FREEDOM OF EXPRESSION IN WARTIME *

THOMAS I. EMERSON †

War and preparation for war create serious strains on a system of freedom of expression. Emotions run high, lowering the degree of rationality which is required to make such a system viable. It becomes more difficult to hold the rough give-and-take of controlled controversy within constructive bounds. Immediate events assume greater importance; long-range considerations are pushed to the background. The need for consensus appears more urgent in the context of dealing with hostile outsiders. Cleavage seems to be more dangerous, and dissent more difficult to distinguish from actual aid to the enemy. In this volatile area the constitutional guarantee of free and open discussion is put to its most severe test.

It is not surprising, therefore, that throughout our history periods of war tension have been marked by serious infringements on freedom of expression. The most violent attacks upon the right to free speech occurred in the years of the Alien and Sedition Acts, the approach to the Civil War, the Civil War itself, and World War I—all times of war or near-war.[1] Yet it was not until the end of World War I that judicial application of the first amendment played any significant role in these events. Up to this point there had been no major decision by the Supreme Court applying the guarantees of the first amendment. Then, in 1919, the Court issued the first of a series of decisions dealing with federal and state legislation that had been enacted to restrict free expression during the war, and thus began the long development of first amendment doctrine.

During World War II, in contrast to prior wartime periods, freedom of speech to oppose the war or criticize its conduct was not seriously infringed. This unusual turn of events may have been due, in part, to the increasing judicial protection afforded free expression through the first amendment, particularly by the liberal decisions which began in 1930 under the Hughes Court, and the ensuing education of public opinion that those decisions engendered. Some of these gains

* This article is a chapter in a forthcoming book on freedom of expression.

† Lines Professor of Law, Yale University. A.B. 1928, LL.B. 1931, Yale University.

1 For a collection of materials dealing with these periods, see 1 T. EMERSON, D. HABER & N. DORSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 35-38 (3d ed. 1967) [hereinafter cited as POLITICAL AND CIVIL RIGHTS].

were lost during the McCarthy era in the early 1950's, which coincided with the hostilities in Korea. On the whole, however, the free speech issues of that period did not relate directly to the war itself, but rather to a more general fear of Communism within the United States.

At the present time, during the Vietnam hostilities, the controversy over freedom of speech in wartime has moved to another level. The general right to oppose the war by speech is fully recognized, but there are, as always, serious problems of realizing in practice the acknowledged rights guaranteed in theory. More important, however, new modes of opposition have developed which raise different issues concerning the border area between expression and action.

The purpose of this article is to explore some of these questions, employing first amendment doctrines I have proposed elsewhere.[2] In briefest summary, the thesis of these doctrines is that maintenance of a system of freedom of expression requires recognition of the distinction between those forms of conduct which should be classified as "expression" and those which should be classified as "action"; and that conduct classifiable as "expression" is entitled to complete protection against governmental infringement, while "action" is subject to reasonable and non-discriminatory regulation designed to achieve a legitimate social objective. Under this theory, "expression" is functionally defined. The definition is based upon the individual and social purposes served by freedom of expression in a democratic society; upon the administrative requirements for maintaining an effective system of free expression in actual operation; and upon the proposition that, normally, harm inheres not in such conduct itself, but resides only in the ensuing "action." This theory requires the court to determine in every case whether the conduct involved is "expression," and, if so, whether such expression has been infringed by the exercise of governmental authority. Where the court so finds, the regulation must be declared invalid under the first amendment. The test is not one of clear and present danger, of incitement or balancing of interests. The balance of interests was struck when the first amendment was put into the Constitution. The function of a court in applying the first amendment is to define the key terms of that provision: "speech" (or expression), "abridge," and "law." The definitions of "abridge" and "law," like the definition of "expression," must be functional in character, derived from the basic considerations underlying a system of freedom of expression. Where the court finds that "expression" is

---

2 T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (1966). The material was first published in an article of the same title in 72 YALE L.J. 877 (1963).

"abridged" by "law," the doctrine of full protection for expression must be applied.

This article deals with the main problem areas concerning freedom of expression as it relates to war and defense.[3] These areas include (1) the law of treason; (2) general criticism of the war effort; (3) more specific forms of expression which may lead to insubordination in the armed forces, obstruction of recruitment, or resistance to conscription; (4) other forms of protest; and (5) practical problems of protecting wartime dissent against illegitimate harassment. Issues relating to marches and demonstrations, issues which do not differ greatly from those involved in the right of assembly generally, are not covered here.

I. The Law of Treason

Historically, one of the major legal weapons employed by governments to protect themselves against external and internal dangers has been the crime of treason. In England before the nineteenth century, and to a lesser extent in the American colonies, treason was given a very broad definition. It was used to eliminate almost any form of political opposition, violent or peaceful, by action or by utterance. When the American revolutionaries came to draw up the Constitution they took particular care to give the crime of treason a limited meaning and

---

[3] One factor requires brief notice here. When dealing with freedom of expression connected with war or defense, there must be some delineation of the boundaries between the civilian and military sectors of our society. Generally speaking, the military sector embraces the conduct of military operations and the internal governance of the military establishment. The latter includes the military law governing the armed forces, martial law, and military government of occupied territory. This military system is outside the civilian system of freedom of expression and is subject to different rules. *See generally,* Bishop, *Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions,* 61 Colum. L. Rev. 40 (1961); Warren, *The Bill of Rights and the Military,* 37 N.Y.U.L. Rev. 181 (1962); Note, *Constitutional Rights of Servicemen Before Courts-Martial,* 64 Colum. L. Rev. 127 (1964); Note, *The Court of Military Appeals and the Bill of Rights: A New Look,* 36 Geo. Wash. L. Rev. 435 (1967); Note, *Servicemen in Civilian Courts,* 76 Yale L.J. 380 (1966).

The problem, then, is to determine when civilian expression enters the domain of the military, and when members of the military are under the protection of the civilian system. Some of the points of contact are clear. Certainly, general discussion of the organization, procedures or operations of the military by civilians is well within the system of free expression, indeed is essential to maintaining the principle of civilian control. Similarly, expression dealing with all facets of the civilian economy which supplies the armed forces is part of the civilian sector. On the other hand, communications dealing with military movements in wartime are plainly subject to military censorship. Likewise, dissemination of information classified as a military secret is subject to controls based on the requirements of the military system, although the issue of what constitutes a military secret may be subject to civilian judicial review. Access to military installations for purposes of exercising the right of free speech is also subject to different rules than is access to non-military public places. More difficult questions involve the extent to which civilian communication can be addressed across the border to members of the military, as in the insubordination cases, and the rights of a member of the military to enjoy the benefits of the free expression system when temporarily acting in a civilian capacity.

to surround it with procedural safeguards. The provision they included in the Constitution, one of the few protections for individual rights embodied in the original document, reads as follows:

> Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.[4]

Thus, the crime of treason is given an express constitutional definition which cannot be extended by any act of the legislature or judiciary. The statute which officially establishes the offense follows the constitutional provision, simply making it explicit that the crime can be committed "within the United States or elsewhere." [5]

The treason provision of the Constitution has been uniformly interpreted to mean that the crime of treason cannot be committed solely through expression, but only through some form of action. This interpretation is based in part upon the constitutional requirement of an overt act. However, it is primarily an attempt to follow the intent of the framers. In *Cramer v. United States*,[6] the leading decision concerning the treason provision, the Court said: "Historical materials aid interpretation chiefly in that they show two kinds of dangers against which the framers were concerned to guard the treason offense: (1) perversion by established authority to repress peaceful political opposition . . . ." [7] It added: "The concern uppermost in the framers' minds, that mere mental attitudes or expressions should not be treason, influenced both definition of the crime and procedure for its trial." [8] The dissenters, disagreeing with the majority on the extent to which the required "overt act" must indicate the whole crime, agreed that expression alone could not constitute treason: "[T]he requirement of an overt act is designed to preclude punishment for treasonable plans or schemes or hopes which have never moved out of the realm of thought or speech." [9]

Under the treason provision, therefore, the test is not whether the expression has a tendency to aid and comfort the enemy, or presents a clear and present danger of doing so. Nor is the interest in national

[4] U.S. CONST. art. III, § 3. On the history of the law of treason and the adoption of the treason provision in the Constitution, *see* Cramer v. United States, 325 U.S. 1, 8-35 (1945); Hurst, *Treason in the United States*, 58 HARV. L. REV. 226, 395, 806 (1944-45); materials cited in POLITICAL AND CIVIL RIGHTS 74-75.

[5] 18 U.S.C. § 2381 (1964).

[6] 325 U.S. 1 (1945).

[7] *Id.* at 27.

[8] *Id.* at 28.

[9] *Id.* at 61. For further material in support of the proposition, see Hurst, *Treason in the United States*, 58 HARV. L. REV. 806, 830-31 (1945).

security balanced against the interest in freedom of expression. Rather, the test is whether the conduct in question constitutes expression or action. While in most of the decided cases the activity alleged to be treasonous has clearly come within the action category, a group of cases arising out of World War II present a closer issue. In *Gillars v. United States*,[10] it was charged that the defendants were guilty of treason in making broadcasts from enemy territory under the sponsorship of the enemy government, as part of the psychological warfare directed against American soldiers and citizens. The argument that the broadcasts constituted only expression and hence could not be treason was rejected by Judge Charles Fahy in the following terms:

> While the crime [of treason] is not committed by mere expression of opinion or criticism, words spoken as part of a program of propaganda warfare, in the course of employment by the enemy in its conduct of the war against the United States, to which the accused owes allegiance, may be an integral part of the crime. There is evidence in this case of a course of conduct on behalf of the enemy in the prosecution of its war against the United States. The use of speech to this end, as the evidence permitted the jury to believe, made acts of words.[11]

The court seems quite right in construing the conduct in the broadcast cases as constituting "action" rather than "expression." The more significant point, however, is the recognition that, under the law of treason, expression is fully protected and only action (even when the charge is treason) is subject to governmental sanctions.

