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Justice Black, the Demonstrators, and a Constitutional Rule of Law

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In evaluating here briefly a jurist whose career as a shaper of the fundamental law has spanned the past three decades, one treads warily for fear of oversimplification. It would be an easy thing to categorize such a man as Justice Black, to pigeonhole him and his philosophy in the compartment marked "liberal" or "activist" and to let it go at that, serene in the thought that the classification had exhausted the subject. But such a categorization would be illusory and perilous were it not hedged about by those qualifications required in an evaluation of a productive mind.

Justice Black's thought processes do not respond readily to classification. This becomes apparent when we consider, on the one hand, his frequently expressed view of the first amendment as an absolute protection of free expression and, on the other, his recently emphasized readiness to curb that expression within the bounds of reasonable and necessary regulations for the preservation of peace and order in the community.[1]

The seeming rigidity of the first view is tempered by two considerations. One is the possibility of construing some types of speech and conduct as beyond the pale of the first amendment, thereby facilitating limited restrictions by government action unencumbered by the absolutist prohibitions of the first amendment.[2] The other

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[1] In his James Madison Lecture at New York University in 1960, Justice Black said: "It is my belief that there *are* 'absolutes' in our Bill of Rights, and that they were put there on purpose by men who knew what words meant, and meant their prohibitions to be 'absolutes.'" Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865, 867 (1960).

[2] Justice Black described this view in the following terms with reference to the term "unreasonable" in the fourth amendment: "The use of the word 'unreasonable' in this Amendment means, of course, that not *all* searches and seizures are prohibited. Only those which are *unreasonable* are unlawful. There may be much difference of opinion about whether a particular search or seizure is unreasonable and therefore forbidden by this Amendment. But if it *is* unreasonable, it is absolutely prohibited." *Id.* at 873.

Or, as Justice Black expressed it with more general reference to all liberties covered by the Bill of Rights: "I shall not attempt to discuss the wholly different and complex problems of the marginal scope of each individual amendment as applied to the particular facts of particular cases. For example, there is a question as to

is illustrated by his dissent in *Barenblatt v. United States*[3] where he agreed that "a law which primarily regulates conduct but which might also indirectly affect speech can be upheld if the effect on speech is minor in relation to the need for control of the conduct."[4]

Whether Black's position on the susceptibility of personal liberties to government regulation is theoretically consistent, and whether its practical consequences are tolerable, can best be evaluated through an analysis of some of his recent opinions dealing with convictions of "sit-ins" and demonstrators.[5]

Obviously, Justice Black cannot be accused of a lack of sympathy for legitimate demonstrators or of a reluctance to enforce constitutional protections in their behalf.[6] However, in recent years he has had occasion in this area to draw a practical line for the

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whether the First Amendment was intended to protect speech that courts find obscene. I shall not stress this or similar differences of construction, nor shall I add anything to the views I expressed in the recent case of *Smith v. California.* I am primarily discussing here whether liberties *admittedly* covered by the Bill of Rights can nevertheless be abridged on the ground that a superior public interest justifies the abridgment. I think the Bill of Rights made its safeguards superior." *Id.* at 867. If, then, the speech or conduct in question is within the protective gounds of the Bill of Rights, Justice Black would appear to deny any power in any branch of government to restrain it in any way.

[3] 360 U.S. 109, 134 (1959).

[4] *Id.* at 141. In approving a "balancing" test where the effect on speech is indirect, Black was careful not to approve the use of that technique where the effect of the legislation on speech is direct: "I do not agree that laws directly abridging First Amendment freedoms can be justified by a congressional or judicial balancing process." *Ibid.* Nevertheless, his allowance of indirect infringement upon speech does leave considerable latitude for legislative regulation, subject to the balancing test.

The "balancing" test, incidentally, has been articulated thusly by Mr. Justice Frankfurter: "To state that individual liberties may be affected is to establish the condition for, not to arrive at the conclusion of, constitutional decision. Against the impediments which particular government regulation causes to entire freedom of individual action, there must be weighed the value to the public of the ends which the regulation may achieve." Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 91 (1961).

