "freedom of the press" can be defined as the liberty to print and distribute written matter. The aspect of "scope" deals with the outer limits of the right. For example, does "freedom of the press" extend to circulating advertising handouts for soap? Does it include unrestricted freedom to use the mail? Does it include pornography under its protection? I think this usage corresponds to that of Black and the authors to whom I refer, *infra* note 28.

some of his brothers disagree.[25] Also, while he asserts that "freedom of the press" has a scope which reaches out to protect so-called obscenity or defamation, a majority of the Court has not accepted his interpretation.[26] As Justice Harlan has recently pointed out, "[t]he modern history of the guarantee of freedom of speech and press mainly has been one of a search for the outer limits of that right."[27] Indeed, it is likely that most of the Court's adjudicative business on the Bill of Rights falls into the delicate field of trying to determine the scope of various guarantees. It follows from this criticism that the dependability of Black's theory of absolutes is gravely undermined, for in order to have a certain efficacy, the scope of the absolute must be agreed upon. If it is not clear, if the scope of a particular right or immunity is not itself defined sharply, then it will be possible for courts to defeat the purpose of Black's absolutism by contracting the rights in the process of defining their scope.

It is only fair to mention here, however, that some apologists for absolutism have attempted to defend Black's position by focusing on the initial problem of determining the meaning of a provision. One of the Justice's defenders is Charles L. Black, a distinguished scholar. Professor Black argues that it is admittedly necessary and acceptable for judges to apply value judgments and to weigh and balance competing considerations of public interest in initially assigning a particular scope to some provision.[28] He suggests that Justice Black, who is "an experienced judge with a long head,"[29] must now accept this. In his interpretation of Justice Black's position, Professor Black spins a revisionist theory which may be summarized as follows: The Court must weigh interests and make judgments on the balance of social justice as it works out the scope of the Bill of Rights provisions in concrete cases. Once it *has* that scope, however, the Court is armed with a core of meaning that can be applied without further indulgence in the uncertain, unstable business of balancing in every single case. By this theory the absolute meaning would not be completely sacrosanct. It might be overruled, but it is understood that the post-bal-

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25 *See* pp. 57-64 *infra.*

26 *See* pp. 54-57 *infra.*

27 Curtis Publishing Co. v. Butts, 388 U.S. 130, 148 (1967).

28 C.L. Black, *Mr. Justice Black, the Supreme Court, and the Bill of Rights,* 222 HARPERS MAG., Feb., 1961, at 63. A similar interpretation is made by Frantz, *The First Amendment in the Balance,* 71 YALE L. J. 1424 (1962); *compare* Meiklejohn, *The First Amendment is an Absolute,* in THE SUPREME COURT REVIEW 245 (P. Kurland ed. 1961).

29 C.L. Black, *supra* note 28, at 68.

ancing meaning continues to apply short of some extraordinary situation that would justify modification of it. According to Professor Black, the Justice does not take his own talk of absolutes literally. Rather, he accepts this modified theory as the best hope of a strong Bill of Rights and indulges the talk of unqualified absolutism as a matter of encouraging an "attitude" that will assure a hearty group of Bill of Rights liberties.

This theory may have its strengths, but I will not evaluate it here because it does not seem to me to properly represent the Justice's own views. Apart from Black's own failure to endorse the preliminary balancing theory, there are three reasons why I cannot attribute it to him. While Professor Black makes much of the need for judges to balance and weigh policy choices in the process of defining a guarantee, the Justice vigorously claims that courts should "interpret" the law and not "legislate" by making a choice of values as to wise social policy. As we have seen with respect to Amendment I, he believes that "constitutional cases must be decided according to the terms of our Constitution itself and not according to the judges' views of fairness, reasonableness, or justice."[30] But such a judgment of fairness is just what Professor Black's approach entails.

Second, unlike Professor Black, the Justice steadily maintains that determination of the scope of the document's provisions is relatively certain in the first place. Of course, he avoids the insupportable claim that there are no blemishes of ambiguity in the document whatsoever. He concedes that there are marginal problems in discerning the Framers' intended scope in such provisions as those against "unreasonable search and seizure" or against "cruel and unusual punishment."[31] But by and large he believes that the Bill of Rights, and especially Amendment I, are literal absolutes which consist of "clear unconditional commands."[32] Insofar as he considers the provisions to be clear, the theory of preliminary balancing is unnecessary.

Third, Justice Black underscores his belief that the provisions of the Bill of Rights are for the most part settled and certain by arguing that if there is any balancing necessary in the Bill of Rights, it has been taken care of by the Framers.

> Of course the decision to provide a constitutional safeguard for a particular right, such as the fair trial requirements of the Fifth and Sixth Amendments and the right of free speech protection of the First, in-

30 I Carpentier Lecture 14.

31 Black, *supra* note 2, at 871-73.

32 Berger v. New York, 388 U.S. 41, 74 (1967) (dissenting opinion).

> volves a balancing of conflicting interests. . . . I believe, however, that *the Framers themselves did this balancing* when they wrote the Constitution and the Bill of Rights. They appreciated the risks involved and they decided that certain rights should be guaranteed regardless of these risks. *Courts have neither the right nor the power to review this original decision* of the Framers and to attempt to make a different evaluation of the importance of the rights granted in the Constitution. *Where conflicting values exist in the field of individual liberties protected by the Constitution, that document settles the conflict,* and its policy should not be changed without constitutional amendments by the people in the manner provided by the people.[33] (emphasis added).

Since I believe that the preliminary balancing theory substantially modifies Justice Black's position, I shall now turn to what the Justice himself has to say by way of explication and refinement of his Amendment I absolutism.

III. The Elements of a Qualified Absolutism

A. "Speech" versus "Conduct"

It is indeeed ironic that the freedoms of expression of Amendment I, which Black calls the "heart" of the Bill of Rights, are the guarantees most carefully limited and circumscribed by the qualifications that he places on his absolutist theory. The central proviso he offers is that the scope of freedom of speech or of the press of Amendment I does not refer to "conduct." Thus no "conduct" can be absolutely privileged against abridgment. Black combines his absolutism with the restricted notion of speech in the following manner:

> I think the Founders of our Nation in adopting the First Amendment meant precisely that the Federal Government should pass "no law" regulating *speech* and *press* but should confine its legislation to the regulation of *conduct.* So too, that policy of the First Amendment made applicable to the States by the Fourteenth, leaves the States vast power to regulate *conduct* but no power at all, in my judgment, to make the expression of views a crime.[34] (emphasis added).

Of course, the distinction between "speech" and "conduct" is by no means peculiar to Black. Others have relied on similar notions for Amendment I purposes,[35] but for Black the distinction is a mainstay

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[33] Black, *supra* note 2, at 879.

[34] Mishkin v. New York, 383 U.S. 502, 518 (1966) (dissenting opinion).

[35] For recognition of a similar principle see Amalgamated Food Employees v. Logan Valley Plaza, 391 U.S. 308 (1968); Cox v. Louisiana, 379 U.S. 536 (1965); Teamsters

of his constitutional theory. Unlike some other versions, his theory sometimes comprehends a rigid distinction between the two concepts. "Speech," he says, means to "communicate ideas . . . through words."[36] In a more amplified way, he says that "the First Amendment grants an absolute right to believe in any government system, discuss all governmental affairs and argue for desired changes in the existing order," but the nub of his concept of "speech" is "mere talk"[37] or writing. The term "conduct" is evidently meant to refer to any overt behavior that goes beyond "speech," although to my knowledge Black provides no general and abstract definition of the term.[38] Where the regulation of "conduct" is involved, Black of course admits that expression of ideas may be in the picture somewhere, but if "conduct" is the main issue, Black concedes that the interests in free speech may be considered in the context of a balancing test.[39] Thus the abhorred judicial test that Black expels through the front door is gingerly readmitted through the back door.

