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Frederick C. Moss

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COMMENTS

THE EFFECT OF THE FIRST AMENDMENT ON FEDERAL CONTROL OF DRAFT PROTESTS

[1]t is fit to take some notice of those who say, that the free expression of all opinions should be permitted, on condition that the manner be temperate, and do not pass the bounds of fair discussion. Much might be said on the impossibility of fixing where these supposed bounds are to be placed; for if the test be offence to those whose opinions are attacked, I think experience testifies that this offence is given whenever the attack is telling and powerful, and that every opponent who pushes them hard, and whom they find it difficult to answer, appears to them, if he shows any strong feeling on the subject, an intemperate opponent.

John Stuart Mill, On Liberty

As this country’s government has increased its war efforts in Vietnam and, consequently, increased the monthly draft calls, protest against the war has increased commensurably. Many of the anti-war groups that have sprung up in the last few years have focused their protest activity on the draft as a means of opposing war. During the summer of 1967, there were several moves of varying success to unite these various anti-war and anti-draft groups in order to co-ordinate protest activity and thereby make it more effective. The protest activity has ranged from dissemination of information about the draft law by church groups to actual interference with the business of induction centers by militant student groups.

The federal government has been granted the power to raise and support Armies, a grant which includes the power to establish conscription as the means to that end. Further, it cannot be disputed that Congress can punish those who interfere with this system of raising armies or attempt to do so, not only in time of declared war, but also during the

5. See, e.g., N.Y. Times, April 1, 1967, at 5, col. 3 (sitting in the entrance to an induction center); id. May 25, 1967, at 4, col. 4 (blocking bus carrying inductees).
“cold war” which has necessitated the maintaining of the armies. The question that arises is: To what extent may protest against the war and the draft be carried before it loses its protection as free speech and becomes punishable as an interference with a governmental function? This comment will seek to deal briefly with the history of government prosecutions against those who have spoken out against the draft, describe the wide variety of anti-draft activity in this country today, and seek to distill from the first amendment a workable principle or test to be used in drawing the line between that form of protest which is protected from governmental censure and that which need not be tolerated. Finally, an attempt will be made to draw that line.

I. GOVERNMENT PROTECTION OF THE DRAFT SYSTEM

A. The Espionage Act of 1917

During the First World War, federal prosecutions against those accused of interfering with the draft system were brought under the third section of Title I of the Espionage Act of 1917, which read in relevant part:

[W]hoever, when the United States is at war . . . shall wilfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or 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. This language was interpreted by Judge Learned Hand in Masses Publishing Co. v. Patten to proscribe direct incitements to violent resistance by urging others, successfully or unsuccessfully, that it is their duty or in their interest to resist the law. Therefore, he concluded that a magazine containing cartoons suggesting that “conscription is the destruction of youth” and poems and texts praising two jailed advocates of draft resistance did not itself advocate resistance to the draft in violation of the Act. Judge Hand was reversed by the Court of Appeals for the Second Circuit.

9. Cf. Gara v. United States, 178 F.2d 38 (6th Cir. 1949), aff’d per curiam by an equally divided Court, 340 U.S. 857 (1950); Warren v. United States, 177 F.2d 596 (10th Cir. 1949), cert. denied, 338 U.S. 947 (1950). In Gilbert v. Minnesota, 254 U.S. 325, 336 (1920), Mr. Justice Brandeis, in a dissenting opinion, recognized that Congress, which has power to raise an army and naval forces by conscription when public safety demands, may, to avert a clear and present danger, prohibit interference by persuasion with the process of either compulsory or voluntary enlistment.

10. Act of June 15, 1917, ch. 30, § 3, 40 Stat. 219, as amended, 18 U.S.C. § 2388(a) (1964). The current statutory language is substantially the same except that the phrase “or attempts to do so” has been added. This section, though titled “Activities affecting armed forces during war,” has been temporarily extended by 18 U.S.C. § 2391 (1964) until 6 months after the termination of the national emergency proclaimed by the President on December 16, 1950. Proclamation 2914, 3 C.F.R. 1949–1953 Comp., at 99. This proclamation is still in effect and, therefore, § 2388 is likewise in full force. The extension section, § 2391, further states that, acts which would give rise to legal consequences and penalties under section 2388 when performed during a state of war shall give rise to the same legal consequences and penalties when they are performed during the period above provided for.

11. 244 F. 535 (S.D.N.Y. 1917), rev’d, 246 F. 24 (2d Cir. 1917).
The court held that the Act proscribed all utterances having the natural and probable effect of encouraging resistance to the law and which are made with the intent to so persuade.\textsuperscript{13} The Espionage Act first came before the Supreme Court in 1919. The case was the famous \textit{Schenck v. United States}\textsuperscript{14} in which officers of the Socialist Party were indicted for conspiracy to violate the Espionage Act in that they mailed circulars to men "who had been called and accepted for military service."\textsuperscript{15} The circulars urged these men to assert their right and duty to oppose the draft. A unanimous Court, in an opinion written by Mr. Justice Holmes, held that, because the nation was at war when the circulars were sent, this expression was not within the protection of the first amendment.\textsuperscript{16} The Court further stated that, "[i]f the act, (speaking, or circulating a paper) its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime."\textsuperscript{17} Congress may prevent interference with the draft system. If words are used under such circumstances that there is a "clear and present danger" that the effectiveness of the draft will be hindered, the words will not be protected. "It is a question of proximity and degree."\textsuperscript{18}

Following the \textit{Schenck} decision, several other Espionage Act cases came before the Court, resulting in convictions that bear testimony to the narrow role the Supreme Court gave to the first amendment at this time. In \textit{Debs v. United States},\textsuperscript{19} the Court unanimously affirmed Eugene V. Debs' conviction under the Act. Debs, in a speech at a Socialist convention, had praised certain individuals who were jailed for resisting the draft and causing insubordination in the armed services. He said: "[Y]ou need to know that you are fit for something better than slavery and cannon fodder."\textsuperscript{20} Decided the same day, \textit{Frohwerk v. United States}\textsuperscript{21} unanimously affirmed a conviction for conspiracy to obstruct recruiting by preparing and publishing, in a German-American newspaper, twelve articles which attacked United States participation in the war. Again writing for the Court, Justice Holmes said:

\textbf{[A] conspiracy to obstruct recruiting would be criminal even if no means were agreed upon specifically by which to accomplish the}

\begin{itemize}
\item 13. \textit{Masses Publishing Co. v. Patten}, 246 F. 24, 38 (2d Cir. 1917).
\item 14. 249 U.S. 47 (1919).
\item 15. \textit{Id.} at 49.
\item 16. "We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights."
\item 17. \textit{Id.}
\item 18. \textit{Id.}
\item 19. 249 U.S. 211 (1919).
\item 20. \textit{Id.} at 214. Mr. Justice Holmes, who wrote for the Court, noted with approval that:
\item [T]he jury were most carefully instructed that they could not find the defendant guilty for advocacy of any of his opinions unless the words used had as their natural tendency and reasonably probable effect to obstruct the recruiting service, &c., and unless the defendant had the specific intent to do so in his mind.
\item 21. 249 U.S. 204 (1919).
\end{itemize}
intent. It is enough if the parties agreed to set to work for that common purpose. 22