As shall be noted below, Justice Black has employed the "balancing" test on occasion rather vigorously as a vehicle for upholding official limitations of conduct and, indirectly, speech.

[5] It will be useful to quote throughout extracts from some of the Black opinions at length in order to assess his own practical utilization of the "balancing" technique in cases where he deemed it justified.

[6] See Garner v. Louisiana, 368 U.S. 157 (1961), the first sit-in case to reach the Supreme Court, in which Justice Black joined in the majority opinion of the unanimous Court which reversed, for lack of evidence, convictions for disturbing the peace. *Cf.* the opinion by Justice Black for the unanimous Court in Thompson v. City of Louisville, 362 U.S. 199 (1960), which was relied upon by the Court majority in *Garner.* Justice Black subscribed to the Supreme Court's decisions in the 1963 sit-in cases, Avent v. North Carolina, 373 U.S. 375 (1963); Gober v. City of Birmingham, 373 U.S. 374 (1963); Lombard v. Louisiana, 373 U.S. 267 (1963); Shuttlesworth v. City of Birmingham, 373 U.S. 262 (1963); and Peterson v. City of Greenville, 373 U.S. 244 (1963), in all of which the Court reversed convictions of sit-in demonstrators.

limitation of individual freedom of action and to affirm that the constitutional protections of expression must be construed in context with the sometimes overarching requirements of an orderly society governed by the constitutional rule of law.

In *Bell v. Maryland*,[7] the Supreme Court remanded to the Maryland Court of Appeals the criminal trespass convictions of Negroes who had engaged in a restaurant sit-in. The five-man majority rested the ruling on the ground that the state court should have an opportunity to consider the convictions in light of the public accommodations laws enacted by the State of Maryland and the City of Baltimore subsequent to the convictions.

Mr. Justice Black wrote a biting dissent, joined by Justices Harlan and White, in which he proceeded to give his opinion on the merits of the case. In so doing, he spelled out the practical implications of his concepts of free expression. Throughout, he affirmed his distinction between speech and action:

> We reject the contention that the statute as construed is void for vagueness. In doing so, we do not overlook or disregard the view expressed in other cases that statutes which, in regulating conduct, may indirectly touch the areas of freedom of expression should be construed narrowly where necessary to protect that freedom. And we do not doubt that one purpose of these "sit-ins" was to express a vigorous protest against Hooper's policy of not serving Negroes. But it is wholly clear that the Maryland statute here is directed not against what petitioners said but against what they did—remaining on the premises of another after having been warned to leave, conduct which States have traditionally prohibited in this country. And none of our prior cases has held that a person's right to freedom of expression carries with it a right to force a private property owner to furnish his property as a platform to criticize the property owner's use of that property.[8]

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[7] 378 U.S. 226 (1964).

[8] *Id.* at 325. In another part of his *Bell* opinion, Justice Black emphasized the importance of preserving the integrity of orderly legal processes, even when they are sought to be used by those who are ignobly motivated: "But a mechanical application of the Fourteenth Amendment to this case cannot survive analysis. The Amendment does not forbid a State to prosecute for crimes committed against a person or his property, however prejudiced or narrow the victim's views may be. Nor can whatever prejudice and bigotry the victim of a crime may have be automatically attributed to the State that prosecutes. Such a doctrine would not only be based on a fiction; it would also severely handicap a State's efforts to maintain a peaceful and orderly society. Our society has put its trust in a system of criminal laws to punish lawless conduct. To avert personal feuds and violent brawls it has led its people to believe and expect that wrongs against them will be vindicated in the courts. Instead of attempting to take the law into their own hands, people have been taught to call for police protection to protect their rights wherever possible. It would betray our whole plan for a tranquil and orderly society to say that a citizen, because of his personal prejudices, habits, attitudes, or beliefs, is cast outside the law's protection and cannot call for the aid of officers sworn to uphold the law and preserve the peace. The worst citizen no less than the best is entitled to equal protection

After noting that the power to amend the Constitution rests conjunctively in Congress and the States, and that "the Founders gave no such amending power to the Court,"[9] Black expressed in stringent terms his resistence that the right of expression must be qualified in some cases by consideration of the rights of others.[10]