There are two criticisms of Black's "speech"/"conduct" distinction that stand out. First, the very wordage of the Amendment renders insupportable the proposition that its primary scope extends only to mere speaking and writing and excludes conduct. Second, Black is faced with severe difficulties in logic in trying to apply the distinction—difficulties which he is only partially able to remedy. Thus the dichotomy is seen to be deficient from the standpoint of the sure and certain applicability that he desires.

B. The Scope of Free Expression

Black's repeated statements on the meaning of Amendment I buttress the view that the freedoms of expression stipulated there are essentially freedoms to express sentiments and arguments in pure words, not by other kinds of behavior. He carries this interpretation to the extent of suggesting that some kinds of behavior, such as particular forms of protest demonstration, may be utterly prohibited by govern-

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Union v. Vogt, Inc., 354 U.S. 284 (1957); Hughes v. Superior Court, 339 U.S. 460 (1950); Cantwell v. Connecticut, 310 U.S. 296 (1940); Schneider v. State, 308 U.S. 147 (1939); T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 60-61 (Vintage ed. 1967).

36 III Carpentier Lectures 3.

37 Carlson v. Landon, 342 U.S. 524, 555-56 (1952) (dissenting opinion).

38 *See* III Carpentier Lectures 9.

39 Konigsberg v. State Bar, 366 U.S. 36, 68 (1961) (dissenting opinion); Barenblatt v. United States, 360 U.S. 109, 142 (1959) (dissenting opinion).

ment without undue impairment of the Amendment.[40] However, a simple reading of the words of the Amendment casts an eclipse of doubt on such an interpretation. It may be plausible to hold that the freedoms of "speech" and "press" comprehend only mere words, but we must remember that the Amendment protects other rights which may by definition include behavior other than utterance of "mere words." With Black's concurrence the Amendment has been held to protect freedom of association, and it befuddles the imagination to see how such a right could be restricted to pure speech.[41] The express words of the provision guarantee the "free exercise" of religion, and practicing one's religious tenets surely, by its very nature, includes the use of ritual and other practices that cannot be confined in their meaning to pure "speech." Moreover, the element of the Amendment for which the Black analysis is most obviously unsatisfactory is the liberty to peaceably assemble and to petition for redress of grievances. No matter how often and how adamantly Black may repeat his formula that the Amendment protects "speech" and not "conduct," it is hard to see how any sensible reading of the English language could comprehend a "right of the people peaceably to assemble" to be something apart from "conduct." It strikes me as highly ironic that a man who pleads so ardently that the absolutes of the Bill of Rights are inscribed in the document in plain words for all to see and who urges a close adherence to those literal words by the Court, should venture this tortured interpretation of the meaning of the Amendment. Still, I know of no occasion where Black tries to square his dichotomy with the wordage of the Amendment taken as a whole and I dare say that I cannot see how he might possibly reconcile the two.

This strange definition which makes pure "speech" the essence of the Amendment is questionable in that it can be used to undermine needed constitutional protection for expression of ideas which are important but which obviously involve more than spoken or written words. A peaceable assembly held to bring public attention to racial discrimination in public housing, for instance, receives only a secondary kind of protection in Black's scheme. But does not the general public have a greater stake in protection of peaceable assembly than in pornography or libelous writings, which might be accorded absolute protection under his theory on the ground that they are "mere words"? On the other hand, are all expressions of "mere words" worth such unbending protection? Black's unlikely interpretation of the scope of

[40] *See* pp. 65-66 *infra.*

[41] Shelton v. Tucker, 364 U.S. 479 (1960).

the absolute in the Amendment, then, may be criticized as setting up poor priorities of importance for different kinds of expression. This is a matter that will be examined in sections IV and V.

C. *Difficulties in the Logic of the Dichotomy*

Even if Black's version of the separation of "speech" and "conduct" is accepted, it may be argued that the aura of sure-fire mechanical certainty that characterizes Black's absolutism is considerably diminished by the distinction, due to the perplexing snarls that confront us once we try to apply it in concrete cases. The dichotomy may seem convincing in some situations, such as the distinction between a polite drawing room conversation and a rowdy street demonstration. It seems to do no great violence to the facts to say that for adjudicatory purposes the first is "speech" and the second is "conduct." But we might note that even a drawing room conversation includes certain conduct, including noise, which may affect others, and equally, the noisiest demonstration may include an element of speech. Protest demonstrations of today may, and usually do, include the use of words—speeches, placards, circulars, chants, songs, prayers. Even if the demonstration skirts the edge of public disorder, it is arguable that it is conduct which deserves some protection under Amendment I. When one raises other possible examples of behavior in which ideas or views are expressed, there are greater problems of categorization. What about a public lecture, organization to publish a book, a harangue in a public park? Where does one find the line between "speech" and "conduct" as it applies to such events?

Justice Black, on occasion, apparently agrees on the impracticability of the categorical distinction and adopts other language. He recently identified picketing, for example, as combining the two kinds of behavior, calling it "speech and press plus other conduct."[42] He concurred in Justice Douglas's formulation: "Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an *inseparable part of it*."[43] (emphasis added). Even though such phrasing pictures "speech" and "conduct" as mixed, Justice Black uses it to maintain his two part formula in which there is something called pure "speech," which is constitutionally unassailable, and something else that is "speech plus," which the government can constrict. To put the matter into the words of a prominent critic of the dichotomy, the problem remains that "all speech is necessarily

[42] III Carpentier Lectures 11.

[43] Roth v. United States, 354 U.S. 476, 514 (1957) (dissenting opinion).

'speech plus.' "[44] At any rate, Black most often chooses to rely on the even more simplistic "speech"/"conduct" dichotomy.

Since the standard is, on its face, an awkward oversimplification, it challenges a judge of even Black's mettle to apply it in convincing fashion. He is faced with options of interpretation in making it apply to different kinds of cases because its ambiguity opens up a wealth of possibilities for determining just what pure "speech" and "conduct" are in concrete terms. One option would be to seek to apply the dichotomy in the most exact fashion by contracting the meaning of the category of pure "speech" to those kinds of verbal expressions which contain the minimum of overt activity. For example, the drawing room conversation might be so classified. This option might be a reasonable effort at making sense out of the standard, but it would severely narrow the limits of absolutely protected speech, and this may be why Black rejects it. He decides instead in favor of an application of the standard which gives a larger coverage of absolute protection, but which is heavy with difficulty. He applies the term "conduct" to some kinds of behavior for which that label could hardly be avoided, such as expressions by groups along busy streets and in sensitive public buildings. But on the other hand, his interpretation of the category of pure "speech" is perhaps more difficult to accept because he insists that Amendment I raises its absolute shield in many kinds of cases where speech and several aspects of conduct are clearly found together in an overall pattern of behavior. In fact, in Black's interpretation most of the Amendment I cases, except for street regulation cases and a few other kinds, fall into the absolute category. In order to provide a theoretical aid in the allocation of cases which obviously involve conduct in the category of "speech," Black employs an auxiliary qualification, to which I now turn.