In the lower federal courts during the First World War, it was not uncommon for persons to be convicted under the Espionage Act for publicly expressing their personal opinions about the war. 23 For example, in Wolf v. United States, 24 the defendant's conviction was based on conversations he had with several persons in which he said, inter alia, "that this war was an unjust war . . . that it was unjust . . . to send the boys across the ocean to fight . . . that the United States was entirely unjustified in its entrance into the present war. . . ." 25 While the Court of Appeals reversed on other grounds, it reasoned that because enlistment was a voluntary act, and because one who believed the war to be unjust would not be disposed to enlist, any attempt to implant such anti-war ideas in the mind of another was, therefore, an attempt to hinder the enlistment service. The fact that it had not been alleged that any of those who heard the defendant's statements were within enlistment age was held to be immaterial since the government need only prove that the statements were given such wide publicity that they might reach men who might become recruits. 26

During World War II, there were relatively few prosecutions for obstructing the draft under the Espionage Act, and only one reached the Supreme Court. 27 In that case, the defendant had written three articles in which he depicted the war as a betrayal of America, and denounced the allies, Jews, and the President. He had mailed copies of the articles to many prominent persons, including labor officials, bishops, military officers, and newspapermen among others. The Government showed that the articles were read by persons subject to the draft, but the Court, in a five to four decision, held that the evidence was insufficient to show the specific intent required by the Act. The statute speaks of "wilfull" obstruction: "That word, when viewed in the context of a highly penal statute restricting freedom of expression, must be taken to mean deliberately and with a specific purpose to do the acts proscribed by Congress." 28

The Court found no evidence tending to show that the defendant's dominant purpose was to reach and to influence those subject to the draft, and also noted that none of the circulars made any direct or affirmative appeals to such persons to not comply with the draft. While the Court did

22. Id. at 209. Justice Holmes noted that there was no special effort made by the "conspirators" to reach men who were subject to the draft, but sustained the conviction because the record did not show that the circulation did not reach such persons. Id. at 208-09.
23. See Z. Chafee, supra note 8, ch. 2.
24. 259 F. 388 (8th Cir. 1919).
25. Id. at 390.
26. Id. at 392. The court further stated that the prosecution need not show that the words were ever actually heard or read by anyone of enlistment age; accord, Coldwell v. United States, 256 F. 805 (1st Cir. 1919).
28. Id. at 680.
not reach the first amendment question, its construction of the Espionage Act seems to come very close to the original interpretation given the Act by Judge Learned Hand in the *Masses* case.\textsuperscript{29} At the very least, *Harriss* casts some doubt upon the present validity of many of the earlier convictions under the Act.

Since World War II no cases have been found where the Espionage Act has been used to prosecute draft protesters.\textsuperscript{30} But this is not to say that those seeking to thwart the draft have not been prosecuted. Since 1940, the federal government has relied primarily on the statute discussed in the next section in order to obtain such convictions.

B. The Universal Military Training and Service Act\textsuperscript{31}

The “Offenses and penalties” section of the current draft law provides:

> [A]ny person . . . who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title . . . or of said rules, regulations, or directions . . . or any person or persons 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 who conspires to commit any one or more of such offenses, shall, upon conviction . . . [receive a maximum fine of $10,000 or a term of not more than five years, or both]. . . .\textsuperscript{32}

Although the language of this statute is rather sweeping, it has been used in a limited way to date. Illustrative of the few cases that have been brought for “counseling” evasion of the draft is *Warren v. United States*.\textsuperscript{33} In that case, the defendant, who did not believe in war, urged his 18 year old stepson not to register for the draft and suggested that he go to Canada or Mexico instead. Although the defendant even offered to

\textsuperscript{29} 244 F. 535 (S.D.N.Y. 1917), rev’d, 246 F. 24 (2d Cir. 1917); see p. 348 supra.
\textsuperscript{30} 1 T. Emerson, D. Haer & N. Dorsen, *supra* note 1, at 83 n.1.
\textsuperscript{31} 50 U.S.C. App. §§ 451-71 (1964). This law was passed in 1948 after the expiration on March 31, 1947 of the Selective Training and Service Act of 1940.
\textsuperscript{32} 50 U.S.C. App. § 462(a) (1964). This section is a re-enactment of 54 Stat. 894, the “offenses and penalties” section of the 1940 draft law, and has been tightened up by amendments since it was originally enacted in the 1940 Selective Service Act. The language “to refuse or evade” was added to eliminate such holdings as that of the Supreme Court in *Keegan v. United States*, 325 U.S. 478 (1945), where the Court said, in a 5-4 decision, that counseling “refusal” to comply with the act was not made criminal by the act because it then said only counseling “evasion” was proscribed. The language, “interfere . . . by force or violence or otherwise,” was added perhaps to prevent such holdings as in *Bagley v. United States*, 136 F.2d 567 (5th Cir. 1943), where the court held that words unaccompanied by acts cannot constitute “force or violence.” The adding of this phrase “or otherwise” would seem to bring within the purview of this act most of the protest activity previously prosecuted under the Espionage Act. See p. 348 supra.
\textsuperscript{33} 177 F.2d 596 (10th Cir. 1949), cert. denied, 338 U.S. 947 (1950). See also *Gara v. United States*, 178 F.2d 38 (6th Cir. 1949), aff’d *per curiam* by an equally divided Court, 340 U.S. 857 (1950); *Baxley v. United States*, 134 F.2d 937 (4th Cir. 1943).
provide funds for emigration, the stepson declined the offer and duly registered. The Court of Appeals for the Tenth Circuit, in affirming the conviction, and denying the first amendment defense, used language very similar to the Espionage Act cases:

Congress has power to raise armies by conscription in time of war as well as in time of war. . . .

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 . . . are qualified freedoms.\(^{34}\)

The court also said that the act of counseling evasion of the draft was made a primary offense by the statute; therefore, to constitute the offense it was not necessary that the person counseled actually evade or refuse to comply with the law.