Of course, "balancing" can be an unconfined and vagrant exercise unless the balancer has not only a real concern for personal freedom of action but also a clear conception of the competing value for the protection of which the balancing is undertaken and the personal freedom limited. For Justice Black, this competing value is the constitutional rule of law, and indeed, for him it is virtually a supreme judicial value even if the occasions for its restrictive application are limited. In his *Bell* opinion, Black expressed a readiness to affirm that rule of law, not for the sake of restricting freedom, but rather for the sake of preserving it and of preventing the development of a climate in which personal freedoms could be swept aside by a rule of force. He concluded his *Bell* opinion with a ringing peroration on behalf of this constitutional rule of law:

> A great purpose of freedom of speech and press is to provide a forum for settlement of acrimonious disputes peaceably, without resort to intimidation, force, or violence. The experience of ages points to the inexorable fact that people are frequently stirred to violence when property which the law recognizes as theirs is forcibly invaded or occupied by others. Trespass laws are born of this experience. They have been, and doubtless still are, important features of any government dedicated, as this country is, to a rule of law. Whatever power it may allow the States or grant to the Congress to regulate the use of private property, the Constitution does not confer upon any group the right to substitute rule by force for rule by law. Force leads to violence, violence to mob conflicts, and these to rule by the strongest groups with control of the most deadly weapons . . . . At times the rule of law seems too slow to some for the settlement of their grievances. But it is the plan our Nation has chosen to preserve both "Liberty" and equality for all. On that plan we have put our trust and staked our future. This constitutional rule of law has served us well. Maryland's trespass law does not depart from it. Nor shall we.[11]

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of the laws of his State and of his Nation. None of our past cases justifies reading the Fourteenth Amendment in a way that might well penalize citizens who are law-abiding enough to call upon the law and its officers for protection instead of using their own physical strength or dangerous weapons to preserve their rights." *Id.* at 327-28.

[9] *Id.* at 342.

[10] "Unquestionably petitioners had a constitutional right to express these views wherever they had an unquestioned legal right to be. . . . But there is the rub in this case—the contention that petitioners had a constitutional right to enter or to stay on Hooper's premises against his will because, if there, they would have a constitutional right to express their desire to have restaurant service over Hooper's protest, is a bootstrap argument. The right to freedom of expression is a right to express views, not a right to force other people to supply a platform or a pulpit." *Id.* at 344-45.

[11] *Id.* at 346.

In *Cox v. Louisiana*,[12] Justice Black dissented from the majority's reversal of a demonstrator's conviction for a violation of a Louisiana statute[13] prohibiting anyone, under any conditions, to picket or parade near a courthouse, residence, or other building used by a judge, juror, witness, or court officer, "with the intent of influencing" any of them. Black was uninfluenced by the peaceful character of the picketing and was unwilling to immunize that picketing simply because it was not overtly boisterous or violent.[14] In his opinion in *Bell v. Maryland*, Justice Black declined to construe freedom of expression as conferring a license to invade private property. In his *Cox* opinion, he went further and limited the right to use the public streets in such a way as to interfere seriously with the orderly processes of that constitutional rule of law which he espoused in the *Bell* case.[15]

Justice Black's opinion in *Cox* is particularly significant because he departed from a discussion and application of fairly neutral principles to frame the issue in terms of the social realities underlying the facts presented by the *Cox* case. In this way, he concluded his *Cox* opinion with an unusually impassioned warning to minority groups that their road to progress lies within the constitutional rule of law:

> And minority groups, I venture to suggest, are the ones who always have suffered and always will suffer most when street multitudes are allowed to substitute their pressures for the less glamorous but more dependable and temperate processes of the law. Experience demonstrates that it is not a far step from what to many seems the earnest, honest, patriotic, kind-spirited multitude of today, to the fanatical, threatening, lawless mob of tomorrow. And the crowds that press in the streets for noble goals today can be supplanted tomorrow by street mobs pressuring the courts for precisely opposite ends.

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12 379 U.S. 559 (1965).