D. "Direct" versus "Indirect" Abridgments

The second of Black's methodological refinements relates to the "speech"/"conduct" distinction and places the emphasis on whether the supposed restriction of rights of free communication is a "direct" or an "indirect" one. Only truly "direct" governmental action against speech is, in this view, completely barred by the Constitution. Black makes this point after conceding that there are some limited balancing possibilities in cases touching speech:

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[44] Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, in THE SUPREME COURT REVIEW 1, 23 (P. Kurland ed. 1965).

> But let me make absolutely clear that this kind of balancing should be used only where a law is aimed at conduct and *indirectly* affects speech; a law *directly* aimed at curtailing speech and political persuasion can, in my opinion, never be saved through a balancing process.[45] (emphasis added).

Black indicates that his criteria might be used to avoid knotty problems of finding the line between "speech" and "conduct" if the Court can simply discern whether the governmental intrusion is "directly" against speech. Let us examine his use of the term to see if it has any special meaning which will aid in applying his theory of absolutes.

Black's stated meaning of the "indirect" relationship is that it refers to situations where governmental regulation or punishment of conduct is the main purpose of some governmental act and any burden that falls on free expression is only an "indirect" effect, a side issue. But since, as we have seen, expression of ideas is bound up with behavior, it becomes very difficult to say whether speech or conduct is the main object of regulation. Some of the clearest instances of confusion on this subject fall into the area of various laws and rulings affecting the so-called political offender. In the case of *American Communications Ass'n v. Douds*[46] the Court scrutinized a law of Congress purporting to discourage conduct causing "political strikes" by making availability of labor arbitration machinery for unions contingent on a non-Communist affidavit signed by their officers. Both conduct and expression of ideas are likely to be affected by that kind of official requirement. Saying what is "direct" and what is "indirect" seems more a matter of assigning labels arbitrarily than of applying a clear rule. A similar impasse in the analysis seems to occur in other kinds of regulations where the government tries to reach suspected subversives,[47] withholds professional licenses for failure to answer questions,[48] punishes people for belonging to organizations which engage in illegal activity,[49] or requires disclosure of membership in political associations.[50] In such cases the regulation referred to is defended as having the direct purpose of reaching the conduct, not the expression of ideas in and of itself, which is considered a threat to national security. If

45 III Carpentier Lectures 16; *cf.* Konigsberg v. State Bar, 366 U.S. 36, 68 (1961) (dissenting opinion).

46 339 U.S. 382 (1950).

47 Braden v. United States, 365 U.S. 431 (1961); Wilkinson v. United States, 365 U.S. 399 (1961); Barenblatt v. United States, 360 U.S. 109 (1959); Watkins v. United States, 354 U.S. 178 (1957).

48 *In re* Anastaplo, 366 U.S. 82 (1961).

49 Dennis v. United States, 339 U.S. 162 (1950).

50 NAACP v. Alabama, 357 U.S. 449 (1958).

Black calls them "direct" abridgments of speech, it would seem that someone else is equally entitled to say they are "indirect" abridgments.

E. Black's Real Meaning: A Suggested Interpretation

I believe a careful examination of Black's writings reveals that he has an answer for this confusion, although perhaps not a satisfying one. I would suggest that the term "direct," in his mind, refers not to the order of impact of a law, nor even to its ostensible purpose of regulation of conduct, but rather to what he observes to be the real and overriding purpose of punishing belief in and expression of hated ideas. I think this meaning is implicit in this summary of his Amendment I interpretation in the Carpentier Lectures:

> My view is, without deviation, without exception, without any ifs, buts, or whereases, that freedom of speech means that government shall not do anything to [the] people . . . [i.e., because of] the views they have or the views they express or the words they speak or write.[51]

Similarly in a case where a witness at a legislative investigation was punished for refusal to answer questions about his political connection, Black, dissenting from the Court's upholding of the conviction, decries penalizing the witness "merely *because of* hostility to views [he] peacefully expressed."[52] (emphasis added). Again, in a sedition prosecution in which organizing violent overthrow of the government was supposedly at issue, Black claims that the truth of the matter was that the defendant was prosecuted for membership in the Communist party "*because* one of the *philosophical tenets* of that group is that the existing government should be overthrown by force. . . ."[53] (emphasis added). If this interpretation is correct—and I believe it is—then "direct" means "direct intention" for Black. Such government regulations must be struck down, he believes, because the true motive behind them, *whether it is admitted or not*, is to punish the expression of unpopular ideas. In this view the question whether the particular method of the legislative act abridges speech by direct impact or as a secondary effect is not the central issue. Thus Black suggests in one case that in order for a law to merit the stamp of constitutionality, it must be "neither openly nor surreptitiously aimed at speech."[54] It is the motive, not the method, that is crucial.

It may be asked what the "directness" criteria adds to the theory

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[51] III Carpentier Lectures 2-3.

[52] Barenblatt v. United States, 360 U.S. 109, 142 (1959) (dissenting opinion).

[53] Scales v. United States, 367 U.S. 203, 260 (1961) (dissenting opinion).

[54] Konigsberg v. State Bar, 366 U.S. 36, 69 (1961) (dissenting opinion).

other than a new measure of confusion. Judicial probing of the inner motives of legislative and other governmental bodies is a touchy business which requires judges to speculate about intentions that may be lost in a fog of legislative rhetoric. Indeed, as recently as May of 1968 Black joined in an opinion of the Court which reaffirmed the Court's traditional policy of refusing to assess the motives of legislative bodies in order to determine constitutionality.[55] The Court's decision in this case upheld criminal penalties for draft card burning. And in a more recent case Black explicitly emphasized his belief in the impropriety of examining underlying motives of legislation.[56] Of course, there may be some cases where the government's true intentions are palpably clear to all. One is reminded of Chief Justice Taft's plaintive question whether, if the motive is plain, the Justices must be expected to shut their minds to what "[a]ll others can see and understand . . . ."[57] But the point is that most often the discovery of a true motive is perilously difficult, not only because the evidence on the question is difficult to evaluate, but also because there will usually be a *plurality* of motives behind a governmental policy. In free speech cases the legislative record will often reveal various combinations of motives to get at hated ideas, as well as motives to regulate behavior in the light of other goals. Judges are bound to disagree honorably as to what motive is the "true" one, if any.

To illustrate the ambiguity of the inquiry, let me refer to the *Douds* case again. There Black stated his conviction, unshadowed by any trace of a doubt, that the loyalty oath requirement for union officials was simply designed to squelch ideas which the Congress feared and despised. But the majority saw it differently, for the opinion of the Court, written by Mr. Chief Justice Vinson, expressed an equally firm belief that the main object of the law was to regulate commerce by removing the causes of disruptive political strikes:

> [T]he right of the public to be protected from evils of *conduct,* even though First Amendment rights of persons or groups are thereby in some manner infringed, has received frequent and consistent recognition by this Court.
>
> When particular conduct is regulated in the interest of public order,

[55] "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." United States v. O'Brian, 391 U.S. 367, 383 (1968).

[56] [T]his Court has consistently held that it is not for us to invalidate a statute because of our views that the 'motives' behind its passage were improper; it is simply too difficult to determine what those motives were.
Epperson v. Arkansas, — U.S. —, — (1968) (concurring opinion).

[57] Bailey v. Drexel Furniture Co., 259 U.S. 20, 37 (1922).

> and the regulation results in an *indirect, conditional, partial* abridgment of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection . . . .
>
> In essence, the problem is one of weighing the probable effects of the statute upon the free exercise of the right of speech and assembly against the congressional determination that political strikes are evils of conduct . . . and that Communists . . . pose continuing threats to that public interest when in positions of union leadership.[58] (emphasis added).