This interpretation of the treason clause is arrived at independently of the first amendment. Indeed, at the time the treason provision was included in the Constitution the first amendment was not yet a part of that document. But the same result should be reached by way of the first amendment. It is clear that this amendment applies to prosecutions for treason, as it does to the exercise of all other governmental powers. And the basic test for the first amendment's protection, that expression must be distinguished from action, is the same as that which is in fact used in interpreting the treason clause. The treason provision, both in theory and in practice, thus lends support to the

[10] 182 F.2d 962 (D.C. Cir. 1950).

[11] The same result could be reached by considering punishment for broadcasting on behalf of an enemy in time of war justified as falling within the sphere of military operations, *see* note 3 *supra*, and thus not within the system of freedom of expression. This seems to have been the theory in a similar case in which the opinion was rendered by Judge Calvert Magruder. Chandler v. United States, 171 F.2d 921 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949). For other broadcasting cases, which did not find it necessary to discuss the expression-action problem, see D'Aquino v. United States, 192 F.2d 338 (9th Cir. 1951), *cert. denied*, 343 U.S. 935 (1952); Best v. United States, 184 F.2d 131 (1st Cir. 1950), *cert. denied*, 340 U.S. 939 (1951).

position that the first amendment affords full protection to all conduct classifiable as "expression."

The crime of treason, of course, does not exist at all in the absence of a declared war. It thus has played no part in connection with protests against the Vietnam conflict.

II. General Criticism of War or Defense Effort

During the Civil War, opposition which took the form of expression was controlled, to the extent that any control was attempted, by executive measures. In general, the problem was considered to be military in nature, and was dealt with in the same way as was the military conduct of the war. The writ of habeas corpus was suspended and many persons accused of disloyal utterances were confined to military prisons. In some areas martial law was declared and the press shut down or censored. The Post Office was closed to "treasonable correspondence" and passport controls were instituted.[12]

During World War I, restrictions on antiwar expression, which were both widespread and intensive, were based primarily upon specific legislation enacted for that purpose. The Espionage Act of 1917,[13] in addition to dealing with actual espionage[14] and protection of military security, provided:

> Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both.[15]

---

[12] *See generally*, H. Nelson, Freedom of the Press from Hamilton to the Warren Court 221-47 (1966); J. Randall, Constitutional Problems Under Lincoln (rev. ed. 1951); D. Sprague, Freedom Under Lincoln (1965); and materials collected in Political and Civil Rights 45-48.

[13] Act of June 15, 1917, ch. 30, tit. I, 40 Stat. 217.

[14] Perhaps a word should be added concerning the classification of espionage as "action." It is true that espionage usually involves the communication of information, and this standing alone would normally be considered "expression." But espionage realistically takes place in a context of action; the espionage apparatus is engaged primarily in conduct that dwarfs any element of expression. Moreover, most espionage consists of conveying information concerning military secrets and would fall within the system of military operations. Hence espionage is not that form of civilian, domestic expression that is embraced within the system of freedom of expression.

[15] Act of June 15, 1917, ch. 30, § 3, 40 Stat. 219, *as amended* 18 U.S.C. § 2388(a) (1964).

Another provision of the Act made punishable the mailing of any matter advocating treason, insurrection, forcible resistance to any law of the United States, or violating any of the other provisions of the Act.[16]

In 1918 the Espionage Act was amended[17] to bring within its prohibitions a variety of other offenses, including saying or doing anything with intent to obstruct the sale of United States bonds, except by way of bona fide and not disloyal advice; uttering, printing, writing, or publishing any language intended to incite resistance to the United States or promote the cause of its enemies, or any disloyal, profane, scurrilous, or abusive language, or language intended to cause contempt, scorn, contumely or disrepute regarding the form of government of the United States, the Constitution, the flag, or the uniform of the Army or Navy; urging any curtailment of production of any things necessary to the prosecution of the war with intent to hinder its prosecution; advocating, teaching, defending, or suggesting the doing of any of these acts; and speaking or acting in support or favor of the cause of any country at war with the United States.[18] Many states enacted similar legislation, some of it even more broadly worded.

These laws were vigorously enforced. Almost two thousand prosecutions were brought under the federal statutes and many others under the state legislation. The resulting suppression has been described by Professor Chafee:

> It became criminal to advocate heavier taxation instead of bond issues, to state that conscription was unconstitutional though the Supreme Court had not yet held it valid, to say that the sinking of merchant ships was legal, to urge that a referendum should have preceded our declaration of war, to say that war was contrary to the teachings of Christ. Men have been punished for criticizing the Red Cross and the Y.M.C.A., while under the Minnesota Espionage Act it has been held a crime to discourage women from knitting by the remark, "No soldier ever sees those socks."[19]

As a result of these wartime prosecutions the attention of the courts was directed to the constitutional protection of free speech em-

---

16 Act of June 15, 1917, ch. 30, tit. XII, 40 Stat. 230, *as amended* 18 U.S.C. § 1717 (1964).

17 Act of May 16, 1918, ch. 75, 40 Stat. 553, *repealed,* Act of March 3, 1921, ch. 136, 41 Stat. 1360.

18 *Id.* The summary is taken from Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 40-41 (1941).

19 Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 51-52 (1941). For other material on the status of freedom of expression in World War I, see POLITICAL AND CIVIL RIGHTS 60-61; Note, *Legal Techniques for Protecting Free Discussion in Wartime,* 51 YALE L.J. 798 (1942).

bodied in the first amendment. Ultimately a number of cases reached the Supreme Court, although no decisions were rendered until after the war was over. It was in these cases, as noted above, that the Supreme Court began the remarkable development of first amendment doctrine which has continued to the present day. At the outset, however, the development was hesitant and faltering. In every case the Court, applying the clear and present danger test, rejected first amendment claims.

The first decision, *Schenck v. United States*,[20] illustrates the Court's attitude and approach. Schenck, who was general secretary of the Socialist Party, and others, were indicted under the Espionage Act of 1917 for conspiring to obstruct recruiting and cause insubordination in the armed forces. The charge was based upon the fact that Schenck had distributed a leaflet opposing the war and the draft, some of the copies of which had reached men who had been drafted. Mr. Justice Holmes, speaking for the Court, described the leaflet as follows:

> The document in question upon its first printed side recited the first section of the Thirteenth Amendment, said that the idea embodied in it was violated by the Conscription Act and that a conscript is little better than a convict. In impassioned language it intimated that conscription was despotism in its worst form and a monstrous wrong against humanity in the interest of Wall Street's chosen few. It said "Do not submit to intimidation," but in form at least confined itself to peaceful measures such as a petition for repeal of the act. The other and later printed side of the sheet was headed "Assert Your Rights." It stated reasons for alleging that any one violated the Constitution when he refused to recognize "your right to assert your opposition to the draft," and went on "If you do not assert and support your rights, you are helping to deny or disparage rights which it is the solemn duty of all citizens and residents of the United States to retain." It described the arguments on the other side as coming from cunning politicians and a mercenary capitalist press, and even silent consent to the conscription law as helping to support an infamous conspiracy. It denied the power to send our citizens away to foreign shores to shoot up the people of other lands, and added that words could not express the condemnation such cold-blooded ruthlessness deserves, &c., &c., winding up "You must do your share to maintain, support and uphold the rights of the people of this country." [21]

---

[20] 249 U.S. 47 (1919).

[21] *Id.* at 50-51.

On the first amendment issue Justice Holmes' opinion was abrupt and begrudging. "It may well be," he said, "that the prohibition of laws abridging the freedom of speech is not confined to previous restraints." [22] But he made it clear that the first amendment did not protect all speech: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." [23] He then went on to enunciate the clear and present danger test:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.[24]

Without specifically finding that the leaflet without more created such a clear and present danger, the opinion concluded by affirming the convictions.

Other cases went even further in sanctioning curtailment of wartime expression under the Espionage Act of 1917. Eugene V. Debs, the Socialist leader, was prosecuted for creating insubordination in the armed forces on the basis of a speech in which he denounced the war as a capitalist plot and supported fellow socialists who had been convicted of resisting the draft. His most extreme statement was, "You need to know that you are fit for something better than slavery and cannon fodder." [25] Debs was given a ten-year sentence and the Supreme Court unanimously upheld the conviction.[26] The officers of a German-language newspaper were found guilty of violating the provision against false news reports in publishing articles slanted toward the German position.[27] And Victor Berger's *Milwaukee Leader* was denied second-class mailing privileges for printing editorials, strongly pro-German in tone, attacking the war and the draft.[28] The extreme provisions of the 1918 amendments to the Espionage Act were likewise upheld in *Abrams v. United States*,[29] where the defend-

[22] *Id.* at 51.

[23] *Id.* at 52.

[24] *Id.*

[25] Debs v. United States, 249 U.S. 211, 214 (1919).

[26] 249 U.S. 211. Debs, aged 63, served in prison from April 13, 1919, until Christmas Day 1921, when President Harding released him without restoration of citizenship. In 1920, while in prison, Debs ran for President on the Socialist ticket, receiving 919,799 votes.

[27] Schaefer v. United States, 251 U.S. 466 (1920).

[28] United States *ex rel.* Milwaukee Social Democrat Publishing Co. v. Burleson, 255 U.S. 407 (1921). For denial of second class mailing privileges for even less outspoken material, see Masses Publishing Co. v. Patten, 246 F. 24 (2d Cir.), *reversing* 244 F. 535 (S.D.N.Y. 1917) (L. Hand, J.).