The Espionage Act and the Selective Service Act were both used during the Second World War to prosecute the leaders of a Negro group which attempted to persuade Negroes not to fight the Japanese.\(^{35}\) The defendants were, at various times, president of the Pacific Movement of the Eastern World, Inc. which set up local branch organizations aimed at organizing the Negro against the war and the draft. The organization held meetings at which the defendants would promote the ideas that Japan was the champion of the Negro, that colored soldiers of America should not fight colored soldiers of other nations, and that Japan would liberate the Negro when it conquered the United States. They were indicted for conspiracy to violate the Espionage Act by wilfully attempting to cause insubordination in the armed forces and to obstruct the draft, and for conspiracy to violate the Selective Service Act. The court affirmed the conviction as to the Espionage Act count, finding that the defendants' utterances had a tendency, and were intended, to cause insubordination and obstruction. After this finding the court deemed it unnecessary to pass on the Selective Service Act conviction.\(^{36}\)

There seems to be little doubt that in the area of "expression" and its impact on the draft system, the Espionage Act and the Selective Service Act overlap. In dealing with either act the courts have cited the Schenck case\(^{37}\) in support of the power of Congress to pass an act which infringes on

34. 177 F.2d at 599. The defendant also raised the issue of freedom of religion in his defense. He claimed the right to counsel his step-son as to his religious conviction against the war and the draft. The court denied any such right, saying that religious beliefs do not justify violation of valid laws; that freedom to believe is absolute, but freedom to act is not, citing West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), Cantwell v. Connecticut, 310 U.S. 296 (1940), and Reynolds v. United States, 98 U.S. 145 (1878); accord, Baxley v. United States, 134 F.2d 937 (4th Cir. 1943).

35. Butler v. United States, 138 F.2d 977 (7th Cir. 1943).

36. Id. at 981. An almost identical case is United States v. Gordon, 138 F.2d 174 (7th Cir. 1943), cert. denied, 330 U.S. 798 (1943), involving the "Peace Movement of Ethiopia." There, no Selective Service Act violation was alleged.

the right of expression. In fact, the same test is used by the courts under both acts to determine whether the printed or spoken words violate the acts. The test, supposedly derived from Schenck, was whether the words were of such a nature and were used in such circumstances that they would have a tendency, or their “natural and probable effect” would be, to cause the evil Congress sought to prevent.

However, when we examine the circumstances under which the government sought to bring suit for violation of the Espionage Act, as compared to the circumstances which provoked prosecutions under the Selective Service Act, a difference is noticeable. Since 1940, when both acts became available to the government for use in prosecuting draft interference, violations of the Espionage Act have been charged where the printed or spoken words were aimed at a rather large audience. Under the Selective Service Act, however, the prosecutions have been aimed at individuals who advocate draft resistance to others individually or to co-members of an organization. This distinguishable use of the statutes is perhaps appropriate in view of the difference in the scope of the acts defined as criminal by the two statutes. In that the Espionage Act speaks in terms of obstructing the recruiting and draft system, it seems that it is more properly aimed at attempts to undermine public support of and compliance with the draft in a more general way. On the other hand, the “counsels evasion” section of the Universal Military Training Act seems aimed particularly at outlawing private counseling situations. It is that same section of the Training Act which punishes any knowing hindrance or interference “by force or violence or otherwise” of the administration of the draft law which appears to be applicable to the conduct prosecuted in the past under each statute. Thus it appears

38. Compare Gara v. United States, 178 F.2d 38, 40 (6th Cir. 1949), aff’d per curiam, 340 U.S. 857 (1950), with Wolf v. United States, 259 F. 388, 391 (8th Cir. 1919).


40. Hartzel v. United States, 322 U.S. 680 (1944); Butler v. United States, 138 F.2d 977 (7th Cir. 1943); United States v. Gordon, 138 F.2d 174 (7th Cir. 1943), cert. denied, 320 U.S. 798 (1943); United States v. Pelley, 132 F.2d 170 (7th Cir. 1942), cert. denied, 318 U.S. 764 (1943). All of these prosecutions also contained a count in the indictment charging an attempt to cause insubordination in the armed services; another often contained in this section of the Act, 18 U.S.C. § 2384 (1964); cf. United States v. Powell, 156 F. Supp. 526 (N.D. Cal. 1957), mistrial declared, 171 F. Supp. 202 (N.D. Cal. 1959). This appears to be the last prosecution under this Act.

41. Keegan v. United States, 325 U.S. 478 (1945); United States v. Miller, 233 F.2d 171 (2d Cir. 1956); Okamoto v. United States, 152 F.2d 905 (10th Cir. 1945); cases cited note 33 supra.

42. While 50 U.S.C. App. § 462(a) (1964), § 12(a) of the Universal Military Training Act, 50 U.S.C. App. § 402(a) (1964), do provide for a mistrial if there is no
that together the two statutes more than cover the field of all possible kinds and degrees of hindrances of the selective service system.

II. THE FIRST AMENDMENT — WHAT DOES IT PROTECT?

In the event of federal prosecutions, the question will be what kinds of expression can the government suppress pursuant to its proper function of raising armies and providing for the common defense. The primary consideration in such cases will be the extent to which the first amendment protects individual freedom of speech against improper governmental sanctions. In the past, the outer limits of the first amendment were drawn in terms of “clear and present danger.” But the scope of the first amendment has expanded immeasurably in the past two decades. Today there is uncertainty not only as to what the “danger” test means, but also as to what is the proper test to be applied when laws restricting speech are evaluated.

Following Dennis v. United States, considerable doubt was raised as to the continuing vitality of the “clear and present danger” test, which traditionally had been used in cases involving free speech and interference with the draft. However, when Dennis and Yates v. United States, which “clarified” Dennis, are examined it can be seen that these cases modified the “clear and present danger” test for certain situations only. In Dennis, the leaders of the Communist Party were charged with conspiracy to teach or advocate the overthrow of the government by force or violence in violation of the Smith Act. Writing the opinion of the Court, Chief Justice Vinson noted that because the defendants were convicted for “advocating” and “teaching,” special attention must be paid to the first amendment’s “demands.” After analyzing the cases that gave birth to the “danger” test, he concluded:

The rule we deduce from these cases is that where an offense is specified by a statute in nonspeech or nonpress terms, a conviction case law to the effect that the statute applies only where there is counseling on an individual basis. In any event, the “knowingly hinder or interfere . . . by force or violence or otherwise” language of this same section contains no such restrictive implications. See note 32 supra.

43. R. CUSHMAN, CIVIL LIBERTIES IN THE UNITED STATES 2 (1956); Finman & Macaulay, supra note 2, at 678-79.
45. 341 U.S. 494 (1951).
46. E.g., Hartzel v. United States, 322 U.S. 680 (1944); Taylor v. Mississippi, 319 U.S. 583 (1943); Schenck v. United States, 249 U.S. 47 (1919); Gara v. United States, 178 F.2d 38 (6th Cir. 1949), aff’d per curiam, 340 U.S. 857 (1950); Butler v. United States, 138 F.2d 977 (7th Cir. 1943); Baxley v. United States, 134 F.2d 937 (4th Cir. 1943).
47. 354 U.S. 298 (1957).
49. 349 U.S. at 502-89.
They '' whether the interest is that the requirement of the 'evil,' [that is, overthrow of the Government] discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.'" The Court then concluded as a matter of law that the danger of an attempted overthrow was sufficiently probable to warrant the application of the statute, and affirmed the convictions.