F. The Problem of Uncertainty

Rigid verbal formulations cannot be depended upon to yield the answers to difficult factual situations by some compelling, automatic logical force. The ambiguity of Black's "speech"/"conduct" and "direct"/"indirect" formulations are telling illustrations of this. Now, of course, all legalistic abstractions designed to facilitate courts' decision-making can be said to suffer from incertitude due to their abstraction. This is true whether one speaks of "proximate cause," "the reasonable man," "clear and present danger," or Black's formulations. So it may seem argumentative to criticize Black on the point of ambiguity.

But I do not believe my criticism is vitiated simply because a similar comment may be directed at other legal phrases. For one thing, it is suggested that Black's formulas suffer especially from confusions. The "speech"/"conduct" separation implies a division for which it is very difficult to find a counterpart in experience, and his position on "direct" abridgment, if I interpret it correctly, depends on the hazardous business of an inquiry into legislative motives. Moreover, the point I wish to stress here is that the ambiguous character of Black's qualifications destroys precisely that quality that he particularly claims for his own jurisprudence—the quality of providing broad, clearly applicable rules which yield nearly mechanical results that are plain to all. This does not measure up well as a jurisprudence of certainty.

But the structure of Black's Amendment I qualifications, in my view, has a deficiency that is more serious than the vice of vagueness. In a later section, I will try to show that Black's categorizations, along with his application of them, have the effect of drastically reducing the constitutional protection for some kinds of socially important free speech activity which are labeled "conduct" under his system.

In the next section, however, I want to try to mark out a limited area of free expression cases where I think his standard can be ap-

[58] 339 U.S. 382, 398-400 (1950).

plied with even results.

IV. THE CATEGORY OF "SPEECH": THE CORE OF JUSTICE BLACK'S ABSOLUTISM

A. The Uncertain Boundaries

What are the absolutely inviolable elements of Amendment I by his theory? What types of cases are included? Generally, I have suggested that Black means to identify as utterly unconstitutional all governmental measures with the "direct" intention of curtailing expression of ideas through spoken or written words. Unfortunately, however, this kind of standard makes it extremely difficult to identify all the kinds of intrusions on free speech, press, or religion that will be struck down by this standard. I suggested in section III that Black does not mark out readily intelligible standards for identifying the areas of inviolability. This can only result in a general fuzziness on the question of what kinds of things are truly absolute. I would venture to say that *most kinds of laws limiting free speech might be approved under the very terms of the Black theory as being mainly directed at "conduct" and therefore only incidentally related to free speech as such.*

I hasten to add that this is not to question the results which Black himself reaches in free speech cases. Indeed, in the McCarthy era Black's famous string of dissenting opinions, was a pillar of single-minded dedication to the principles of open communcation of ideas. What I question at this point is his method, which does not by any means, it seems to me, lead into the results he wants in any automatic and objective way. Paul A. Freund, a friendly critic of Black, notes with concern the unfortunate legacy of the jurisprudence of "direct" versus "indirect" as the terms were once applied to the nation's commerce. Freund calls it "somewhat surprising" that the Justice should adopt a standard that "proved to be so artificial and eventually discredited a criterion." He continues that "[i]n the hands of a less sensitive judge than Justice Black the test could yield results that by his standards would be quite perverse."[59]

B. The Core of Black's Absolutism

In spite of the grave ambiguities of Black's qualifying criteria, I have indicated that there are at least some limited areas of cases where

[59] Freund, *Mr. Justice Black and the Judicial Function*, 14 U.C.L.A. L. REV. 467, 472 (1967).

that criteria applies rather well. I am not trying to specify in the abstract all kinds of cases where his standards would unequivocally give absolute protection to a communication of ideas. But one can say that there are some areas where it is plain that the government applies "direct" punishment of pure "speech" within Black's meaning. The kinds of cases fall mainly, although not exclusively, under the category of litigation of freedom of the press. I refer specifically to the subjects of libel and slander,[60] invasion of privacy through publicity,[61] excessive trial publicity,[62] and obscenity.[63] (The latter, of course, extends to forms of supposedly artistic expression other than the written word.) Black's absolutism is not compromised or qualified away here. He consistently speaks against the notion that government has any power at all to punish these supposed offenses, and at the same time one can observe the plain, predictable effect of the criteria he applies that have such confusing results elsewhere. In these areas where the printed word or some artistic expression is threatened by government, it is relatively correct to say that the authorities move against it not because of some separable overt "conduct," but simply because there is a "direct" intent to reach some alleged inequity in the expression itself.

It would, of course, be too much to say that Black's rationale covers the entire realm of freedom of the press and artistic communications without any compromise or doubt. We have seen his contention, which is universally recognized, that valid regulatory statutes may restrict freedom of the press incidentally where literature is distributed in public, and there may conceivably be other areas where outright suppression of the printed word is defended on the ground that some supposed

60 *See* Curtis Publishing Co. v. Butts, 388 U.S. 130, 170 (1967) (concurring in case number 150 and dissenting in case number 37); New York Times Co. v. Sullivan, 376 U.S. 254, 293 (1964) (concurring opinion); Black & Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549 (1962); III Carpentier Lectures 5.

61 Time, Inc. v. Hill, 385 U.S. 374, 398 (1967) (concurring opinion).

62 Black has suggested in a non-judical statement that prosecution for this offense is absolutely barred. Black & Cahn, *supra* note 60, at 555-57. But he has indicated elsewhere that a "clear and present danger test" was appropriate in such cases. Bridges v. California, 314 U.S. 252 (1941). He has also joined recently in a dissenting opinion which indicates that there might be some rational limitations on publication to protect fair trial. Estes v. Texas, 381 U.S. 532, 601 (1965). I am inclined to accept this absolutist statement as being Black's actual view, however.

63 *See, e.g.*, Ginsburg v. United States, 383 U.S. 463, 476 (1966) (dissenting opinion); Mishkin v. New York, 383 U.S. 502, 515 (1966) (dissenting opinion); Smith v. California, 361 U.S. 147, 155 (1959) (concurring opinion); Kingsley Pictures Corp. v. Regents, 360 U.S. 684, 690 (1959) (concurring opinion).

"conduct" is being regulated. But abridgments in the form of laws against obscenity, libel, and invasion of privacy are more clearly punishment because the *expression itself* is perceived to be evil in essence or effect. And that "direct intent" is what the Black criteria, if I interpret them correctly, flatly bar.

In this connection, I would suggest that Black's opinions on the subject of censorship of obscenity are not only clear in theoretical application but also extremely convincing when judged by the result for which he argues. His opinions have a salutary crispness and clarity as they stand beside the vexing confusions of his brothers who continue their efforts to unravel the mysteries of the term "obscenity."[64] Black chides his brothers of the majority because, for one thing, he observes that by their very efforts to manage the indefinable enigma of obscenity law, they set themselves up, somewhat arrogantly, as a "Supreme Board of Censors."[65] But the main force of his argument is in his defense of his own alternative. His philosophy of constitutional simplicity and certainty rings true on this subject when he pleads, "I read 'no law . . . abridging' to mean *no law abridging*."[66] His literal reading of the Amendment would sweep the nation's statute books clean of such laws by laying the plain, uncompromising rule that the Constitution commands it, and it would simultaneously extract the Court from its self-spun web of garrulous confusion. In the *Kingsley Pictures v. Regents*[67] case which involved censorship of motion pictures, Black wrote:

> We are told that the only way we can decide whether a State or municipality can constitutionally bar movies is for this Court to view and appraise each movie on a case-by-case basis. Under these circumstances, every member of the Court must exercise his own judgment as to how bad a picture is, a judgment which is ultimately based at least in large part on his own standard of what is immoral. The end result of such decisions seems to me to be a purely personal determination by individual Justices as to whether a particular picture viewed is too bad to allow it to be seen by the public. Such an individualized determination cannot be guided by reasonably fixed and certain standards. Accordingly, neither States nor moving picture makers can possibly know in advance, with any fair degree of certainty, what can or cannot be done in the field of movie making and exhibiting. This

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[64] *See* Kalven, *The Metaphysics of the Law of Obscenity*, in THE SUPREME COURT REVIEW 1 (P. Kurland ed. 1960).