[29] 250 U.S. 616 (1919). For a collection of cases and materials, see POLITICAL AND CIVIL RIGHTS 77-83.

ants had thrown, out of a window and into the street, militantly worded leaflets calling for a general strike. Starting with the *Abrams* case, Justices Holmes and Brandeis began to express dissenting views. But a majority of the Court held firmly to the position that any expression which showed a tendency to interfere with the war effort could validly be suppressed. The clear and present danger test, while accepted in theory, was not applied in practice to check this result.

At the outbreak of World War II, statutes restricting wartime dissent were on the books, ready to be enforced. Although the 1918 amendments to the Espionage Act were repealed in 1921 [30] and have never been revived, the original 1917 Act,[31] applicable only in time of war, remained in force. The passage of the Smith Act in 1940,[32] moreover, added a somewhat similar provision not limited to wartime. This provision made it unlawful

> for any person, with intent to interfere with, impair, or influence the loyalty, morale or discipline of the military or naval forces of the United States—
>
> (1) to advise, counsel, urge or in any manner cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces of the United States; or
>
> (2) to distribute any written or printed matter which advises, counsels, or urges insubordination, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces of the United States.[33]

And the Selective Service and Training Act of 1940,[34] the first draft law enacted after World War I, established criminal penalties for any person "who knowingly counsels, aids, or abets another to evade registration or service" or any of the requirements of the Act.[35]

The Espionage Act of 1917, the Smith Act, and the Selective Service and Training Act of 1940 continued in effect throughout World War II. Nevertheless, by this time both judicial and public attitudes toward general criticism of the war had somewhat mollified. There were a few prosecutions under the Espionage Act of 1917 but only one case reached the Supreme Court; [36] there, a conviction was

30 Act of March 3, 1921, ch. 136, 41 Stat. 1360.

31 Act of June 15, 1917, ch. 30, tit. I, 40 Stat. 217.

32 Act of June 28, 1940, ch. 439, §§ 1-5, 54 Stat. 670, *as amended* 18 U.S.C. § 2387 (1964).

33 *Id.* § 1(a).

34 Act of Sept. 16, 1940, ch. 720, 54 Stat. 885, *as amended* 50 U.S.C. App. § 462(a) (1964) [hereinafter referred to as section 462(a)].

35 *Id.* § 11(a).

36 Hartzel v. United States, *322* U.S. 680 (1944). *See also* United States v. Pelley, 132 F.2d 170 (7th Cir. 1942), *cert. denied,* 318 U.S. 764 (1943).

reversed for want of sufficient evidence, the Court not reaching the first amendment issues. A prosecution was commenced in the District of Columbia against twenty-eight alleged pro-Nazis for conspiracy to violate the insubordination provisions of the Smith Act. But the trial judge died after seven months of trial and the prosecution was not reinstituted.[37] A prosecution was also instituted against eighteen members of the Socialist Workers Party in Minneapolis under these and other provisions of the Smith Act. Here a conviction was obtained and affirmed by the court of appeals, the Supreme Court denying certiorari.[38] The one conviction under the Selective Service Act which came before the Supreme Court was reversed for want of sufficient evidence.[39]

The new attitude and changed position of the Supreme Court were clearly reflected in *Taylor v. Mississippi*,[40] the only case it decided during World War II involving a state sedition law. Two members of the Jehovah's Witnesses had been convicted under a Mississippi statute prohibiting the teaching or dissemination of literature "designed and calculated to encourage violence, sabotage, or disloyalty to the government of the United States, or the state of Mississippi." [41] They were charged with making statements such as "It was wrong for our President to send our boys across in uniform to fight our enemies," and "these boys were being shot down for no purpose at all." The Supreme Court unanimously reversed. Although the doctrinal basis of the decision is not precisely stated, the point of view is clear:

> The statute as construed in these cases makes it a criminal offense to communicate to others views and opinions respecting government policies, and prophecies concerning the future of our own and other nations. As applied to the appellants, it punishes them although what they communicated is not claimed or shown to have been done with an evil or sinister purpose, to have advocated or incited subversive action against the nation or state, or to have threatened any clear and present danger to our institutions or our Government. What these appellants communicated were their beliefs and opinions concerning domestic measures and trends in national and world affairs.

---

37 *See* United States v. McWilliams, 54 F. Supp. 791 (D.D.C. 1944). The indictment was later dismissed for failure to prosecute. United States v. McWilliams, 163 F.2d 695 (D.C. Cir. 1947).

38 Dunne v. United States, 138 F.2d 137 (8th Cir. 1943), *cert. denied*, 320 U.S. 790 (1943).

39 Keegan v. United States, 325 U.S. 478 (1945). *See generally*, on the World War II cases, POLITICAL AND CIVIL RIGHTS 83-84; Note, *The Effect of the First Amendment on Federal Control of Draft Protests*, 13 VILL. L. REV. 347, 348-54 (1968).

40 319 U.S. 583 (1943).

41 *Id.* at 584.

> Under our decisions criminal sanctions cannot be imposed for such communication.[42]

The right of dissent in wartime has recently become a major issue once again with the escalation of hostilities in Vietnam. The existing statutory base for imposing restrictions on antiwar protest (in the form of expression rather than action) consists of:

(1) The Espionage Act of 1917.[43] In its original form this legislation was to be in effect only "when the United States is at war," and of course no official declaration of war has been made. In 1953, however, Congress enacted legislation providing that the Espionage Act of 1917 should remain in force "until six months after the termination of the national emergency proclaimed by the President on December 16, 1950 . . . or such earlier date as may be prescribed by concurrent resolution of Congress." [44] The 1950 proclamation of national emergency has continued in effect.[45]

(2) The Smith Act of 1940.[46] The provision quoted above [47] remains unchanged.

(3) The Universal Military Training and Service Act of 1948 [48] (also known as the Selective Service Act). This statute, a successor to the Selective Service and Training Act of 1940,[49] now provides that anyone "who knowingly counsels, aids, or abets another to refuse or evade registration in the armed forces or any of the requirements of this title," or anyone "who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this title . . . or the rules or regulations made pursuant thereto," is guilty of an offense punishable by five years in prison or a $10,000 fine, or both.[50]

Despite the wording of these statutes, and their very early interpretations, it is now completely clear that general opposition to the

---

[42] *Id.* at 590 (footnotes omitted).

[43] Act of June 15, 1917, ch. 30, tit. I, 40 Stat. 217.

[44] Act of June 30, 1953, ch. 175, 67 Stat. 133, *as amended* 18 U.S.C. § 2391 (1964).

[45] Proclamation No. 2914, 3 C.F.R. 99 (Supp. 1958), 50 U.S.C. App. at 9497 (1964).

[46] Act of June 28, 1940, ch. 439, §§ 1-5, 54 Stat. 670, *as amended* 18 U.S.C. § 2387 (1964).

[47] Text accompanying note 33 *supra.*

[48] 50 U.S.C. App. § 462(a) (1964).

[49] Act of Sept. 16, 1940, ch. 720, 54 Stat. 885.

[50] 50 U.S.C. App. § 462(a) (1964). For some of the state laws in the area, see Note, *The States, the Federal Constitution, and the War Protestors,* 53 CORNELL L. REV. 528, 535-36 (1968).

war or defense effort, no matter how vigorously asserted, is constitutionally protected. The fact that such expression might reach members of the armed forces or have some detrimental effect on the operation of the draft is not sufficient reason for denying that protection. The case of *Bond v. Floyd*,[51] decided in 1966, makes this clear.

Julian Bond, a Negro, had been elected to the Georgia House of Representatives. He was refused his seat by the legislature because of statements by him opposing the draft and criticizing United States policies in Vietnam. Among the offending statements was one by the Student Non-violent Coordinating Committee, which Bond, then SNCC's Communications Director, had endorsed. It declared in part:

> We believe the United States government has been deceptive in its claims of concern for freedom of the Vietnamese people, just as the government has been deceptive in claiming concern for the freedom of colored people in such other countries as the Dominican Republic, the Congo, South Africa, Rhodesia and in the United States itself.
>
> . . . .
>
> Samuel Young [a Negro] was murdered because United States law is not being enforced. Vietnamese are murdered because the United States is pursuing an aggressive policy in violation of international law. The United States is no respecter of persons or law when such persons or laws run counter to its needs and desires.
>
> . . . .
>
> . . . We maintain that our country's cry of "preserve freedom in the world" is a hypocritical mask behind which it squashes liberation movements which are not bound, and refuse to be bound, by the expediencies of United States cold war policies.
>
> We are in sympathy with, and support, the men in this country who are unwilling to respond to a military draft which would compel them to contribute their lives to United States aggression in Viet Nam in the name of the "freedom" we find so false in this country.
>
> . . . .
>
> We therefore encourage those Americans who prefer to use their energy in building democratic forms within this country. We believe that work in the civil rights movement and with other human relations organizations is a valid alternative to the draft. We urge all Americans to seek this alternative, knowing full well it may cost their lives—as painfully as in Viet Nam.[52]

[51] 385 U.S. 116 (1966).
[52] *Id.* at 119-21.

The Supreme Court unanimously held that the refusal to seat Bond violated his first amendment rights. As to the right of general opposition to the Vietnam war the Court said:

> Certainly there can be no question but that the First Amendment protects expressions in opposition to national foreign policy in Vietnam and to the Selective Service system. The State does not contend otherwise.[53]

If one compares the statement upheld in the *Bond* case with those denied protection in *Schenk* and *Debs*, the distance traversed in first amendment interpretation is quite apparent. The development had taken place in decisions relating to first amendment protection of expression in circumstances not involving wartime dissent, but the *Bond* case confirmed the application of the broader meaning of the first amendment to the war and defense situation.

In doctrinal terms, however, the *Bond* case is not very enlightening. The Court simply declared that the statement in question was protected by the first amendment and found no need to elaborate. There was no talk of clear and present danger, or of balancing. The *Bond* case does suggest, however, that the doctrine demanding complete protection for expression has strong judicial support in this area. Free and open discussion of war and defense issues is essential to the life of a democracy. As the World War I experience demonstrates, restrictions on speech of this character, whereby "expression" as well as "action" is inhibited, can easily reach such proportions and have such a stifling effect as to bring the nation close to a police state.