13 LA. REV. STAT. § 14:401 (Cumulative Supp. 1962).

14 "While I agree that the record does not show boisterous or violent conduct or indecent language on the part of the 'demonstrators,' the ample evidence that this group planned the march on the courthouse and carried it out for the express purpose of influencing the courthouse officials in the performance of their official duties brings this case squarely within the prohibitions of the Louisiana statute and I think leaves us with no alternative but to sustain the conviction unless the statute itself is unconstitutional, and I do not believe that this statute is unconstitutional, either on its face or as applied." 379 U.S. at 583.

15 "This statute, like the federal one which it closely resembles, was enacted to protect courts and court officials from the intimidation and dangers that inhere in huge gatherings at courthouse doors and jail doors to protest arrests and to influence court officials in performing their duties . . . . Justice cannot be rightly administered, nor are the lives and safety of prisoners secure, where throngs of people clamor against the processes of justice outside the courthouse or jailhouse doors. The streets are not now and never have been the proper place to administer justice. Use of the streets for such purposes has always proved disastrous to individual liberty in the long run, whatever fleeting benefits may have appeared to have been achieved." *Ibid.*

> Minority groups in particular need always to bear in mind that the Constitution, while it requires States to treat all citizens equally and protect them in the exercise of rights granted by the Federal Constitution and laws, does not take away the State's power, indeed its duty, to keep order and to do justice according to law. Those who encourage minority groups to believe that the United States Constitution and federal laws give them a right to patrol and picket in the streets whenever they choose, in order to advance what they think to be a just and noble end, do no service to those minority groups, their cause, or their country. I am confident from this record that this appellant violated the Louisiana statute because of a mistaken belief that he and his followers had a constitutional right to do so, because of what they believed were just grievances. But the history of the past 25 years if it shows nothing else shows that his group's constitutional and statutory rights have to be protected by the courts, which must be kept free from intimidation and coercive pressures of any kind. Government under law as ordained by our Constitution is too precious, too sacred, to be jeopardized by subjecting the courts to intimidatory practices that have been fatal to individual liberty and minority rights wherever and whenever such practices have been allowed to poison the streams of justice. I would be wholly unwilling to join in moving this country a single step in that direction.[16]

These last two passages are extensively quoted here because of their utility in showing the intensity of the Justice's insistence upon the rule of law even when its application works a restraint upon the groups seeking goals which he regards benevolently. But the Black opinion in *Cox* may also be most useful to the students of the Constitution as a practical example of the application of the "balancing" test. This can be seen in the passages in which he concurred with the majority's reversal of the convictions based upon the Louisiana statutes prohibiting breach of the peace and obstruction of streets and sidewalks. Justice Black regarded the case as appropriate for the "balancing" technique because "when passing on the validity of a regulation of conduct, which may indirectly infringe on free speech, the Court does weigh the circumstances in order to protect, not to destroy, freedom of speech, press, and religion."[17]

In *Cox*, Justice Black applied the "balancing" test and found the convictions unsupported by a narrow public interest sufficiently defined.[18] He then considered the breach of the peace statute invalid

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[16] *Id.* at 583-84.

[17] *Id.* at 578.

[18] "The statute therefore neither forbids all crowds to congregate and picket on streets, nor is it narrowly drawn to prohibit congregating or patrolling under certain clearly defined conditions while preserving the freedom to speak of those who are using the streets as streets in the ordinary way that the State permits. A state statute of either of the two types just mentioned, regulating *conduct*—patrolling and marching—as distinguished from *speech*, would in my judgment be constitutional, subject only to the condition that if such a law had the effect of indirectly impinging on

because, owing to its vagueness, it equipped the police with the power to enforce it or not depending on their own personal whims or prejudices. Black also disapproved of the statute prohibiting obstruction of streets and sidewalks because it exempted only labor picketing and thus was a denial of the equal protection of the laws.[19]