[65] Kingsley Pictures Corp. v. Regents, 360 U.S. 684, 690 (1959) (concurring opinion).

[66] Smith v. California, 361 U.S. 147, 157 (1959) (concurring opinion).

[67] 360 U.S. 684 (1959).

uncertainty cannot easily be reconciled with the rule of law which our Constitution envisages.[68]

Black's stand on censorship of literature and the arts may be the strongest plank of his absolutist structure. It is notable that in the Carpentier Lectures, his most recent and most thoroughly qualified statement of his Amendment I theory, he specified the law of censorship of obscenity as constitutionally eliminated, and he is equally unequivocal when speaking on the law of defamation.[69] But as he moves to other fields of Amendment I adjudication, where the general theories we have seen fail to dictate a clear result, the ambiguities and qualifications begin to appear. Let us look more closely at the workings of his theory in the other fields of speech and assembly.

V. THE CATEGORY OF "CONDUCT": BALANCING AND RIGHTS OF POLITICAL PROTEST

A. The Concept of "Demonstrative Speech"

Black allows the balancing axe to fall especially hard on some kinds of activity which include expression of ideas but which he classifies as "conduct." The most dramatic and controversial forms of expression that he includes under the heading of "conduct" are various means of political protest by demonstration. At this point I should like to suggest the term "demonstrative speech" to denote these forms of protest. This term, I believe, has the virtue of reflecting the intimate interaction between speech and conduct that exists in experience. Specifically, it is meant to include all the forms of activity in which groups carry on peaceful proceedings in order to communicate their ideas of social protest in public or private places. Demonstrations such as sit-ins, marches, and rallies are the referents.[70]

No one can fail to be impressed by the power of earnest conviction with which Black sets forth his views on demonstrative speech. He underlines the need for regulation of group behavior in public, especially where clamorous gatherings approach or even enter some kinds of public building where the politics of confrontation is an imminent threat to the orderly workings of government, or where they en-

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[68] Kingsley Pictures Corp. v. Regents, 360 U.S. 684, 690-91 (1959) (concurring opinion).

[69] III Carpentier Lectures 5.

[70] I coin the term "demonstrative speech" to identify the kinds of activities Professor Harry Kalven discusses and heartily defends in an important article. Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, in THE SUPREME COURT REVIEW 1 (P. Kurland ed. 1965).

ter some private place which is protected by valid trespass law. Black's beliefs are solidly based on his deep attachment to the less glamorous virtues of seeking social change through the normal adjudicative and electoral machinery, which in his view serve dissident minorities and everybody else much better in the long run.

He warns that today's demonstration easily becomes tomorrow's riot. In an opinion in 1966 he closes with an eloquent thought on the law and the Negro protest:

> It is an unhappy circumstance in my judgment that the group, which more than any other has needed a government of equal laws and equal justice, is now encouraged to believe that the best way for it to advance its cause, which is a worthy one, is by taking the law into its own hands from place to place and from time to time. Governments like ours were formed to substitute the rule of law for the rule of force. Illustrations may be given where crowds have gathered together peaceably by reason of extraordinarily good discipline reinforced by vigilant officers. "Demonstrations" have taken place without any manifestations of force at the time. But I say once more that the crowd moved by noble ideals today can become the mob ruled by hate and passion and greed and violence tomorrow. If we ever doubted that, we know it now. The peaceful songs of love can become as stirring and provocative as the Marseillaise did in the days when a noble revolution gave way to rule by successive mobs until chaos set it.[71]

Still, I should like to argue that Black's view is one-sided; if a balancing test is fairly to be applied to the "conduct" of demonstrative speech, there is a social interest in protecting it that should be recognized. It is interesting to note that only a few years ago Black joined a Court which seemed to value protest assemblies and other demonstrations as a laudable exercise in freedom of expression. In a string of cases reaching as far back as 1961, there were many decisions exonerating protestors on various grounds,[72] including free speech. In a 1961 case,[73] Mr. Justice Harlan wrote a long concurring opinion on group protest methods in which he characterized a peaceful sit-in campaign as "free trade in ideas" which "appeals to good sense and to the power of reason . . . just as much, if not more than a public oration delivered from a soap box. . . ."[74] In the 1963 case

[71] Brown v. Louisiana, 383 U.S. 131, 167-68 (1966) (dissenting opinion).

[72] The cases may be found in a useful chart compiled by Professor A. E. Howard which summarized thirty-one demonstration protest cases from 1961 to 1966. Howard, *Mr. Just Black: The Negro Protest Movement and the Rule of Law*, 53 VA. L. REV. 103 (1967).

[73] Garner v. Louisiana, 368 U.S. 157, 201 (1961) (concurring opinion).

[74] *Id.*

of *Edwards v. South Carolina*[75] Black joined in the Court's opinion reversing the conviction of students for demonstrating on state capital grounds, which the Court lauded as an exercise of Amendment I rights "in their most pristine and classic form."

These opinions may reflect the idea that demonstrations can be defended as falling clearly in the tradition of communicating ideas through constitutional means that are particularly fitted to the needs of the current era of social protest. The poor, the non-white, the disenchanted youth can employ demonstrative speech in a peaceful way to state their case, while regular means of urging reform are not readily available to them. They have limited access to press and television channels because of the enormous costs involved. They glean little satisfaction from the established political system because the structure of that system, it may be argued, minimizes their effectiveness largely by dent of unconstitutional discrimination. Still, in spite of their very weak position in what is usually called the power structure, they can challenge the national conscience in dramatic fashion through demonstrative speech. Furthermore, the business of pressing for reform can be carried on by this kind of communication within the imperative limitations of public order. As Professor Kalven suggests in an important article on the subject, demonstrative speech in the "public forum" is a workable alternative to civil disobedience or violent revolution.[76] As such, this form of communication performs the gravely important function of venting feelings of frustration and indignation while the society courses through the painful business of readjustment and reform. Moreover, demonstrative speech can be a peaceful way to help bring about changes. The March on Washington and other courageous enterprises of the late Dr. Martin Luther King are in point, as are some anti-war demonstrations. In a small book published last May, Mr. Justice Fortas argues cogently that demonstrative speech, although it has sometimes been abused, can be an effective prod to social reform. Probably with the intention of meeting some of Black's arguments, he summarizes his argument with this ringing defense of demonstrative speech:

> The events of the past few years in this nation dramatically illustrate the power of the ordinary citizen, armed with the great rights to speak, to organize, to demonstrate. It would be difficult to find many situations in history where so much has been accomplished by those who, in cold realism, were divorced from the conventional in-

[75] 372 U.S. 229, 235 (1963).