In *Yates v. United States*, Mr. Justice Harlan said:

The essence of the *Dennis* holding was that indoctrination of a group in preparation for future violent action, as well as exhortation to immediate action, by advocacy found to be directed to "action for the accomplishment" of forcible overthrow, to violence as "a rule of principle of action," and employing "language of incitement," . . . is not constitutionally protected when the group is of sufficient size and cohesiveness, is sufficiently oriented towards action, and other circumstances are such as reasonably to justify apprehension that action will occur.  

50. *Id.* at 505.
51. *Id.* at 508, 510.
52. *Id.* at 510. The Chief Justice reasoned that the "imminency of the danger" requirement of the "clear and present danger" rule could not apply in cases where the interest at stake is democracy itself. Hence it may be concluded that the "imminency" requirement still applies in cases where the interests at stake are not so great. *See M. Shapiro, Freedom of Speech: The Supreme Court and Judicial Review* 66 (1966).
54. *Id.* at 321 (emphasis added).
The Court and Congress were primarily concerned with inhibiting the growth of an effective subversive organization, and the Court adopted a first amendment test specifically for that purpose. Since Dennis, the Court has fully realized this and has held that first amendment rights can not be so restricted or invaded by the legislature except when dealing with subversive groups. Therefore, because in draft interference cases the gravity of the evil is substantially less than a violent coup d'etat, and because the Communist Party is probably only incidentally involved in the anti-draft movement, the Dennis-Yates modification of the range of expression traditionally protected by the first amendment becomes inapposite to a consideration of the meaning of the "clear and present danger" test in this context.

Since the decision in American Communications Ass'n v. Douds, a new approach to first amendment cases has come to the fore. This is the "balancing" test, according to which the problem is viewed as one of weighing the probable effects the statute will have upon the exercise of free speech against the interests of society that are sought to be protected by the legislature. At the foundation of this test is the idea that while beliefs are inviolate, conduct may be regulated for the protection and ordering of society. And, in that speech is a form of conduct, it too may be regulated in its manner and place when the regulation results only in an "indirect, conditional, partial abridgment. . ." This reasoning has been extended to support decisions upholding state compelled disclosure of membership in the Communist Party or other allegedly subversive associations. Thus, the balancing test will be used where the

55. In Barenblatt v. United States, 360 U.S. 109, 127 (1959) the Court said:
That Congress has wide power to legislate in the field of Communist activity in this Country. . . is hardly debatable. . . In the last analysis this power rests on the right of self-preservation, "the ultimate value of any society," Dennis v. United States. . .

On these premises, this Court in its constitutional adjudications has consistently refused to view the Communist Party as an ordinary political party, and has upheld federal legislation aimed at the Communist problem which in a different context would certainly have raised constitutional issues of the gravest character. See id. at 147-53 (Black, J. dissenting); Gibson v. Florida, 372 U.S. 539, 547, 549, 557-58 (1965); Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 88-105 (1961).

56. 339 U.S. 382 (1950). In Douds, the constitutionality of the non-Communist affidavit provision of the Taft-Hartley Act was unsuccessfully attacked as deterring free speech.

57. Id. at 400.

In Konigsberg, supra at 50-51, Mr. Justice Harlan formulated the test thusly:
\[G\]eneral regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental
statute does not, as applied, directly prohibit speech because of its content. But, where the prohibition is directly on the substance of the speech, and not on its form, it appears that the "clear and present danger" test will be applied. This holds true whether the statute makes an act unlawful and the evidence of the proscribed act in the particular case is speech, or the statute makes speech itself the crime. In either case, the result is the same: the prohibition falls on the content of the speech. In any prosecutions for obstructing the draft by printed or spoken words under the Espionage Act, where the statute speaks in terms of conduct, or under the Universal Military Training and Service Act, which outlaws a particular kind of speech, the Government would be seeking to convict for what was said, as well as where and when it was said.

Therefore, application of the "balancing" test would be improper in such cases.

Proceeding from the premise that "clear and present danger" is the proper test in any case involving speech that is alleged to obstruct the draft or counsel evasion of it, the inquiry is then: What does the phrase mean? When applied to such cases in the past, not infrequently persons were convicted because of the "tendency" of their words to produce the evil to be prevented. This "tendency test" was adopted by the Supreme Court while the first amendment was in its infancy. It was applied in Gitlow v. New York and Whitney v. California over the protests of Justices Holmes and Brandeis who urged that a "tendency" was not a sufficient reason to abridge expression. However, as Mr. Justice Vinson indicated in Dennis v. United States, the Court subsequently has not followed Gitlow and Whitney, but has "inclined toward the Holmes-Brandeis rationale." Nevertheless, the lower federal courts, even when purporting to apply the "clear and present danger" test, continued to convict for words whose tendency might induce someone to unlawful action.

interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved.

62. 18 U.S.C. § 2388(a) (1964): "Whoever . . . willfully obstruc... the recruiting or enlistment service of the United States, . . ."
63. 50 U.S.C. App. § 462(a) (1964): "[A]ny person . . . who knowingly counsels . . . another to refuse or evade registration or service, . . ."
64. E.g., Debs v. United States, 249 U.S. 211 (1919); Warren v. United States, 177 F.2d 596 (10th Cir. 1949).
65. In Thomas v. Collins, 323 U.S. 516, 530 (1945), the Court pointed out that when first amendment liberties are involved, "it is the character of the right, not of the limitation, which determines what standard governs the choice. . . ."
66. Z. Chafee, supra note 8, at 51; Emerson, supra note 44, at 909-10, 936n.71.
67. See, e.g., Gara v. United States, 178 F.2d 38 (6th Cir. 1949), aff'd per curiam, 340 U.S. 857 (1950); Baxley v. United States, 134 F.2d 937 (4th Cir. 1943).
68. 268 U.S. 652 (1925).
69. Referring to the Gitlow case, Mr. Justice Holmes said: "But the prevailing notion of free speech seems to be that you may say what you choose if you don't shock me." 2 Holmes-Pollock Letters 163 (M. Howe ed. 1961).
70. 341 U.S. 494 (1950).
71. Id. at 502 and cases there cited.
72. Cases cited note 39 supra.
There have been no prosecutions for obstructing the draft or counseling evasion of it for over 10 years. Yet in that time, the Court has used the "clear and present danger" test in such a manner in related first amendment areas so as to indicate that any such "tendency" test would be inconsistent with today's concept of "first amendment protected expression."

In the past two decades, the role of the "clear and present danger" doctrine has been restricted to contempt cases involving statements thought to obstruct justice and to criminal libel cases. In Wood v. Georgia, a sheriff accused local judges who had initiated a grand jury investigation of Negro bloc voting habits of political intimidation and persecution of the voters. He was cited for contempt of court on the grounds that his statements were calculated to obstruct the grand jury investigation and, therefore, constituted a clear and present and imminent danger to the administration of justice. The Supreme Court rejected the finding of a clear and present danger, holding that the clear and present danger standard, quoting Bridges v. California, was "a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."