Thus, in the mid-1960's, the general right to express strong dissent to war and defense policies has been broadly accepted, certainly in theory if not always in practice. Both government officials and public opinion have come, if not to appreciate the full value, at least to recognize the inevitability of such protest in a society that aspires to remain democratic.[54] By this time, indeed, the legal issues have shifted and the question is no longer one involving the general right of open dissent. The controversial areas have become (1) the extent to which the first amendment protects expression specifically urging

---

[53] *Id.* at 132.

For a discussion of the *Bond* case, see Finegold, *Julian Bond and the First Amendment Balance*, 29 U. PITT. L. REV. 167 (1967). *See also* Wolin v. Port of New York Authority, 392 F.2d 83 (2d Cir. 1968), upholding the right to distribute anti-war leaflets in the Port Authority terminal; Kissinger v. New York City Transit Authority, 274 F. Supp. 438 (S.D.N.Y. 1967), holding that the New York City Transit Authority, which rented advertising space in the subways, could not refuse advertising in the form of anti-war posters.

[54] *See, e.g.*, President Johnson's press conference reported in the N.Y. Times, Nov. 18, 1967, at 1, col. 1.

resistance to the Selective Service laws; and (2) the constitutional line between "expression" and "action" employed in various forms of protest.

III. Expression Specifically Urging or Advising Insubordination or Resistance to the Draft

As dissent concerning war or defense policy moves from the general to the particular, it begins to raise more controversial questions. And as it is directed towards the armed forces and their system of recruiting, it touches especially sensitive areas. These are precisely the issues which opposition to the Vietnam war has brought to the fore today, and which the courts must now face.

Unfortunately, existing case law on the subject is sparse, mostly out of date, and generally unsatisfactory. Shortly after enactment of the 1948 Selective Service Act several cases were brought under section 462(a). One case involved Dr. Wirt A. Warren, a Kansas physician. Dr. Warren was a Unitarian and a pacifist, opposed to all wars on religious grounds. He "advised, counseled and urged" his stepson not to register for the draft and offered to provide funds for him to go to Canada or Mexico. The stepson rejected the advice and registered. Dr. Warren was convicted and sentenced to two years in prison; his conviction was upheld on appeal.[55] The Supreme Court denied certiorari.[56] On the first amendment issue, the court of appeals' view was

> Freedom of religion and freedom of speech, guaranteed by the First Amendment, with respect to acts and utterances calculated to interfere with the power of Congress to provide for the common defense and to insure the survival of the nation are qualified freedoms. They may not be construed so as to prevent legislation necessary for national security, indeed, that may be necessary for our survival as a nation.[57]

In another case, Larry Gara, Dean of Men at Bluffton College (a Mennonite institution), was prosecuted under the same provision. Dean Gara was a Quaker who had himself refused to register in World War I and considered it his religious duty to oppose all forms of cooperation with war. He had consistently advocated that men of draft age, who opposed war on grounds of conscience, should refuse to register. The particular incident for which Gara was indicted

[55] Warren v. United States, 177 F.2d 596 (10th Cir. 1949).
[56] 338 U.S. 947 (1950).
[57] 177 F.2d at 599 (footnote omitted).

involved a student at the college who was arrested for failing to register. Gara, present at the arrest, said to the student, "Do not let them coerce you into registering." The district court held that, since the student had a continuing duty to register, this counsel violated the Act. The court of appeals affirmed the conviction.[58] On the first amendment issue, the court conceded that general expression of opinion opposed to the Selective Service Act "might well be protected." But it held that this protection did not extend to counseling others to violate the law, "the counseling being also expressly forbidden by statute":

> No decision has been handed down by the Supreme Court holding that violation of an express statute enacted by Congress in the exercise of its constitutional power to provide for the common defense is excused under the First Amendment because the acts of violation are consummated, as counseling always must be, through the medium of words.[59]

The Supreme Court, dividing four to four, affirmed without opinion.[60]

While the *Warren* and *Gara* cases indicate the nature of the problem, neither opinion throws much light on the first amendment issue. The courts simply failed to come to grips with the question, at least in terms that would be required by the first amendment theory enunciated above.

The later decision of the Supreme Court in *Bond v. Floyd*,[61] already mentioned, is not much more helpful. The Court there expressly held that "Bond could not have been constitutionally convicted under 50 U.S.C. App. § 462(a)." [62] His statements "were at worst unclear on the question of the means to be adopted to avoid the draft" and did "not demonstrate any incitement to violation of law." [63] The Court was plainly moving away from the *Warren* and *Gara* cases. But it did not make clear how far it would go, nor did it elaborate the doctrinal basis of its holding. Further analysis of the problem is necessary.

If one examines the actual forms of communication employed in opposition to the draft during the Vietnam war, they appear to fall into three categories, representing a progression. The first category comprises that expression which does not specifically advise or urge anyone to violate existing law. Many persons, of course, have urged others not to enlist voluntarily in the armed services. Many individuals and groups offer advice about the rights of conscientious objectors and the

---

[58] Gara v. United States, 178 F.2d 38 (6th Cir. 1949).
[59] *Id.* at 41.
[60] 340 U.S. 857 (1950).
[61] 385 U.S. 116 (1966).
[62] *Id.* at 133.
[63] *Id.* at 133-34.

most effective way to present a case for a conscientious objector classification. Others go further and urge potential draftees to file conscientious objector forms, whether or not they are clearly qualified, and even though it may burden the Selective Service machinery.

The second category is made up of communication which advises or urges persons of draft age not to register, not to submit to induction, or not to cooperate with the Selective Service system in other ways. Such advice or exhortation may be limited to support of those who already have moral or religious scruples against service in the armed forces, or it may be addressed to a wider audience. In either case the action urged, if taken by the draftee, would constitute a violation of the Selective Service Act. The communication might vary widely in its impact, depending on such factors as whether it was in writing or in speech, addressed to a large group or to an individual, couched mildly as advice or intensely as urging, issued by an individual or by an organization, or uttered outside an induction center or at a dinner in the ballroom of a luxury hotel.

Expression urging or advising this form of resistance to the draft has been widespread and open. In September of 1967, for example, a group of 320 ministers, professors, writers, and others, many of them well known in their several fields, signed a document entitled "A Call to Resist Illegitimate Authority." In it they recounted various methods of resistance to the war being used by different persons, noting that "some are refusing to be inducted." The signers approved these efforts, saying: "We believe that each of these forms of resistance against illegitimate authority is courageous and justified." [64] Shortly afterwards, eighteen Protestant, Roman Catholic, and Jewish leaders, joined by fifty delegates to the United States Conference on Church and Society, issued a public statement in which they declared: "We hereby publicly counsel all who in conscience cannot today serve in the armed forces to refuse such service by non-violent means." [65] Similar expressions have been made by numerous organizations and individuals.

The constitutional issues involved in this form of expression seem to be raised by the indictment, in January of this year, of five members of the group which had issued "A Call to Resist Illegitimate Authority." The defendants, Rev. William Sloane Coffin, Jr., Michael Ferber, Mitchell Goodman, Marcus Raskin, and Dr. Benjamin Spock, were charged with conspiracy to "counsel, aid and abet diverse Selective Service registrants" to "refuse and evade service" and to "fail and refuse to have in their personal possession" registration certificates and

64 THE NEW REPUBLIC, Oct. 7, 1967, at 35.
65 N.Y. Times, Oct. 26, 1967, at 10, col. 8.

notices of classification (draft cards), as required by the Selective Service regulations; and with conspiracy to "hinder and interfere" with the administration of the Selective Service Act, all in violation of section 462(a).[66] More specifically, the alleged conspiracy is that the defendants agreed that they "would sponsor and support a nationwide program of resistance" to the Selective Service system; that some of them "would conduct and participate in a public meeting at the Arlington Street Church, Boston," at which they "would accept possession" of draft cards; that the defendants would "participate in a demonstration of resistance" at the Department of Justice Building in Washington on October 20, 1967, at which draft cards "surrendered and collected at various demonstrations . . . held in various communities throughout the United States" would be "collected . . . and deposited in a common repository"; that defendant Coffin would address registrants and others participating in the demonstration, "publicly counselling said registrants . . . to continue to refuse to serve in the armed forces"; and that four of the defendants "would deliver to the Attorney General of the United States the aforesaid repository" containing the draft cards. Most, or all, of the alleged conspiracy would seem to involve communications falling within the second category of current means of war protest.[67]

The third category of expression includes advice or instruction in various illegal methods of evading the draft—for example, how to feign insanity, drug addiction, homosexuality, chronic illness, or the like. Communications of this sort could be made under a variety of circumstances, ranging from a casual remark to a thorough training in the preferred technique of deception. In actuality, while such communications undoubtedly have taken place, they are not normally given publicity and an estimate of their frequency is not possible.[68]

---

[66] Indictment, United States v. Coffin, Crim. No. 68-1-F (D. Mass., Jan. 5, 1968).

[67] For news accounts of the Department of Justice demonstration on October 20, 1967, see N.Y. Times, October 21, 1967, at 8, col. 3; Grauman, *After the Mobilization: The Goals of Dissent,* 205 THE NATION 617, 619-20 (1967).

Some of the conduct by the registrants, which conduct the defendants are charged with conspiring to counsel, aid and abet, might not constitute a violation of law. In addition, it is not clear to what extent turning in draft cards or failing to have personal possession of them is protected by the first amendment. For a discussion of this issue, which involves drawing the line between "expression" and "action," see text accompanying notes 83-84 *infra.* It should be noted here, however, that insofar as the conduct urged on the registrants was not a violation of law, the communication by the defendants would fall into the first category noted above, rather than the second.