[76] Kalven, *supra* note 70, at 10-11.

> struments of power. Negroes and the youth-generation held no office. They did not control political machines. They did not own vast newspapers or magazines or radio or television stations. But they have caused great events to occur. . . . They have forced open the frontier of a new land—a land in which it is possible that the rights and opportunities of our society may be available to all, not just to some; in which the objectives of our Constitution may be fully realized for all; and in which the passion and determination of youth may be brought to the aid of our pursuit of the marvelous ideals that our heritage prescribes.[77]

With some allowances for florid overstatement, Justice Fortas's eloquence at least serves to support the point that demonstrative speech, insofar as it accedes to the requirements of order in a crowded society, is entitled to a high place on the scale of constitutionally protected values. Although there were a number of decisions on sit-ins and other demonstrations reaching back to 1961 where Court holdings favored protestors, in more recent opinions some members of the Court show increasing skepticism about group protest methods, and Black is probably now the undisputed leader in this new questioning.[78] His attitude seems to rest largely on a special concern for the violation of property rights where demonstrations occur, as well as on a sheer distaste for demonstrative speech as a method of urging social change.

B. The Sanctity of Property Rights

Black indicates that for him the social interest prerogatives of property ownership, in both public and private property, tend to outweigh the interests in communication of ideas of the demonstrators. This may seem strange for one who is consistently reputed to be a political "liberal," but it is evident nonetheless. He says that:

> The First and Fourteenth Amendments take away from government, state and federal, all power to restrict freedom of speech, press and peaceful assembly where people have a right to be for such purposes.

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[77] A. FORTAS, CONCERNING DISSENT AND CIVIL DISOBEDIENCE 19 (1968). This was published two months after Black delivered his harsh indictment of demonstrative speech in his Columbia University lectures.

[78] *See* United States v. O'Brian, 391 U.S. 367 (1968); Amalgamated Food Employees v. Logan Valley Plaza, 391 U.S. 308, 327, 333, 337 (1968) (dissenting opinions, Black, Harlan, White JJ.); Cameron v. Johnson, 390 U.S. 611 (1968); Walker v. City of Birmingham, 388 U.S. 307 (1967); Adderly v. Florida, 385 U.S. 39 (1966); Brown v. Louisiana, 383 U.S. 131, 151 (1966) (dissenting opinion); Cox v. Louisiana, 379 U.S. 536 (1965); Bouie v. Columbia, 378 U.S. 347, 363 (1964) (dissenting opinion); Bell v. Maryland, 378 U.S. 226, 318 (1964) (dissenting opinion).

> That much is clear and to me indisputable. But recently many loose words have been spoken and written about an alleged First Amendment right to picket, demonstrate, or march, usually accompanied by singing, shouting or loud praying, along the public streets, in or around government-owned buildings, or in and around other people's property . . . . I do not believe that the First Amendment grants a constitutional right to engage in the conduct of picketing or demonstrating, whether on publicly-owned streets or on privately-owned property.[79] (emphasis omitted).

Recent opinions by Black elaborate a theory of private and of public property rights for demonstrative speech cases. As to private property, he shows especial sensitivity to the prerogatives of the private owner to restrict the speech of those who use his property, regardless of whether the property is open as a service to the general public. "[N]o matter how urgently a person may wish to exercise his First Amendment guarantees to speak freely," Black admonishes, "he has no constitutional right to appropriate someone else's property to do so."[80] He even suggests that nowadays some people have it in their heads that Amendment I will protect them if they want to barge into someone else's home to make a speech,[81] although I know of no case where this proposition is seriously made. Black adds support for his view by appealing to the Bill of Rights itself:

> Our Constitution recognizes and supports the concept of private ownership of property and in the Fifth Amendment provides that "no person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."[82]

This is quite a curious point of emphasis for a New Deal "liberal" who has devoted a good portion of his life to de-emphasizing the high place of vested property interests in the Congress and the judiciary of this country!

Applying this philosophy, the Justice stands firm against the notion that orderly sit-ins in racially segregated businesses are constitutionally protected,[83] and he opposes the notion that picketing in a private shopping center is a right of free speech. In the recent case of *Amalgamated Food Employees v. Logan Valley Plaza*[84] Mr. Justice

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79 III Carpentier Lectures 10.

80 *Id.* at 13.

81 *Id.* at 10. *Cf.* Black & Cahn, *supra* note 60, at 558.

82 III Carpentier Lectures 13.

83 Bell v. Maryland, 378 U.S. 226, 318 (dissenting opinion); Bouie v. Columbia, 378 U.S. 347, 363 (1964) (dissenting opinion).

84 391 U.S. 308 (1968).

Marshall said for the majority that private shopping centers open to the public had a public responsibility to allow communication of ideas through picketing on their sidewalks. No racial issue was involved in this case, but the relevance of racial protest was noted.[85] Justice Marshall, for the Court, rested his opinion on the authority of a 1946 Black opinion, *Marsh v. Alabama*,[86] in which Black balanced in favor of free speech where petitioners were using the streets of a privately owned company town to proselytize. Black, dissenting in *Amalgamated*, flatly rejected the idea that *Marsh* was apposite. He invoked a pure property rights doctrine and included the familiar admonishment that the majority was usurping a legislative power in this case:

> To hold that store owners are compelled by law to supply picketing areas for pickets to drive store customers away is to create a court-made law wholly disregarding the constitutional basis on which private ownership of property rests in this country.[87]

He referred again to the statements on property in the due process and eminent domain clauses of Amendment V.

> This means to me that there is no right to picket on the private premises of another to try to convert the owner or others to the views of the pickets. It also means, I think, that if this Court is going to arrogate to itself the power to act as the Government's agent to take a part of [the shopping market owner] Weis' property to give to the pickets for their use, the Court should also award Weis just compensation for the property taken.[88]

If libertarians have reason to be distressed over Black's forthright defense of private property against the nuisance of demonstrative speech, they are probably even more taken back by his current stand on the importance of public property where demonstrations are concerned. He seems just as adamant here as when talking of private property. He flatly rejects the notion that the Constitution "compels government, either federal or state, to provide a place for people to speak, write or assemble on government-owned streets, highways, buildings and other publicly-owned places."[89] In spirited opinions he argues for holding against peaceful demonstrators before a courthouse,[90]

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85 *Id.* at 308.

86 326 U.S. 501 (1946).

87 391 U.S. 308, 329 (1968) (dissenting opinion).

88 *Id.* at 327.

89 III Carpentier Lectures 13-14.

90 Cox v. Louisiana, 379 U.S. 536, 575 (1965) (concurring in case number 24 and dissenting in case number 49).

a jail house,[91] and in a segregated public library.[92] In the case of *Adderly v. Florida*[93] he asserts that "[t]he State, *no less than a private owner of property*, has power to preserve the property under its control for the use to which it is lawfully dedicated."[94] And in *Brown v. Louisiana*,[95] where five Negroes were arrested on a breach of the peace statute for sitting quietly to protest racial discrimination in a public library, Black again rested his opinion, which dissented from the majority's reversal of the conviction, on property rights grounds. Amendment I, he said, "does not guarantee to any person the right to use someone else's property, even that owned by government and dedicated to other purposes, as a stage to express dissident ideas."[96] Black's startling reference to the public library as "someone else's property" pushes to an extreme his defense of a state's custodial power over its property that seems to be as complete as that of a private store owner over his own shop.