This is an affirmation of the "clear and present danger" doctrine in the form espoused by Holmes and Brandeis in the Whitney and Gitlow cases. In Bridges, the Court held that, in "clear and present danger' cases, neither 'inherent tendency' nor 'reasonable tendency' is enough to justify a restriction of free expression." However, in Cox v. Louisiana, the defendants were convicted of violating a state statute prohibiting picketing "near" a courthouse with the intent to obstruct justice. The Supreme Court, in upholding the conviction, rejected the "clear and present danger" test as applied in Bridges and distinguished that case on the ground that conduct intertwined with speech was not speech in its "pristine form," and therefore was not entitled to the same protection under the first amendment. The Court indicated that, assuming the applicability of the "clear and present danger" test, the conclusion that such a danger did exist under the circumstances would have been proper. The Cox case may prompt the conclusions that, in the area of "obstruction of justice," the "clear and present danger" rule will be restricted in its use to cases involving only expression by words not intertwined with conduct, and that when it is applicable, the "danger" test will be used primarily to

73. 370 U.S. 375 (1962).
74. 314 U.S. 252, 263 (1941).
75. 370 U.S. at 384.
78. 379 U.S. 559 (1965).
strike down infringements on speech. The *Cox* case can also be seen as an application of the general rule that a state may regulate conduct if the regulation is related to a public interest and does not amount to a restriction on the content of the expression.

In *Ashton v. Kentucky*, the defendant was convicted for common law criminal libel, defined by the trial court as any writing calculated to create a disturbance or to lead to any indictable act. The Supreme Court reversed on the ground that the crime was unconstitutionally vague and, as applied, it resulted in an infringement on the right of free speech. In arriving at this result the Court quoted such "clear and present danger" cases as *Cantwell v. Connecticut* and *Terminiello v. Chicago*, and concluded with the statement that: "[w]hen First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer."

The last Supreme Court decision dealing with the Universal Military Training and Service Act was *Bond v. Floyd*. In that case, the Georgia House of Representatives denied a newly elected Negro representative a seat in the House on the ground, among others, that he had violated section 12 of the Military Training and Service Act, in that he had counseled, aided, or abetted others to refuse or evade the draft. The basis for the charge was that Bond had publicly endorsed a statement issued by the Student Nonviolent Coordinating Committee (SNCC) in which the Committee voiced its "sympathy" and "support" for all who "are unwilling to respond to a military draft." Bond further stated that, as a pacifist, he was anxious to encourage people not to participate in war "for any reason that they choose," but that he did not advocate that people could break laws. In commenting on this charge, the Court said that Bond could not have been constitutionally convicted under the Act, because the

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80. In Edwards v. South Carolina, 372 U.S. 229 (1963), the conviction for breach of the peace of demonstrators who massed at the State House was reversed by the Supreme Court as unconstitutionally infringing their rights of free speech and assembly. The Court did not mention the "clear and present danger" test specifically, but the opinion of the Court concluded (at 237-38) with a long quote from *Terminiello v. Chicago*, 337 U.S. 1, 4-5 (1948) which rested on the danger test. See Cox v. Louisiana, 379 U.S. 536, 546 (1965).

83. 310 U.S. 296 (1940).
84. 337 U.S. 1 (1949).
85. 384 U.S. 195, 200 (1966); accord, New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964). Even more recently, in *Elfrandt v. Russell*, 384 U.S. 11, 18 (1966), the Court struck down a state statute which required state employees to take a loyalty oath and criminally punished anyone who took the oath and then became or remained a member of the Communist Party. Condemning the statute as too broad, the Court said:

A statute touching those protected [first amendment] rights must be "narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State." *Cantwell v. Connecticut*, 310 U.S. 296, 311.
SNCC statement was not, under any interpretation, "a call to unlawful refusal to be drafted," and Bond's statements did not "demonstrate any incitement to violation of law. . . . See, e.g., Wood v. Georgia . . . Yates v. United States . . . Terminiello v. Chicago. . . ." In the last case to deal with a prosecution for interference with the draft under the Espionage Act of 1917, Hartzel v. United States, the Court said that it was clear that one element necessary to constitute an offense under the statute was "an objective one, consisting of a clear and present danger that the activities in question will bring about the substantive evils which Congress has a right to prevent." A year earlier, in Taylor v. Mississippi, the Court had dealt with a conviction under a state statute prohibiting the teaching of matter designed and calculated to encourage disloyalty to the United States and state governments. The defendants had stated that it was wrong to send boys to war, that it was wrong to fight, and that American boys were being shot for no purpose. The Court reversed the conviction on this charge, holding: "[W]hat they communicated is not claimed or shown to have . . . advocated or incited subversive action . . . or to have threatened any clear and present danger to our institutions or our Government. What these appellants communicated were their beliefs and opinions. . . ."

In other first amendment areas, even when not applying a "clear and present danger" test, the Court has stressed the need to find an "incitement" of action and an "imminent" danger of unlawful conduct in order to uphold restrictions on expression. In Kingsley Picture Corp. v. Regents, a New York court denied a license to show a motion picture because it presented adultery as being right and desirable under certain circumstances. The Supreme Court reversed, stating:

Advocacy of conduct proscribed by law is not, as Mr. Justice Brandeis long ago pointed out, "a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on." Whitney v. California, 274 U.S. 357, at 376 (concurring opinion).

This Whitney language was also substantially adopted by Chief Justice Vinson in American Communications Ass'n v. Douds, where he said,

88. 385 U.S. at 133.
89. 385 U.S. at 134 (emphasis added). It is most indicative of the present Court's attitude toward draft interference prosecutions that it cited two cases grounded on the "clear and present danger" test, Wood and Terminiello. Yates taught that the Smith Act can proscribe "advocacy which incites to illegal action," 354 U.S. 298, 313 (1957), and no less, if it is to stay within the bounds of the first amendment.
92. Id. at 687.
93. 319 U.S. 583 (1943).
94. Id. at 589-90 (emphasis added). Compare this analysis with the positions taken in Wolf v. United States, 259 F. 388 (8th Cir. 1919), and Coldwell v. United States, 256 F. 805 (1st Cir. 1919).
96. Id. at 689.
after discussing Whitney and Bridges, that "it follows therefrom that even harmful conduct cannot justify restrictions upon speech unless substantial interests of society are at stake." 98

In Ashton v. Kentucky, 99 the Court cited Cantwell v. Connecticut, 100 which declared incitements to be outside the protection of the first amendment, and De Jonge v. Oregon, 101 in which the Court said:

These [first amendment] rights may be abused by using speech or press or assembly in order to incite to violence and crime. . . . But the legislative intervention can find constitutional justification only by dealing with the abuse. 102