After a four week trial, four of the defendants were convicted and one (Marcus Raskin) acquitted. N.Y. Times, June 15, 1968, at 1, col. 3.

[68] For references to additional newspaper and other reports of war protests, see Note, *The States, the Federal Constitution, and the War Protestors,* 53 CORNELL L. REV. 528, 528-29 (1968); Note, *The Effect of the First Amendment on Federal Control of Draft Protests,* 13 VILL. L. REV. 347, 362-63 (1968).

Assuming that all these forms of communication in opposition to the draft are prohibited by a literal reading of the Espionage Act or the Selective Service Act, to what extent are they protected by the first amendment? One can analyze the problem in terms of the ad hoc balancing test, the clear and present danger test, the "incitement" test, or the expression-action test.

The results under the ad hoc balancing test are highly uncertain. Balancing the interest in freedom of expression against the interest in national security or in maintaining the armed forces does not yield any clear or certain answer. The factors on each side of the scale are in no way comparable. There is no common ground, or unit of measurement, between the value to national security and the injury to the system of freedom of expression. Hence there is no standard of reference on which to base a reasoned, functional determination. The formula is so loose and open-ended, so lacking in judicial guidelines, that it becomes difficult for a court to do more than confirm (or, perhaps, reject) the judgment of the legislature.

It is possible that under the balancing test the line might fall between the first and second categories, the first being protected and the second and third not, on the theory that the action urged in the first category is not a violation of existing law. But this feature of the case would not by itself be decisive. The violation factor in the equation might still be outweighed by other factors favoring freedom of expression. Or the ensuing action, even though not a violation of law, might be deemed so detrimental to the state as to outweigh the interest in freedom of expression. There is no readily apparent point at which to strike the balance. In view of the abstract weight popularly given to national security in our society, however, it could even be that the line would be drawn somewhere through the middle of the first category.

The clear and present danger test presents other difficulties. Unless one considers the clear and present danger test as identical with the balancing test, it is useful only as a supplement to that test. In those situations where the balance (omitting elements of clear and present danger) is plainly against freedom of expression, the clear and present danger test can be employed to protect more expression than plain balancing otherwise would. This is true, for instance, in most situations where the evil apprehended is a violation of law resulting from physical violence. Where the balance (apart from clear and present danger) favors freedom of expression, the clear and present danger test is not useful; in fact, it becomes restrictive. Thus, where it is determined that freedom of speech outweighs the interest in

keeping litter off the streets, the question whether distribution of leaflets would create a clear and present danger of littering the streets is irrelevant. In short, the clear and present danger test makes sense only in those situations where, apart from the clear and present danger element, the balance of interests would be struck against the first amendment right.

In the context of anti-draft expression, the clear and present danger test would operate to protect some speech in all three categories which would otherwise be outlawed by the balance-of-interests process. By its very nature, however, expression which did not create a clear and present danger of persuading the person to whom it was addressed would tend to be ineffective or innocuous. The clear and present danger test would be beneficial in limiting the scope of an enforcement campaign, by cutting down the possibility of bringing prosecutions for "harmless" expression. But it scarcely seems to meet the needs of a system of freedom of expression.

The "incitement" test, which may be the test which the Court used in the *Bond* case, would operate something like the clear and present danger test, protecting some portion of expression in all three categories. The boundaries of protection are, however, even more vaguely delineated than under the clear and present danger test. Justice Holmes was correct when he said, "Every idea is an incitement." [69] The concept of "incitement" thus affords no concrete frame of reference upon which to base a decision. It poses an exercise in semantics, not concretely related to the function and operations of a system of freedom of expression. No rational application of the concept is possible.

The expression-action test would clearly protect all communication falling within the first and second categories. The dividing line, under this test, would be drawn somewhere in category three. Within that category, conduct that amounts to "advice" or "persuasion" would be protected; conduct that moves into the area of "instructions" or "preparations" would not. The essential task would be to distinguish between simply conveying an idea to another person, which idea he may later act upon, and actually participating with him in the performance of an illegal act. It is true that the distinction does not offer automatic solutions and that courts could easily disagree on any particular set of facts. But this process of decision-making is related to the nature of "expression" and the functions and operations of a system of freedom of expression. It is therefore a rational method of approaching the problem.

[69] Gitlow v. New York, 268 U.S. 652, 673 (1925).

The basic justification for applying the expression-action test has been set forth elsewhere and will not be repeated here. But it is fair to ask whether in the specific context of the military draft the doctrine is, from a realistic point of view, a viable one. There are strong reasons for thinking it is.

No one can doubt that the various communications expressing opposition to the draft during the Vietnam war have been, and continue to be, a highly significant feature of the process of formulating decisions made necessary by the crisis in our affairs. Those communications perform the precise function that expression is intended to serve in a democratic society. This is true even where the communication advises or urges violation of the draft law. Indeed, such communication discloses, as no other form of expression could, the intensity of opposition to the war and the proximity of the nation to irreparable division and disaster.

Yet the question remains, can society afford to permit all utterances within the limits of the expression-action rule? This theory of the first amendment gives to the government full power over the ensuing action, if any there be. There is no reason why that power cannot be effectively exercised here. Prosecution for refusal to submit to induction, or for any other violation of the Selective Service Act, is always open to the government. If such prosecutions are inadequate to control the situation, it is inconceivable that prosecution of those expressing dissent or opposition would do so.

Punishment for expression and restrictions on free speech are subject to serious limitations in terms of both the requirements of due process and public expectations of democratic conduct. Repression might be effective against a small, unpopular minority. But where it is applied to a substantial and prominent portion of the population it is almost sure to fail. Moreover, sanctions would be particularly ineffective against the kind of offenses and offenders involved in draft protests, where the issues are usually seen as religious and moral ones and the opinions fiercely held. The beliefs and convictions of most persons who counsel violation of the draft laws are not lightly tossed aside when opposition develops. It is difficult to believe that a campaign of prosecutions aimed at the restriction of expressions of opinion would have a deterrent effect. Nor would it be likely under such circumstances to reduce the underlying opposition to the draft.

At the same time, the danger to the system of freedom of expression and to society as a whole inherent in such a policy of repression would be enormous. Once under way, a campaign to restrict expression would not readily find a stopping place. It would arouse the

most irrational and divisive forces in the community, and in the end it could stop encouragement to draft resistance only by curbing all expression opposing the war.

The problems with respect to communication tending to cause insubordination in the armed forces are likewise best dealt with through the expression-action principle. The clear and present danger test, as the World War I decisions demonstrate, could lead to suppression of all opposition to the war. So could the balancing test. In actual practice there would seem to be few occasions when communication reaching members of the armed forces could have any immediate effect. Civilians normally do not have access to military installations for purposes of direct address. Expression must be in the form of writing or, if oral, made to a mixed audience which includes some voluntary listeners from the armed forces. It is not surprising, therefore, that the Espionage Act and the Smith Act have never been applied in any situation involving "direct incitement" to mutiny. In any event the expression-action test would seem completely viable. Here again, if the sanctions available to punish any ensuing action taking the form of actual insubordination are not sufficient to safeguard the social interest, it is hardly likely that punishment of expression will make the difference. And any such attempt can only add to the social disruption or crush all public discussion of war issues.

IV. Other Forms of Protest to War or Defense Efforts

Protest against war or defense efforts may take many forms in addition to those considered in the previous section and those forms of assembly, such as meetings, parades, picketing and so forth, which will not be discussed here. As the Vietnam war has progressed, opposition has been displayed by burning, turning in, and refusing to carry draft cards; physical obstruction of draft boards; lying down in front of troop trains; pouring blood over files in draft board offices; and in numerous other ways. These forms of protest raise squarely the question whether the conduct involved is to be classified as expression or action. If the conduct is held to be expression, the further issue arises whether, and under what principle, it is to be protected. The applicable doctrines have been considered in the previous section but the initial problem is the one to which the courts rarely address themselves, namely, what is "expression" protected by the first amendment and what is "action" not so protected.

Before considering specific instances, certain general features of the problem should be kept in mind. To some extent expression and action are always mingled; most conduct includes elements of both. Even the clearest manifestations of expression involve some action, as

in the case of holding a meeting, publishing a newspaper, or even merely talking. At the other extreme, a political assassination includes a substantial mixture of expression. The guiding principle must be to determine which element is predominant in the conduct under consideration. Is expression the major element and the action only secondary? Or is the action the essence and the expression incidental? The answer, to a great extent, must be based on a common sense reaction, made in light of the functions and operations of a system of freedom of expression.

Yet often there is something more to go on—some extrinsic points of reference which provide useful guides. The problem does not arise in the abstract, but in the context of whether specific governmental controls are valid or not. Hence in order to determine whether the governmental control is directed against that element of the conduct which constitutes expression only, it is sometimes helpful to consider what comparable forms of action, divorced from expression or the particular kind of expression involved, are normally subject to governmental control. In the political assassination case, for example, murder is usually the object of official sanction regardless of what is intended to be expressed by the murderer. But opening and shutting the mouth, the action connected with making an address, is not commonly an object of governmental control. Likewise, other extrinsic factors, such as the objective of the legislature in framing the regulation, may indicate whether the government is actually seeking to curtail the expression element of mixed conduct. The type of sanction invoked is a useful guide as well; the penalty may be clearly excessive when tested against the usual sanction applied to comparable conduct when not combined with the particular expression. Thus the problem of segregating expression and action, or rather separating governmental control of expression from governmental control of action, is open to some degree of rational analysis.