I would be tempted to argue that this position does not at all fit with Black's earlier opinions,[97] but I shall not go into that here. What is scarcely debatable, however, is that Black's current stress on property rights in free speech cases is quite marked, and it plays a strong role in the results Black reaches in demonstrative speech cases in recent years. Nor is it debatable that this particular qualification of the free speech absolutism is so far-reaching in its implications that it drastically compromises the supposedly uncompromisable freedom to speak. By his sweeping doctrine, property rights of private persons are asserted against free expression. Equally, he gives wide latitude of abridgment, even complete denial, of demonstrative speech under the so-called custodial power of the state on public property. Thus, there is no absolute right to speak on private property and no absolute right to speak on public property. We have a right to ask what kind of prop-

91 Adderly v. Flordia, 385 U.S. 39 (1966).

92 Brown v. Louisiana, 383 U.S. 131, 151 (1966) (dissenting opinion).

93 385 U.S. 39 (1966).

94 Adderly v. Flordia, 385 U.S. 39, 47 (1966).

95 383 U.S. 131 (1966).

96 Brown v. Louisiana, 383 U.S. 131, 166 (1966) (dissenting opinion).

97 It is interesting to speculate whether there is a "new" Black who is less libertarian than the "old" Black. Without trying to decide the matter here, I would suggest that some of Black's earlier statements seem to me to mark out a position that would be far more permissive about hortatory speech (and demonstrative speech) in public than the position he now holds. *See* Feiner v. New York, 340 U.S. 315, 321 (1951) (dissenting opinion); Kovacs v. Cooper, 336 U.S. 77, 98 (1949) (dissenting opinion); Marsh v. Alabama, 326 U.S. 501 (1946); Martin v. City of Struthers, 319 U.S. 141 (1943); Jamison v. Texas, 318 U.S. 413, 415-16 (1943).

erty is left where there would be a guaranteed right for peaceable assembly, since all property is either private or public. Little wonder that in a recent television interview with Black, CBS commentator Eric Severied suggested that the Justice left only the realm of midair for people to assemble and express their views.[98]

Hand in glove with Black's preference for property rights, there is a clear aversion for the practice of political protest by demonstration itself. The best example in point, I believe, is the Carpentier Lectures which express scorn about demonstrative protest and which show no evidence of agreeing that there are redeeming features to this method of communication. He calls it "use of the streets for propaganda purposes" through "offensive conduct" which discommodes travelers.[99] He seems to see nothing in demonstrative speech but contempt for valid law and invitation to riot. The country's established legal processes, he says,

> . . . do not provide that elected officials, counselmen [*sic*], mayors, judges, governors, sheriffs or legislators, will act in response to preemptory demands of the leaders of tramping, singing, shouting, angry groups controlled by men who, among their virtues, have the ordinary amount of competing ambitions common to mankind. A control of this kind by such particularized groups is directly antagonistic to a control by the people's representatives . . . . [G]overnment by clamorous and demanding groups is very far removed from government by the people's choice at the ballot box. What we have in this country is a government of laws, designed to achieve justice to all, in the most orderly fashion possible, and without leaving behind a deluge of hate-breeding divisions and dangerous riots.[100]

Finally, in the matter of Black's harsh attitude toward demonstrators of all types, he also makes the insupportable suggestion that demonstrative speech is characteristically an illegal operation. Assuring his lecture audiences that demonstrative speech is outside Amendment I protection, he states that the difference between constitutional freedoms of speech, press, and religion and

> non-constitutionally protected conduct like picketing and street marching . . . marks the difference between arguing for changes in the governing rules of society and in [*sic*] engaging in conduct designed to break and defy valid regulatory laws.[101]

I submit that this is grossly overdrawn.

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98 *Mr. Justice Black and the Bill Of Rights*, CBS Reports, Dec. 3, 1968.

99 III Carpentier Lectures 17.

100 *Id.* at 18.

101 *Id.* at 11.

C. *Absolutes, Balancing, and Demonstrative Speech*

A comment on the precise relationship between the principles of Black's qualified absolutism and the outcome of his opinions in demonstrative speech cases is appropriate. We have established that in his thinking there are two lines of defense for the liberties of expression in Amendment I. The first line is the complete, unqualified, absolute protection for those liberties specified in the Amendment. But we are advised that freedom of speech does not include "conduct." The second line of defense is in the form of a balancing test where "conduct" is being regulated and the regulation only "indirectly" affects liberty of expression. Of course, all forms of demonstrative speech are, by Black's definition, "conduct," so only the second line of defense is available for any interests in free speech that may be present in them. But Black, in the cases I have just discussed, applies the test—if he applies it at all—in a nebulous way which seems to foredoom the forms of demonstrative speech.

The operation of the balancing test that Black may be using in these cases is quite difficult to grasp. He does reaffirm that where demonstrative speech, such as "patrolling and marching," is concerned, "[the] Court does, and I agree that it should, 'weigh the circumstances' to protect, not to destroy, freedom of speech, press, and religion."[102] The next step in the logical sequence of his analysis would presumably be an explicit cataloging of the major social interests pressing for recognition and satisfaction, but this is conspicuously missing in the Black opinions I have discussed. Important factors, then, are simply not discussed in the balancing process. There is no doubt that Black's concerns for property rights are entitled to some weight and that his admonitions about orderly adherence to the rule of law are valid considerations. Similarly, he urges quite rightly that the Court must take a close look at interests in controlling group activities where sensitive government buildings are involved. He discusses all of these factors. What is missing from these opinions is any explicit recognition of the importance of orderly demonstrative speech to disadvantaged minorities in a changing society. Black restates the balancing formula, but he does not clearly set forth his precise thinking on the balancing calculation.

From the tenor of these opinions, it is suggested here that if Black makes any effort to apply the balancing test, he finds nothing at all on the free expression side of the scales. One is forced to this

[102] Cox v. Louisiana, 379 U.S. 536, 578 (1965) (concurring in case number 24 and dissenting in case number 49).

conclusion in view of Black's repeated endorsements of the idea that some kinds of demonstrative speech can be absolutely barred by government. Thus he finds it constitutionally appropriate to outlaw all sit-ins in private places of business[103] as well as in a segregated public library.[104]

He said of a picketing demonstration in *Cox v. Louisiana,*[105]

> I have no doubt about the general power of Louisiana to bar all picketing on its streets and highways. Standing, patrolling, or marching back and forth on streets is conduct, not speech, and as conduct can be regulated *or prohibited.*[106] (emphasis added).

I see nothing to stand in the way of the *outlawing of all demonstrative speech* by an entension of this logic.

I think this discussion raises some interesting points of reservation on Justice Black's Amendment I theory. First, it has been my intention here to suggest that his doctrine of a non-abridgeable freedom of speech is constructed in a manner that in fact urges iron-handed restrictions on social interests in free expression which are of the utmost importance now. This is a bewildering comment to have to make about an absolutist theory of Amendment I. Perhaps if his theory is now tested by his own professed goals of assuring a strong Amendment I with the maximum liberty of expression, then his theory must be found wanting.

On the other hand, there is a second, more favorable point to the criticism. In these demonstrative speech cases, where Black finds a balancing test appropriate, he perhaps unwittingly provides some support for his own tireless criticism of the balancing standard in other cases. He laments that not only does the majority employ the test in situations where the words of the Constitution forbid it, but also that the test is vaguely conceived and carelessly applied in a way that gives full reign to a judge's subjective preferences. He notes the major failure of the majority in some balancing cases is to take full and fair account of the stake the whole society has in essential freedoms of expression.[107] He suggests it is too often the case

> [that] when the cherished freedoms . . . emerge from this [balancing] process, they are too weightless to have any substantial effect upon the

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103 Bell v. Maryland, 378 U.S. 226, 318 (1964) (dissenting opinion).