The point is that when free speech is involved, that which advocates unlawful action, and yet falls short of "incitement" to unlawful conduct, is protected. 103 The late Professor Meiklejohn defined "incitement" as "an utterance so related to a specific overt act that it may be regarded and treated as a part of the doing of the act itself, if the act is done. Its control, therefore, falls within the jurisdiction of the legislature." 104 Society may legitimately be concerned about illegal actions and incitements to such action. But, as expressed by Mr. Justice Holmes, "Every idea is an incitement." 105 Therefore, "incitement" must be defined very close to action in order to protect the expression of beliefs, opinions, and the "robust advocacy" necessary to a functioning democracy. 106 This was, in the Holmes-Brandeisian sense, the function of the "clear and present danger" test. 107 The line over which expression may not pass without losing its protection must be drawn with reference to the danger created at the time of the expression. As Mr. Justice Rutledge said:

In the abstract the problem could be solved in various ways. At one extreme it could be said that society can best protect itself by prohibiting only the substantive evil and relying on a completely free interchange of ideas as the best safeguard against demoralizing propaganda. Or we might permit advocacy of lawbreaking, but only so long as the advocacy falls short of incitement. But the other extreme position, that the state may prevent any conduct which induces people

98. Id. at 397.
100. 310 U.S. 296, 306 (1940).
102. Id. at 364-65.
103. Z. CHAFEES, FREE SPEECH IN THE UNITED STATES 23, 35, 47 (1954); A. MEIKLEJOHN, POLITICAL FREEDOM 122 (1965).
104. A. MEIKLEJOHN, supra note 103, at 123.
106. The line between expression which is protected by the first amendment and that which is not is, necessarily, very narrow. Professor Meiklejohn drew the line in terms of "advocacy of action" and "incitement of action," the latter not being protected. A. MEIKLEJOHN, supra note 103, at 122. Professor Emerson, on the other hand, draws the line in terms of "expression" as opposed to "action." Speech "inseparably locked with action," he contends, should be treated as "action." Emerson, Toward a General Theory of the First Amendment, 72 YALE L.J. 877, 931, 932 (1963). Martin Shapiro, in FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 71, 118 (1966), speaks in terms of the distinction between "thought" and "action." 107. Z. CHAFEES, supra note 103, at 82; Mendelson, Clear and Present Danger — Toward a Balanced Theory of Free Speech, 47 CORNELL L. REV. 1 (1962).
to violate the law, or any advocacy of unlawful activity, cannot be squared with the First Amendment.108

Speech which advocates unlawful action may not be infringed until it comes very close to causing that unlawful conduct. Therefore, one cannot be convicted of obstructing the draft by words, or of attempting to do so, unless the words would clearly incite an obstruction. And one may not be convicted of counseling evasion of the draft until his advocacy of such illegal conduct amounts to an incitement of it.

III. THE DRAFT PROTESTERS109

The year 1967 witnessed perhaps the widest variety of anti-draft activity in over a decade. The draft has become a prime target for the growing number of those who dissent from our government's Vietnam policies, regardless of whether their motives for opposing the war are political, moral, or racial. For example, draft counseling and resistance centers have been organized throughout the country.110 The Vermont Council of Churches and the American Friends Service Committee, a Quaker organization, offer counseling services aimed at helping conscientious objectors to avoid participation in the war, and inform those subject to the draft of their legal rights under the laws.111 The militant student organization, Students for a Democratic Society, and the Congress of Racial Equality operate "draft resistance unions" and "workshops."112

Mass demonstrations at draft boards and induction centers are perhaps the most widespread forms of protest. Techniques range from silent picketing with signs such as "Don't Kill - Don't Die - Don't Go," to aggressive acts of civil disobedience, such as blocking the doors of buildings and obstructing the movement of busloads of inductees.113 Generally such disruptions result in arrests on charges of disorderly conduct and trespassing, but recently, seven members of the Student Nonviolent Coordinating Committee who picketed an induction center were reportedly indicted by federal authorities "for interfering with administration of the Military Training and Service Act."114

In seeking to "escalate opposition to the war,"115 nationally known figures such as Dr. Martin Luther King have publicly urged "avoidance

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109. See generally Finman & Macaulay, supra note 2, at 641-61. This section of the comment will attempt to present but a sampling of the most recent varieties of protest in order to highlight and give background to the free speech and governmental self-protection problems discussed later.
110. Time, Sept. 8, 1967, at 15. It is estimated in this report that the total number of draft counseling centers is now over 100.
112. N.Y. Times, June 20, 1967, at 25, col. 4; id. May 7, 1967, at 1, col. 3.
of military service for those who are against the war,” encouraging
them to seek conscientious objector status. The more militant “Black
Power” spokesmen, however, such as Stokely Carmichael, H. Rap Brown,
and Floyd McKissick, have openly urged Negroes to resist the draft by
any means. In California, a group of pacifists have formed the Com-
mittee for Draft Resistance. They have announced that they intend to
“explicitly encourage, aid and abet ... civil disobedience ...” of the draft
law, even though it may result in fines or imprisonment.

Perhaps the most extreme form of anti-draft activity, and that which
is clearly illegal, is the operating or aiding an “underground railroad” by
which draft evaders might emigrate across our borders or disappear into
the slums of our nation’s big cities. A few student groups have openly
declared their intention to assist those seeking refuge from the draft in
Canada. While it is difficult, if not impossible, to tell how serious a
threat to the draft system such activity may pose, or even if organized
underground railroads do exist, it has been estimated that presently there
are about 1500 American “draft dodgers” in Canada.

Generally speaking, it has been reported that draft dodging convictions,
draft delinquencies, and applications for conscientious objector status
have increased during 1967, but that they are still below Korean and
Second World War levels. Whether this increase is simply due to
the increased war activity and draft calls, or to the activity of draft
resistance groups, is certainly debatable. Apparently, the federal author-
ities have not felt that the anti-draft activity to date presents a substantial
threat to the draft system, but if the war continues, anti-draft activity
will surely increase. As the draft protest increases it is becoming apparent
that its form will change from simple dissent to aggressive civil disobedi-
ence. Under such circumstances, the possibility of federal prosecutions
will be more likely, if not already a fact.

116. Id. April 5, 1967, at 1, col. 2.
117. Id. June 28, 1967, at 2, col. 7; id. May 1, 1967, at 1, col. 7; id. April 16, 1967,
§ 4, at 3, col. 3. The position on the draft adopted by the First National Conference
on Black Power was stated simply as “Hell, no, we won’t go.” Id. July 24, 1967,
at 16, col. 2.
118. Id. July 18, 1967, at 27, col. 3.
119. Id. May 7, 1967, at 1, col. 3 (Students for a Democratic Society); id. April
9, 1967, at 22, col. 1 (a student faction of the American Friends Service Committee);
see Time, supra note 110.
120. O. Clausen, Boys Without a Country, N.Y. Times, May 21, 1967, § 6 (Mag-
zine), at 25. Canada will not extradite anyone merely for draft dodging. Id.
122. Assistant Attorney General Fred M. Vinson, head of the Justice Department’s
Criminal Division, stated before the House Armed Services Committee on May 5,
1967, that draft law violation problems had not increased appreciably in the last decade
and that no one had been prosecuted for helping others avoid the draft “because the
Department felt no one has violated the law.” N.Y. Times, May 6, 1967, at 1, col. 6.
123. E.g., N.Y. Times, Oct. 18, 1967, at 1, col. 2, (city ed.); id. at 9, col. 1; id.
124. On June 8, 1967, the federal authorities reportedly indicted two men on
charges of attempting to thwart the draft law. N.Y. Times, June 9, 1967, at 89, col. 4;
IV. DRAFT PROTEST AND THE FIRST AMENDMENT

At the outset, it can be safely posited that conduct which does, in fact, obstruct, interfere, or hinder the functioning of the draft process may be punished under the law without invoking any serious first amendment questions. Such conduct would include disruptions of Selective Service offices and induction centers by means of mass sit-ins and demonstrations which interrupt the business routine of those places. This is "conduct," not "expression" in its true meaning, and conduct may be regulated in the interest of peace and order. The same can be said for on-the-scene exhortations and encouragement of obstructive conduct, as well as activity which aids and abets the operation of an "underground railroad" thus enabling draft eligibles to evade the requirements of the law.