These issues have received most attention in the draft card burning cases. In 1965, as part of the mounting protest to the Vietnam war, several well-publicized incidents occurred in which persons subject to the draft publicly burned their registration certificates or notices of classification. The Selective Service Act did not at the time contain any provision specifically prohibiting the intentional destruction of these cards. But the regulations issued by the Selective Service System required each person registered under the draft to have his card in possession at all times,[70] and violation of the regulations was punishable as a violation of the Act, by a fine of $10,000, or imprisonment for five

[70] 32 C.F.R. §§ 1617.1, 1623.5 (1957).

years, or both.[71] Hence a person burning his draft card would later be subject to prosecution under the regulation for failing to have the card in his possession. In 1965 Congress passed an amendment to the Selective Service Act to provide that anyone who "knowingly destroys" or "knowingly mutilates" his draft card is guilty of an offense under the Act and subject to its penalties.[72] Following passage of the amendment the number of draft card burnings increased and several prosecutions were commenced.

The handling of this rather novel first amendment problem by the lower federal courts illustrates the uncertainty and poverty of existing first amendment doctrine. None of the courts gave adequate consideration to the issue of separating expression and action in the complex situation presented to them. All of them concluded or assumed, however, that draft card burning includes some expression and, hence, comes within the protective scope of the first amendment. They then addressed themselves to the question whether the expression was protected or unprotected by that constitutional guarantee. None utilized the clear and present danger test, although the situations have been those in which the clear and present danger concept would have been relevant. Rather, all relied upon the balancing test, one balancing in favor of first amendment rights and the others against.[73]

The issue reached the Supreme Court in *United States v. O'Brien*[74] and, by a vote of seven to one, that Court upheld the statute. Chief Justice Warren, writing for the majority, rejected O'Brien's argument that the burning of his registration certificate was "symbolic speech" protected by the first amendment. The essence of the Court's position is set forth in the following paragraph:

> We cannot accept the view that an apparently limitless variety of conduct can be labelled "speech" whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to

---

[71] 50 U.S.C. App. § 462(b)(6) (1964).

[72] 50 U.S.C. App. § 462(b)(3) (Supp. II, 1967).

[73] O'Brien v. United States, 376 F.2d 538, 541 (1st Cir. 1967) (balancing in favor), *rev'd*, 88 S. Ct. 1673 (1968); United States v. Miller, 367 F.2d 72 (2d Cir. 1966) (balancing against), *cert. denied*, 386 U.S. 911 (1967); United States v. Smith, 249 F. Supp. 515 (S.D. Iowa), *aff'd per curiam*, 368 F.2d 529 (8th Cir. 1966) (balancing against); United States v. Cooper, 279 F. Supp. 253 (D. Colo. 1968) (balancing against).

All the courts balanced the general interest in national security against the interest in freedom of expression. But more precisely, the question under the balancing test would seem to be: Does the government's interest in preventing non-possession *by burning* (not non-possession in general) outweigh the interest in freedom of expression?

[74] 88 S. Ct. 1673 (1968).

> bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest. We find that the 1965 amendment to § 462(b)(3) of the Universal Military Training and Service Act meets all of these requirements, and consequently that O'Brien can be constitutionally convicted for violating it.[75]

The Court then went on to demonstrate that "legislation to insure the continuing availability of issued certificates serves a legitimate and substantial purpose in the [draft] system's administration;" [76] held that the 1965 amendment "specifically protects this substantial governmental interest;" [77] and perceived "no alternative means that would more precisely and narrowly assure the continuing availability of issued Selective Service certificates than a law which prohibits their willful mutilation or destruction." [78] Finally, the Court rejected the contention that the purpose of the legislation was specifically to punish expression, invoking the "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." [79]

The Court's analysis of what constitutes "expression" covered by the first amendment is grossly inadequate; its formula for protecting

---

[75] *Id.* at 1678-79 (footnotes omitted).

[76] *Id.* at 1679.

[77] *Id.* at 1681.

[78] *Id.*

[79] *Id.* at 1682. Mr. Justice Douglas dissented on the ground that the Court should have considered the question whether "conscription is permissible in the absence of a declaration of war," a point not raised before in the case. *Id.* at 1685. Mr. Justice Marshall did not participate.

that expression is dangerously weak; and the result reached is completely unrealistic. The Court makes no attempt to determine whether the conduct of burning a draft card is to be classified as "expression" or "action." Rather, it assumes there is a "communicative element" in the conduct, classifies the situation as one where "speech" and "nonspeech" elements are combined, and holds that regulation of the "nonspeech" element is permissible, no matter what the effect on the speech element, so long as it "furthers an important or substantial governmental interest." What this novel analysis does is relegate the "expression" protected by the first amendment to a "communicative element" and allow all other aspects of the conduct to be restricted or suppressed regardless of the impact on freedom of expression. On this theory, so long as the governmental regulation does not *directly* deal with the "communicative element," it may prohibit or control all other aspects of holding a meeting, marching or demonstrating, distributing literature, exhibiting a motion picture, publishing a newspaper, forming an association, and many other forms of "expression." The formula would also seem to imply that any "indirect" regulation of expression, such as loyalty programs, a legislative committee's investigation, a disclosure requirement, and the like, would be upheld so long as the governmental interest involved were "important or substantial." This degree of protection for expression falls far short of even that afforded by the balancing test. The Court's view embodies an artificial, sterile concept of the expression protected by the first amendment, one wholly incapable of meeting the needs of a modern system of freedom of expression.

The burning of a draft card is, of course, conduct that involves both expression and action. Yet it seems quite clear that the predominant element in such conduct is expression (opposition to the draft) rather than action (destruction of a piece of cardboard). The registrant is not concerned with secret or inadvertent burning of his draft card, involving no communication with other persons. The main feature, for him, is the public nature of the burning, through which he expresses to the community his ideas and feelings about the war and the draft.

Moreover, it is apparent that governmental control was directed at the expression element of draft card burning, not at the action element. The destruction of a small bit of paper, the action element involved, is not normally punished by five years in prison. A different problem is presented by the fact that the action results in a failure of the registrant to have a card in his possession and hence interferes with the operation of the draft system. This problem of insuring the

"continuing availability of issued certificates" [80] can be and is handled by a different form of legislation. As noted above, the Selective Service regulations already made it a criminal offense for a registrant not to have a draft card in his possession. Congress might have wished to incorporate that prohibition in a formal statute, but it did not do so. Certainly it would make no sense for Congress to prohibit loss of possession by *reason of burning,* rather than loss of possession generally. What Congress did, in short, was simply to punish a form of expressing opposition to the draft; the effect of the amendment in improving the operation of the draft system was trivial and superfluous.

This conclusion is confirmed, though it need not rest upon, the legislative history of the 1965 amendment. The Supreme Court argues that the legislative motive cannot be considered if the legislation is valid on its face. Yet the only consideration necessary is that ordinarily given to a problem of statutory interpretation. Moreover, the Court itself recognizes an exception to its rule where, as in determining whether a statute is designed to impose a penalty, "the very nature of the constitutional question requires an inquiry into legislative purpose." [81] Surely the exception applies here. When a statute deals with conduct involving both expression and action, the first amendment issue turns in part upon the question whether the legislation is directed at the expression or the action sector of the conduct. If one examines the legislative history here it is difficult to avoid the conclusion that the obvious and indeed acknowledged purpose was, as the Senate Committee on Armed Services explained, to punish "the defiant destruction and mutilation of draft cards by dissident persons who disapprove of national policy." [82]

Having reached this point, the expression-action theory requires that full protection be extended to the expression and that the statute be declared invalid. This conclusion is fully justified by all the considerations of theory, practice, and experience mentioned above.[83]

The same analysis applies to the conduct of turning in draft cards. This method of expressing opposition to the war has come to be preferred to draft card burning, which has receded into the background over the past year. Already some thousands of registrants have re-

---

[80] *Id.* at 1679.

[81] *Id.* at 1682 n.30.

[82] *Id.* at 1684. Extracts from the committee reports are printed as an appendix to the Court's opinion. For the debate, see 111 CONG. REC. 19,102; 19,134; 19,669 (1965). The Court's contention that Congress was also concerned with "the smooth functioning of the Selective Service System" appears, to this reader at least, unsupportable.

[83] For other discussion of the draft card burning problem, see Velvel, *Freedom of Speech and the Draft Card Burning Cases,* 16 KAN. L. REV. 149 (1968).

turned their draft cards to Selective Service boards, deposited them with the Department of Justice, or otherwise surrendered them to some government official. In making this gesture the quality of expression clearly prevails over the element of action. The conduct is hardly different from writing a letter of protest. Actually, the turning in of draft cards is not, as such, a violation of any express provision of any existing statute or regulation. It might, of course, be taken as offending the prohibition in section 462(a) against hindering or interfering with the administration of the Selective Service Act. In addition, some draft boards might use it as the basis for ordering immediate induction of the registrant. But, the conduct being primarily expression, such direct sanctions would plainly violate the first amendment.

The turning in of a draft card does, however, give rise to collateral problems. The registrant is then in the position of not having a draft card in his possession, a violation of the Selective Service regulations. Some draft boards have applied the sanction of reclassifying the registrant or accelerating his induction on the ground that he was "delinquent" under the regulations. The separation of expression and action under these circumstances involves some difficulties, but they are not insuperable. The failure to keep a draft card in one's possession would seem to be conduct classifiable as action, not expression. Though the initial destruction or return of the card may have been expression protected by the first amendment, the consequent failure to carry the draft card is conduct in which the action (or inaction) element predominates. The requirement of carrying identification is not an uncommon form of regulation. Refusal to comply with such a regulation on grounds of conscience or belief, although expression, is no different from refusal to conform to the laws requiring automobile drivers to carry licenses. The total context, particularly the nature of the government's interest in relation to the expressive qualities that have come to be attached to the conduct, differentiate the burning or turning in of draft cards from a refusal to have them in one's possession.