104 Brown v. Louisiana, 383 U.S. 131, 151 (1966) (dissenting opinion).

105 379 U.S. 536 (1965).

106 Cox v. Louisiana, 379 U.S. 536, 581 (1965) (concurring in case number 24 and dissenting in case number 49).

107 Konigsberg v. State Bar, 366 U.S. 36, 71-75 (1961) (dissenting opinion).

> constitutional scales and must therefore be sacrificed in order not to disturb what are conceived to be the more important interests of society.[108]

I think Black's own record supplies some good support for this argument.

VI. A Note on the Undesirability of Absolutes

Most of this article is meant to examine the rigor of Black's reasoning rather than the value of his ideas. A main question of value regarding his Amendment I theory is whether it is desirable to have absolutes in constitutional law at all. Simply put, should there be the attempt to delineate rights beyond all abridgment? There is a thorough literature on this subject,[109] but its importance compels me to add a word on it even if that word is bound to be highly personal.

Black argues for the idea of putting some kinds of rights of expression utterly outside the reach of government. One might respond that it is very difficult for a society to live with absolute rights of free expression. Black urges that in the long run it is much more difficult to do without them. He avers that the great danger of allowing some curbs on free expression is that in times of stress, the public will condone the suppression of vital rights in favor of a deadening orthodoxy. "Misuses of government power" at such times, he says, "has brought suffering to humanity in all ages. . . . Some of the world's noblest and finest men have suffered ignominy and death for no crime—unless unorthodoxy is a crime."[110] He believes that freedom cannot survive if the government has the right to make "reasonable" restrictions on free speech.

I would argue that in general the anti-absolutists have the better of the debate. The decisive reason is that social problems include bundles of important interests, "interests of society pushing in opposite directions,"[111] to quote the last Justice Frankfurter. These clashing

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108 Lathrop v. Donohue, 367 U.S. 820, 872 (1961) (dissenting opinion).

109 *E.g.*, T. Emerson, Toward a General Theory of the First Amendment 53-58 & nn.10-20 (Vintage ed. 1961); Hook, *A Philosopher Dissents in the Case of Absolutes*, in Free Speech and Political Protest 77 (J. Summers ed. 1967); M. Shapiro, Freedom of Speech: The Supreme Court and Judicial Review 76-105 (1966); C.L. Black, *Mr. Justice Black, the Supreme Court, and the Bill of Rights*, 222 Harpers Mag., Feb., 1961, at 63; Frantz, *The First Amendment in the Balance*, 71 Yale L. J. 1424 (1962); Mendelson, *The First Amendment and the Judicial Process: A Reply to Mr. Frantz*, 17 Vand. L. Rev. 479 (1964); Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 Calif. L. Rev. 821 (1962).

110 Black, *The Bill of Rights*, 35 N.Y.U. L. Rev. 865, 879 (1960).

111 Rochin v. California, 342 U.S. 165, 171 (1952).

interests are inseparably combined. To satisfy one is to diminish others. Interests in public security, order, and freedom continuously run counter to the interests of free speech, and I submit that free speech is not so important that it must prevail completely. In fact, as we have seen, Black himself gives only lip service to truly absolute liberty of expression. Respectfully, I have argued that no talismanic slogans about "speech" and "conduct," "direct" and "indirect," afford this alleged absolute a salvation. Far from showing us how to save an utterly unhampered free speech, his qualifications in Amendment I theory affirm the need to reconcile this interest with others in concrete situations.

I have alluded to his admirable statements in the area of the "solid core" of his absolutism. It is here, I think, that he makes arguments against obscenity legislation with a stinging persuasiveness. But even in the core area of absolutes, it is difficult to accept the results of some of his positions. Should Amendment I be taken to mean, as Black says it should, that it strikes down all legal protection for the individual against the vulgar glare of false or distorted publicity? Should the Amendment be read to prevent all legal action against the news media for sensationalistic and inflammatory publicity that might threaten fair trials? Is not the Amendment VI guarantee of a jury trial considered by Black to be another absolute right, and would this right not be seriously damaged if there were not constitutionally permissible regulation of the reportage of trials in the press? Should Amendment I be read to stand in the way of all defamation actions regardless of malice? On this last point alone consider the words of Professor Sidney Hook, one of Black's most searing critics:

> This [Black's rejection of the law of defamation] means that if one falsely charges a person in a position of trust with being an embezzler, or charges a scholar with plagiarism, or a teacher with perverse abuse of his students, or an official with handling over secret documents to enemy agents, or a nurse with poisoning a patient (to mention only a few notorious cases in recent years), and that as a consequence of these false and malicious charges the innocent person's professional life has been ruined, the victim can have no redress from the calumniator. *It is only a matter of words, not of actions, says Justice Black.*[112]

> Indeed, the implications of Black's articulated philosophy are so terrifying that if it were to prevail, the entire structure of human freedom would be more seriously undermined than if the legislative measures

[112] Hook, *supra* note 109, at 78.

> he deplores were multiplied a thousand times over. For Justice Black would strip American citizens of any legal protection against every form of slander, libel or defamation, no matter how grave and irreparable the consequent damage to life, limb, property and reputation. The very foundations of civil society—and not merely of democratic society, whose viability depends more than any other on certain standards of public virtue—would collapse if speech which falsely charged citizens with murder, theft, rape, arson and treason was regarded as public discussion and hence privileged under the law.[113]

This condemnation may be excessively strong, but even when tempered down, it solidly supports the argument that the responsibility of the courts should be to seek the maximum latitude for Amendment I liberties while at the same time striving toward other rightful social interests which are imperatives of a just and healthy society. In many cases Black's view would sacrifice such interests by his insistence of perceiving only one facet of many-sided constitutional problems.

VII. CONCLUSION

Black's theory of Amendment I is viewed as deficient when judged by the standards of precision in applicability, a standard that Black himself sets, and by its policy results. Black's rigid dichotomies of "speech" versus "conduct" and "direct" versus "indirect" are, in general, difficult to apply and invite subjective judgment. Only in a few limited areas is a "core" of absolutes readily definable by his criteria. The major deficiency in policy results in Black's somewhat intolerant attitude toward demonstrative speech. Protection for this form of expression is undermined by Black's categorization of it as "conduct" and also by his use of an overdrawn concept of the prerogative of a private or public property owner to deny rights of expression of dissenting ideas through protest. Indeed, if the latter tenet—the prerogative of the property owner—were exploited to its fullest, then almost any statement of views might be restricted by government or by a private businessman excercising his "custodial" authority. With respect to demonstrative speech, then, it is evident that Black's absolute Amendment I provides less protection for earnest expression of important views than some of his non-absolutist brothers would want to guarantee. Moreover, it is the argument of this author that Black's Amendment I would provide complete safety for some kinds of expression (defamation, invasion of privacy, trial publicity) which probably do not deserve immunity from all official interference. Taken as a whole,

[113] *Id.* at 83-84.

it seems to me that Black's Amendment I approach is a good illustration of the extreme difficulty of constructing a flatly absolutist theory that works with the precision of a buzz saw and is consistent with good policy results. While it may be desirable to consider some phases of Amendment I law as absolute, it seems for the most part better to litigate the Amendment in terms of the vagaries of some less ambitious theory.