Although such disruptive demonstrations may fall within the scope of the federal laws, it seems both inappropriate and unlikely that arrests would be made on the basis of these statutes. The interests infringed by the disturbances are not so much federal, but are primarily the interests of the local citizens who have a right to go about their business unmolested. Consequently, the demonstrators should be, and usually have been, dealt with by local authorities under city and state laws against disorderly conduct, trespass, and incitement to riot. Perhaps the initiation of federal prosecutions would depend upon the degree and frequency of the interference, the ability of the local authorities to cope with the situation, and the nature of the organization and leadership behind the demonstrations.

At the opposite end of the spectrum of anti-draft activity is that which is "pure speech," disassociated from conduct per se, and, it is submitted, protected expression. This would include all public communication as to the immorality of the war or draft, and even the public advocacy of "avoidance" of the draft by, for example, applying for conscientious objector status. In effect this expression seeks to persuade the listener to adopt a belief and, in the latter case, to act on that belief in a legal manner. As the Court said in Thomas v. Collins:

[The protection of the first amendment] extends to more than abstract discussion, unrelated to action. . . . "Free trade in ideas" means free trade in the opportunity to persuade to action, not merely to describe facts. . . . Indeed, the whole history of the problem shows it is to the end of preventing action that repression is primarily directed and to preserving the right to urge it that the protections are given.

125. As indicated earlier, such conduct would be indictable under either the Espionage Act, 18 U.S.C. § 2388(a) (1964) or under the Military Training and Service Act, 50 U.S.C. App. § 462(a) (1964).
126. To the Government, the most valuable parts of the statutes with regard to prosecution of tightly organized draft-resistance groups involved in illegal activity are their conspiracy provisions, 18 U.S.C. § 2388(b) (1964) and 50 U.S.C. App. § 462(a) (1964).
127. For an examination of the recent Supreme Court decisions covering the regulation of demonstrations by states and cities, see Note, Regulation of Demonstrations, 20 HAV. L. REV. 1773 (1967).
These protections may be best maintained by requiring the likelihood that an imminent substantial danger would directly result from an expression before such an expression can be punished. In other words, it is necessary that the expression amount to an incitement of illegal action, notwithstanding its "bad tendency."

First amendment problems arise when the protest activity is confined to peaceful demonstrations such as picketing. In such cases the activity combines the elements of conduct and expression of ideas. Perhaps whether such activity is regulable conduct or is to be respected as free expression depends on which element predominates, expression or conduct. While the presence of a handful of picketers marching silently in front of an induction center presents no substantial danger to the draft system as a whole, it is possible that a potential registrant or inductee may be persuaded not to enter the building after reading the picketers' placards or a pamphlet that they have handed to him. Here, the only interest that could possibly be involved is federal, not local. There is no activity that would traditionally involve the use of city or state laws aimed at preserving public order. Rather, there is a collision between a form of expression and the will of Congress to punish those who attempt to persuade others not to comply with the law. Picketing and parading is a legitimate form of public expression of opinion and is protected by the first amendment.\(^\text{129}\) Suppression under the draft law or the Espionage Act would necessarily entail a restriction on the substance of the expression and not just its form. Thus, the "clear and present danger" test necessitates the finding of an incitement to illegal action before the expression would fall outside the bounds of free speech and into the area properly proscribed by the statutes. It would seem that picketing and leafleting of induction centers would lose its protection as free speech only where an attempt is made to primarily and directly persuade those subject to the draft to violate the law. Thus, protest which urges others to seek legal alternatives to the draft or intends primarily to give public form to dissent would fall short of inciting to unlawful conduct.

The most difficult area in which to draw the line between protected and nonprotected speech is where the speaker advocates unlawful action, that is, where evasion or resistance to the draft by illegal means is urged. As it was demonstrated earlier,\(^\text{130}\) and is clearly underscored in *Yates v. United States*,\(^\text{131}\) even advocacy of unlawful action is protected speech so long as it does not incite unlawful conduct. Short of this, advocacy of the principle of noncompliance with a law is a primary means of arousing opposition to that law and of calling the attention of the people and their representatives in the legislature to the alleged immorality or injustices of the law.\(^\text{132}\)

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130. See p. 360-62 *supra*.
132. In his concurring opinion in *Dennis v. United States*, 341 U.S. 517 (1950), Mr. Justice Frankfurter stressed that mere advocacy of formal noncompliance of the
Where one individual has urged another individual to evade the draft, the Government has invoked the Military Training and Service Act provision against "counseling" evasion. However, in these cases the courts have not defined the word "counsels," and it is nowhere defined in the statute. Judge Learned Hand probably best articulated the common meaning of the word in one of the earliest Espionage Act cases where he said that, "[t]o counsel or advise a man to an act is to urge upon him either that it is his interest or his duty to do it." This definition seems to fit the utterances deemed violative in the cases, and if the circumstances are such that the counselee is urged to act or not to act "now," the result being a violation of the law, the facts would seem to meet the incitement test.

Perhaps the most critical type of advocacy of disobedience of the draft law, and that which receives the most publicity, is the vociferous anti-draft speech made before a gathering of draft-eligible young men. It might be argued that under certain circumstances such words amount to counseling refusal to comply with the draft within the meaning of the Universal Training Act. Perhaps this would be true if it were shown that the statements directly urged breaking of the law, that they were specifically aimed at a group of people presented with the immediate opportunity to break the law, that the speaker primarily intended in the course of his talk to instigate law breaking, and that it was probable that the words would be so acted upon. Absent one of these elements, the speech would either not lose its mantle of protection, or would not satisfy a requirement of the Act.