As action, the failure to have a draft card would not be protected by the first amendment and would be subject to appropriate sanction. But such sanction would have to be directed to the action, not to any accompanying expression. Thus no person could be reclassified after turning in his draft card except insofar as other persons, willfully failing to have draft cards in their possession for other reasons, are treated in the same way. And no criminal punishment could be inflicted greater or different from that customarily employed to maintain effective operation of the draft system through requiring registrants to carry draft cards. Thus, the element of expression in the conduct

could not be penalized by applying a sanction not otherwise invoked or by aggravating the punishment in any way.[84]

Laws prohibiting the burning or other desecration of the flag involve similar issues. All states, as well as the District of Columbia, have statutes of this type,[85] but proposals for expanded federal legislation are frequently made. These statutes are obviously supported by strong emotions and have never been held to violate constitutional rights. But their validity under the first amendment is questionable where the conduct is intended as a symbolic gesture of defiance or opposition. In such a case the element of expression would seem to constitute the essential feature of the conduct, or at least the part at which punishment is being directed. The action element—consisting of making a fire in the street or some similar act—is incidental to the expression. The Supreme Court's decision in *Stromberg v. California*,[86] invalidating one section of the California red flag law, would seem to support this position.

It is possible to consider desecration of the flag as equivalent to "fighting words," likely to provoke an immediate breach of the peace, and therefore classifiable as action. But this seems something of a stretch. It is also possible to uphold the flag desecration statutes by applying the balancing test or the clear and present danger test. Yet ultimately it is difficult to avoid the conclusion that desecration of the flag, however obnoxious it may be to some of us, is realistically intended as expression and nothing else. It should therefore be treated as such. For those who may be shocked by this conclusion it is well to remember that loyalty to the flag, like loyalty to the country, cannot be coerced.

Certain other forms of protest against the war effort more clearly consist of conduct in which action predominates and which is therefore not protected by the first amendment. Mass physical obstruction of draft boards, induction centers, military installations, or other places constitutes action, except insofar as the obstruction is an integral part of the right of assembly.[87] Obstruction of troop movements by lying down in front of troop trains or blocking traffic on a city street falls

[84] This was the position of the Court of Appeals for the First Circuit in O'Brien v. United States, 376 F.2d at 541-42, *rev'd*, 88 S. Ct. 1673 (1968). *But cf.* Wills v. United States, 384 F.2d 943 (9th Cir. 1967).

The discussion above does not attempt to consider any of the due process, privacy or other constitutional questions involved in the possession requirement.

[85] *See, e.g.*, 4 U.S.C. § 3 (1964).

[86] 283 U.S. 359 (1931). The issue is now before the Supreme Court on appeal from a conviction under the New York statute. Street v. New York, 20 N.Y.2d 231, 229 N.E.2d 187, 282 N.Y.S.2d 491 (1967), *prob. juris. noted*, 36 U.S.L.W. 3483 (June 17, 1968) (No. 688).

[87] The right of assembly and the extent to which physical obstruction is justified in exercise of that right are, as previously pointed out, not discussed in this article.

within the same category. So also does the more unusual conduct of pouring blood over Selective Service files.[88] To attempt to bring such forms of protest within the expression category would rob the distinction between expression and action of all meaning, and would make impossible any system of freedom of expression based upon full protection of expression.

Action protest is often undertaken as a form of civil disobedience. It is not within the province of this article to deal with that subject. But a few words should be said on the question whether such civil disobedience is compatible with a system of freedom of expression. For present purposes civil disobedience may be defined as conduct which (1) is in violation of a valid (constitutional) law; (2) is undertaken on the basis of a moral principle held sufficient to overcome the normal obligation to comply with the law; (3) is non-violent in nature; and (4) causes no direct injury to other persons. By definition, civil disobedience constitutes action, not protected expression.

Civil disobedience tends to undermine law and order, at least the law and order of the moment, which are necessary to the functioning of a system of freedom of expression. Civil disobedience attempts to achieve results through a kind of coercion or pressure, at a tense emotional level, whereas expression usually operates through more moderate means of persuasion. Enforcement of the law against acts of civil disobedience may spill over into suppression of freedom of expression. In these and other ways there is a tension between these two means of political communication.

In the long run, however, there is no necessary incompatibility between a system of freedom of expression and a measured amount of civil disobedience. In some ways civil disobedience serves the same ends as freedom of expression. By calling attention to the problems which give rise to such drastic action, it forces reconsideration of the issues and promotes a better chance to reach consensus. By disclosing the intensity with which a position is held, it measures an important factor in the political process. By giving sharp warning of stress in society, it greatly increases the likelihood of achieving a satisfactory balance between stability and change. In short, acts of civil disobedience can supplement a system of free expression in rendering a democratic structure more responsive and more effective.

The principal difference is that civil disobedience is strong medicine. There is no such thing as too much freedom of expression in

[88] For an account of this incident see N.Y. Times, Oct. 28, 1967, at 5, col. 3. The participants were subsequently convicted of violating the Selective Service Act, two being sentenced to six years in prison and one to three years. N.Y. Times, May 25, 1968, at 1, col. 1.

a free society. But there can be an excess of civil disobedience. An overdose may be fatal. Civil disobedience can be compatible with the first amendment, as with other institutions of a democratic society, but its existence is always a signal of danger.

V. Remedies Against Harassment of Dissent in Wartime

From all that has been said it is apparent that, as a matter of constitutional theory, the first amendment affords a substantial measure of protection to expression directed against a war effort. The problem remains, however, of realizing those rights in practice amid the stresses of an actual war. It is important to keep in mind, therefore, the nature of the harassment which can beset a system of freedom of expression in wartime and the possible role of the courts in affording legal remedies.

During the Vietnam conflict expression in opposition to the war has been widespread, increasingly frequent, and on the whole accepted as a constitutional right. But various forms of harassment have been developed and employed to stifle dissent. Some of this has come from high federal officials. President Johnson has, on several occasions, acknowledged the right of citizens to dissent on war issues, but he has also let it be known that he "was dismayed by the demonstrations and has given his full endorsement to the Justice Department's investigation of possible Communist infiltration of the antidraft movement," [89] and, on another occasion, that the Federal Bureau of Investigation "was keeping an eye on 'antiwar activity.'" [90] Former Attorney General Katzenbach told a news conference that "the Justice Department [has] started a national investigation of groups behind the antidraft movement." He added, "There are some Communists involved in it. . . . We may very well have some prosecutions." [91] Six months later the national secretary of the Students for a Democratic Society asserted that there "seems to be a national investigation" of his organization by the F.B.I.[92] There was also evidence that opposition to the Vietnam war was being taken as unfavorable evidence in loyalty-security investigations.[93]

Similar attacks upon wartime dissent have come from the legislative branch. Many individual legislators, on and off the floor of

---

89 N.Y. Times, Oct. 19, 1965, at 1, col. 8.

90 N.Y. Times, April 16, 1967, at 1, col. 1.

91 N.Y. Times, Oct. 18, 1965, at 1, col. 6.

92 N.Y. Times, April 19, 1966, at 6, col. 1.

93 American Civil Liberties Union Bull. No. 2259, Mar. 7, 1966.

Congress, have denounced opposition to the war as disloyal conduct.[94] In 1965 the Senate Internal Security Subcommittee made public a staff report which attacked a number of individuals as having "persistent records of Communist sympathies and/or of association with known Communists and known Communist movement and front organizations," [95] and asserted that the antiwar demonstrations had "clearly passed . . . into the hands of Communists and extremist elements." [96] No opportunity was given the named individuals to reply. In March 1967 the House Committee on Un-American Activities issued a report on a protest scheduled for April known as Vietnam Week, the theme of which was: "The real objective of Vietnam Week is not the expression of honest dissent to promote the best interest of the American people and their Government, but to do injury and damage to the United States and to give aid and comfort to its enemies." [97]

Other forms of harassment have included widespread police interference with the right of assembly and repeated incidents of police brutality, as well as police photographing of persons participating in peaceful antiwar marches, vigils and other demonstrations. Attempts by draft boards to accelerate the induction of antiwar demonstrators have also occurred.[98] Summarizing the situation in June 1967, the American Civil Liberties Union said:

> [T]o applaud the fact that dissent has not been muted, despite the rising emotionalism of the Vietnam War, is not to say we may relax the civil libertarians' vigil. There are signs, ominous signs, that a storm is brewing. . . . The random collection of incidents attached to this statement . . . illustrate[s] the steadily accelerating strains on unpopular expression. . . . Such instances show that dissent is now the object of official and private intimidation and harassment. Unless these, and others, are vigorously and courageously opposed, unless the right and importance of dissent are re-affirmed and defended, the nation could slip

---

[94] *See, e.g.*, N.Y. Times, May 6, 1967, at 1, col. 6; *Hearings on H.R. 271 Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 90th Cong., 1st Sess. (1967).

[95] SENATE COMM. ON THE JUDICIARY, SUBCOMM. TO INVESTIGATE THE ADMIMISTRATION OF THE INTERNAL SECURITY ACT AND OTHER INTERNAL SECURITY LAWS, THE ANTI-VIETNAM AGITATION AND THE TEACH-IN MOVEMENT: THE PROBLEM OF COMMUNIST INFILTRATION AND EXPLOITATION, S. Doc. No. 72, 89th Cong., 1st Sess. 45 (1965).

[96] *Id.* at xv.

[97] HOUSE COMM. ON UN-AMERICAN ACTIVITIES, COMMUNIST ORIGIN AND MANIPULATION OF VIETNAM WEEK (APRIL 8-15, 1967), H.R. Doc. No. 186, 90th Cong., 1st Sess. 2 (1967).

[98] *See* text accompanying notes 101-114 *infra*.

> back into a new era of McCarthyism with its dangers to a free society—fear, conformity and sterility.[99]

There is no effective legal remedy for much of this activity. Statements of public officials or warnings of investigation, for instance, are not subject to judicial redress.[100] Nor is it possible to obtain court review of most activities of legislative committees, apart from citations for contempt, or of many aspects of the loyalty-security program. In other situations the issues can be brought to the courts, as in the case of legislative contempts or draft board reclassifications, but only at a stage in the proceedings when much damage has already been done and when failure to prevail in court results in a criminal conviction. In still other situations, such as interference with the right of assembly, judicial relief is theoretically possible, but often cumbersome, time-consuming, or ineffective.