The question that remains is whether such an anti-draft speech may be punishable as a wilfull obstruction of the draft system under the Espionage Act. Assuming that the audience is strenuously urged to tell the draft board "Hell, no, we ain't going" and to go to jail instead of to war, the problem is, in terms of the incitement requirement, that this necessarily is advocacy of future action. The listener may be persuaded to refuse to go when he is called to service, or refuse to register when he becomes 18 years old, but he can not, as soon as the speech ends, run out into the street and "evade the draft." Certainly, where the audience

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Government should be protected as far as possible in order to preserve any valid criticism of our society that such commentary may contain. Id. at 549. He further argued that, "[s]uppressing advocates of overthrow inevitably will also silence critics who do not advocate overthrow but fear that their criticism may be so construed,"

133. See p. 351 supra.

134. See cases cited note 33 supra. One possible reason for this failure to define "counsels" in the cases may be that in Gara and in Warren, the violation, and therefore the "counseling," was admitted by the defendants.

135. Masses Publishing Co. v. Patten, 244 F. 535, 540 (S.D.N.Y. 1917); see p. 348 supra.

136. For example, in April 1967, Stokely Carmichael spoke at predominately Negro Tougaloo College in Jackson, Mississippi. In parts of his speech he attacked the war and the draft, causing his audience of 600 to 700 students to shout "Hell, no, we won't go!" for a full 10 minutes. N.Y. Times, April 16, 1967, § 4, at 3, col. 3. See also id. May 1, 1967, at 1, col. 7.
is large and made up of persons subject to the draft, the danger that this type of speech presents to the draft system is greater than that presented by individual counseling. Where the speaker intends to persuade a large audience of receptive persons to violate the draft law, and intends thereby to "obstruct" or "interfere" with selective service processes, the first amendment requirement that the immediacy of the evil be present is put to the acid test. It could be argued, using the words of Chief Justice Vinson in the Dennis case, that, "[i]f the ingredients of the reaction are present [that is, speaker's unlawful intent; words of incitement; listeners liable to the draft] we cannot bind the Government to wait until the catalyst [that is, the opportunity for the listener to violate the law] is added."138 But if there is a necessary time-lag between the occasion of the words of incitement and the occasion for taking the illegal action stimulated by those words, the proper remedy is not punishment of the speaker, but "to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education. . . . Such . . . is the command of the Constitution."139 Dennis and Yates allowed advocacy of future illegal action by words of incitement to be proscribed only after the Court was satisfied that an action-bent group existed, and that it was of sufficient size and cohesiveness "to justify the apprehension that action will occur."140 Thus, if the speaker and audience are members of a group which does not operate in the overt political arena, the "marketplace of ideas," no amount of discussion and education could work to avert the unlawful action. But absent this element, the danger created by the words at the time of utterance does not seem to be so great or so imminent as to justify the abandonment of the commitment of democracy embodied in the first amendment.

V. Summary and Conclusion

As noted previously, the early Espionage Act cases gave little weight to the protections of the first amendment. While the convictions in the lower courts were obtained during a time of national crisis and war, the same convictions were affirmed by the Supreme Court years after these circumstances had abated. During World War II the Supreme Court reviewed only two draft interference cases,141 but these cases indicated that greater respect would be afforded expression and that the first amendment required that restrictions thereon be tested by the "clear and present danger" test. However, the lower courts, in cases brought under both the Espionage Act and the Selective Service Act since 1940, did not apply

the “danger” test in fact, but rather based their convictions for interference with the draft by words on a finding that the “natural and probable effect” of such words could result in draft law violations.

Since 1950, prosecutions for obstructing the draft or counseling evasion of it have been somewhat rare, and the “clear and present danger” test has lead an uncertain life in the Supreme Court. The Court has refused to apply it in cases involving the Communist Party and has turned to the “balancing” test in other areas. However, it is submitted that, excepting only the Communist cases, the “balancing” test has not yet been applied where criminal sanctions fall directly on speech. In those cases where sanctions fall directly on speech, which would include any brought under the federal statutes for obstructing or counseling evasion of the draft, the first amendment requires that the statute meet the strictest test to be valid, and this is the “clear and present danger” test as viewed in the context of today’s broad first amendment ideals.

The recent Supreme Court cases that apply the “clear and present danger” test continue to stress the requirement of imminency of a serious harm before speech in its “pristine form” may be restricted or punished. In recent cases in other “free speech” areas, the Court, while not expressly mentioning the “danger” test, emphasizes that even advocacy of unlawful conduct must amount to an incitement before it can be proscribed. Certainly any “tendency” or “probable effect” test is inconsistent with such protection. Thus, the key to the “clear and present danger” doctrine lies in the application of the concept of incitement whereby it can be determined whether the expression is so close to the illegal conduct it seeks to provoke that the expression itself may be punished.

There can be little doubt that the federal government is closely watching the anti-war, anti-draft movements which are becoming more committed to the policy of civil disobedience. The federal prosecutor, the Department of Justice, has the duty of prosecuting those who interfere with the draft under the Espionage Act and the Universal Military Training Act. In fulfilling this duty the Department necessarily has a large amount of discretion in deciding under what circumstances it will seek to enforce the laws through the courts. But in times of national stress, when the conflict of ideas becomes sharp, intolerance grows and the majority puts pressure on the federal government to exercise its discretion and silence an unpopular or disquieting minority. The executive agencies vow not only to enforce the laws, but also to uphold the Constitution and therefore to take into account the first amendment rights of the individual as well as the welfare of society. Against the pressures to minimize constitutional considerations must stand resolute adherence to ob-

142. In May of 1967, the House Armed Services Committee called Assistant Attorney General Fred M. Vinson before it and reportedly “demanded” that the Justice Department prosecute those who urged defiance of the draft law. One representative stated that the public was inundating Congress with mail demanding that it take action against draft evaders and protesters. N.Y. Times, May 6, 1967, at 1, col. 7.
jective, judicious, even courageous prosecutorial policies, for it is certainly the prosecutor who can best and most immediately put into practice the theory underlying our Constitution.

Although some of the recent protest activity is most probably violative of federal law, federal action against such activity is proper only when it presents a high degree of danger to the administration and efficacy of the system. In other words, federal prosecution should be withheld, even where the speech or conduct is illegal, so long as that speech or conduct remains inconsequential and may be handled adequately by local authorities. The initiation of federal prosecutions would have a deterrent effect on the protests in general. In light of the legitimate, critical function of protest, the prosecutorial discretion should be exercised only where the damage that could result to the system justifies the loss of the benefits to be derived from dissenting activity.

Frederick C. Moss

143. At the Congressional hearing, note 142 supra, one representative exclaimed, "Let's forget the First Amendment." To this Mr. Vinson replied, "I am a firm believer in the First Amendment." He further testified: "A great deal of the Constitution is intended to protect minorities and dissenters," and that "[a]ny law that deals with utterances must be read in the light of the First Amendment."

When asked what can be done against those who dissent and urge disobedience of the draft, Mr. Vinson replied: "We can all applaud the 99 per cent of our citizens who vigorously support their country." Id. at 6, col. 4.

144. For an eloquent plea that individual counseling of evasion cases such as Warren v. United States, 177 F.2d 596 (10th Cir. 1949), cert. denied, 338 U.S. 947 (1950), should not be prosecuted, see M. Konvitz, Fundamental Liberties of a Free People 397-99 (1957).