It is not possible to deal here with the complex issues involved in this largely unexplored field of law. All that can be done is to stress two generalities and to recount briefly one significant development. The first general point is that the judicial structure is not capable, by itself, of fully protecting in practice the theoretical rights guaranteed under our system of freedom of expression. Full realization of those rights must depend ultimately upon attitudes ingrained in the public mind and support extended by the body politic as a whole. The other point is that, granting that certain deficiencies are inherent in the judicial system, its performance could be greatly improved. One of the major challenges before us is to develop those judicial techniques which will enable our laws and legal institutions to ensure our system of freedom of expression the highest degree of protection of which these techniques are theoretically capable.

One significant step, which illustrates what must be done to render judicial protection of wartime dissent more effective, has recently been taken. That step advances the techniques for securing judicial review at an early enough stage to be useful. It concerns the controls exercised by the draft boards over expression of dissent by persons subject to registration under the Selective Service Act.

In 1965 statements were issued by various Selective Service officials that students who engaged in anti-war protests would lose

---

99 American Civil Liberties Union, The Vietnam War and the Status of Dissent, June 4, 1967. An accompanying memorandum listed numerous instances of harassment. *See also* an earlier statement of the A.C.L.U., Civil Liberties and Vietnam Protests, Oct. 27, 1965; A.C.L.U. 46TH ANNUAL REPORT (JULY 1, 1965-JAN. 1, 1967) at 30-31 (1967); *McCarthyism: Ten Years Later,* THE PROGRESSIVE, June 1967, at 3.

100 *But see* Finman & Macaulay, *Freedom to Dissent: The Vietnam Protests and the Words of Public Officials,* 1966 WIS. L. REV. 632, 677-723 (1966).

their draft deferments and would be immediately inducted into military service.[101] The issue came to a head in October when a group of students at the University of Michigan staged a sit-in at a local draft board in Ann Arbor, for which they were convicted of trespass. The Michigan Selective Service headquarters thereupon sent the names of the students involved to their local draft boards, indicating that the sit-in was a violation of the Selective Service Act and could subject the participants to reclassification and immediate induction. Some of the students were reclassified by their draft boards as I-A, subject to immediate induction.[102] General Hershey, Director of the Selective Service System, took the position that registrants should not lose deferments or be penalized under the Selective Service Act for protest against the war so long as their protest was "peaceful and legal," but that registrants who engaged in sit-ins at draft boards, burned draft cards, or otherwise interfered with the administration of the Selective Service system in violation of the law should be subject to immediate induction.[103] His views were disputed by a group of 103 law professors who argued that illegal acts protesting the war were punishable in the ordinary way, but could not validly be a basis for the imposition of sanctions by the draft boards.[104] The Assistant Attorney General in charge of the Criminal Division agreed with the law professors.[105]

The threat to freedom of expression posed by the actions of the Selective Service officials is readily apparent. Certainly a draft board may not constitutionally reclassify any registrant, or apply any other sanction to him, simply because he chooses to exercise his constitutional right to express opposition to the war. Nor may the draft board take such action where the registrant engages in an illegal form of anti-war protest. In such a situation the board is not attempting to punish action; other, comparable illegal acts have not been punished by induction. Rather, the board is undertaking to punish the expression element in the protest. Furthermore, apart from the constitutional issues, the Selective Service Act itself does not authorize draft boards to apply such sanctions.[106]

---

101 *See* Letter from American Civil Liberties Union to Gen. Lewis B. Hershey, Director of the Selective Service System, Nov. 5, 1965, reprinted in Civil Liberties and Vietnam Protests, *supra* note 99.

102 Cohen, *Punishment by Conscription: General Hershey's Big Stick,* 201 THE NATION 520, 520-21 (1965).

103 Letter from General Lewis B. Hershey, 202 THE NATION, Jan. 3, 1966 (unnumbered page preceding p. 1).

104 Yale Daily News, Jan. 6, 1966, at 2, col. 2.

105 *See* N.Y. Times, Jan. 12, 1966, at 1, col. 1.

106 *See* Wolff v. Local Bd. No. 16, 372 F.2d 817 (2d Cir. 1967), *noted in* 81 HARV. L. REV. 685 (1968); Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff,* 116 U. PA. L. REV. 1033, 1045-46 (1968); Note, *Reclassification of the Sit-In Demonstrators,* 19 U. FLA. L. REV. 143 (1966).

Yet the position of the registrant is a precarious one. General Hershey has not withdrawn from his position, and while his view is not binding on local draft boards, it is obviously persuasive if not compelling. Even more important, however, is the fact that under existing law the registrant cannot challenge his draft status in the courts except by refusing to submit to induction and raising the issue in the subsequent criminal prosecution.[107] Nor can he always be sure that some form of apparently legal demonstration will not end in illegality. For a registrant, therefore, the exercise of first amendment rights to protest the war becomes, as a practical matter, most hazardous.

The effect of this impasse on a system of freedom of expression can never be completely redressed. But fortunately the courts have been able to fashion a partial remedy. Two of the Michigan students, who had been reclassified by their New York draft boards, brought suit to compel the boards to restore their student deferments.[108] The district court dismissed the complaint, following the rule that a draft board classification may be challenged only in a subsequent criminal prosecution.[109] The court of appeals reversed, carving out an exception to the usual rule where "the threat to First Amendment rights is of such immediate and irreparable consequence not simply to these students but to others as to require prompt action by the courts to avoid an erosion of these precious constitutional rights." [110] This doctrine, which has potential application in many other areas of first amendment rights, represents an important advance in judicial protection of our system of freedom of expression.[111]

Two years later General Hershey reiterated and expanded his position. In a letter to local draft boards on October 26, 1967, he declared:

> [D]eferments are given only when they serve the national interest. It is obvious that any action that violates the military selective service act or the regulations, or the related processes cannot be in the national interest.
>
> It follows that those who violate them should be denied deferment in the national interest. It also follows that illegal activity which interferes with recruiting or causes refusal of

---

[107] *See* Estep v. United States, 327 U.S. 114 (1946); Falbo v. United States, 320 U.S. 549 (1944).

[108] Wolff v. Local Bd. No. 16, 372 F.2d 817 (2d Cir. 1967).

[109] *See id.* at 823.

[110] *Id.* at 820.

[111] The technique is one that was employed by the Supreme Court, in connection with harassment under state sedition laws, in Dombrowski v. Pfister, 380 U.S. 479 (1965). *But cf.* DuBois Clubs of America v. Clark, 389 U.S. 309 (1967); Cameron v. Johnson, 88 S. Ct. 1335 (1968).

> duty in the military [or] naval forces could not by any stretch of the imagination be construed as being in support of the national interest.[112]

General Hershey's letter was directed against registrants who were turning in their draft cards as well as those registrants who were demonstrating more generally in opposition to the draft. Local draft boards throughout the country began reclassifying registrants in accordance with General Hershey's recommendation and a series of cases, similar to the *Wolff* case, have been brought to challenge such actions.[113] But the impact on the right to oppose the war extends beyond the particular individuals affected, and in order to reach the broader problem a class suit has been instituted in the District of Columbia seeking to force the Selective Service System to abandon the whole policy.[114] Whether the development begun in the *Wolff* case will be brought to an effective culmination depends upon the outcome of these cases.

VI. Conclusion

Our experience over the years in attempting to provide legal support for an effective system of freedom of expression in wartime would seem to point to several basic conclusions. Neither the clear and present danger test, nor the incitement test, nor the balancing test, affords an adequate measure of protection under the first amendment. Only the rule of full protection for expression, as distinct from action, establishes a clear-cut, functional doctrine that can withstand the pressures of wartime. The major problem, therefore, is to define the terms, and refine the concepts, of "expression" and "action." This

---

112 N.Y. Times, Nov. 9, 1967, at 2, col. 4. *See also* Martin, *The Draft as Punishment: Trial by Hershey,* 204 The Nation 139 (1968).

113 *See* N.Y. Times, Dec. 2, 1967, at 3, col. 1; N.Y. Times, Jan. 26, 1968, at 3, col. 3. One of these cases, in which a divinity student classified IV-D was reclassified I-A after turning in his draft card, is pending in the Supreme Court, the Court of Appeals for the Tenth Circuit having affirmed the dismissal of the case by the District Court for the District of Wyoming. Oestereich v. Local Bd. No. 11, — F.2d — (10th Cir. Feb. 20, 1968), *cert. granted,* 36 U.S.L.W. 3443 (May 20, 1968) (No. 1246).

Following the *Wolff* decision the Selective Service Act was amended to make explicit the rule that judicial review of draft board classification was obtainable only as a defense to a criminal prosecution for refusal to accept induction. Pub. L. No. 90-40, § 8, 81 Stat. 104 (1967), *amending* 50 U.S.C. App. § 460(b)(3). The constitutional questions, however, still remain.

114 N.Y. Times, Dec. 3, 1967, at 2, col. 7. The suit is being brought by the National Student Association, the Students for a Democratic Society, and 15 presidents of university student councils. National Student Association, Inc. v. Hershey, Civ. No. 3078-67 (D.D.C., March 7, 1968). The suit was dismissed by the District Court on the ground that the Hershey letter of October 26 was only a recommendation, not a directive, and hence not reviewable. The case has been appealed.

process is essential for any satisfactory application of the first amendment. For conduct amounting to expression must be free of restrictions, and conduct amounting to action cannot be governed by the principles appropriate to expression. Beyond this the crucial task is to improve the techniques for making the theoretical protection of the first amendment realizable in practice. The full protection theory of the first amendment is viable in wartime, but it needs further support to survive as a reality.