More recently, the Supreme Court, in *Brown v. Louisiana*,[20] reversed the breach of the peace convictions of Negroes who peaceably "stood in" at a public library to protest alleged racial discrimination in the operation of the library. Justice Black wrote a dissent, in which Justices Clark, Harlan, and Stewart concurred. In *Bell*, Justice Black had denied the right of demonstrators to appropriate private property as a forum for their expression. In *Cox*, he denied their right to use the streets in a manner contrary to the indirect but real prohibitions of a statute designed directly to shield the judicial process from mass pressures. And in *Brown v. Louisiana*, he protested vigorously against what he considered to be the majority's acquiescence in the appropriation of public buildings as arenas for the expression of protest. Applying again, and it seems consistently, his doctrine that expression is subject to indirect regulation when confronted by a proportionate public interest, Justice Black dismissed the petitioners' contention that their status as protestors insulated them from conviction for their statutorily prohibited conduct of remaining in the library,[21] and attacked with particular force the majority's reliance upon the first amendment to sanction the invasion of the public library.[22] Black emphasized that,

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freedom of speech, press, or religion, it would be unconstitutional if under the circumstances it appeared that the State's interest in supressing the conduct was not sufficient to outweigh the individual's interests in engaging in conduct closely involving his First Amendment freedoms." *Id.* at 577.

19 See *id.* at 581.

20 383 U.S. 131 (1966).

21 "There is simply no evidence in the record at all that petitioners were arrested because they were exercising the 'right to protest.' It is nevertheless said that this was the *sole* reason for the arrests. Moreover, the conclusion that the statute was unconstitutionally applied because it interfered with the petitioner's so-called protest establishes a completely new constitutional doctrine. In this case this new constitutional principle means that even though these petitioners did not want to use the Louisiana public library for library purposes, they had a constitutional right nevertheless to stay over the protest of the librarians who had lawful authority to keep the library orderly for the use of people who wanted to use its books, its magazines, and its papers. But the principle espoused also has a far broader meaning. It means that the Constitution, the First and the Fourteenth Amendments, requires the custodians and supervisors of the public libraries in this country to stand helplessly by while protesting groups advocating one cause or another, stage 'sit-ins' or 'stand-ups' to dramatize their particular views on particular issues." *Id.* at 165.

22 "This is the First Amendment which, as I have said in the past, is to me the very heart of our free government without which liberty and equality cannot exist. But I have never thought and do not now think that the First Amendment can sustain the startling doctrine the prevailing opinion here creates. The First Amendment, I

in his view, there had been no racial discrimination directed by the library authorities against petitioners on the occasion in question.[23] Moreover, the Justice warned that the principle of the majority opinion threatened paralysis of government by the invasion of public buildings other than libraries.[24]

As in *Cox*, the Black opinion in *Brown v. Louisiana* contained an emphatic denial that the Constitution affords to minority groups which have suffered from discrimination an unlimited right to seize public property as a stage for protest.[25] Indeed, Justice Black issued a veiled warning to minority groups that even lawful demonstrations can lead to unlawful and self-destructive ones.[26]

In the current term of the Supreme Court, Justice Black delivered the opinion for the five-man majority in *Adderley v.*

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think, protects speech, writings, and expression of views in any manner in which they can be legitimately and validly communicated. But I have never believed that it gives any person or groups of persons the constitutional right to go wherever they want, whenever they please, without regard to the rights of private or public property or to state law. Indeed a majority of this Court said as much in *Cox v. Louisiana*. . . . Though the First Amendment guarantees the right of assembly and the right of petition along with the rights of speech, press, and religion, it does not guarantee to any person the right to use someone else's property, even that owned by government and dedicated to other purposes, as a stage to express dissident ideas. The novel constitutional doctrine of the prevailing opinion nevertheless exalts the power of private nongovernmental groups to determine what use shall be made of governmental property over the power of the elected governmental officials of the States and the Nation." *Id.* at 166.

[23] *Id.* at 160.

[24] "And it should be remembered that if one group can take over libraries for one cause, other groups will assert the right to do it for causes which, while wholly legal, may not be so appealing to this Court. The States are thus paralyzed with reference to control of their libraries for library purposes, and I suppose that inevitably the next step will be to paralyze the schools. Efforts to this effect have already been made all over the country." *Id.* at 165.

[25] "It is high time to challenge the assumption in which too many people have too long acquiesced, that groups that think they have been mistreated or that have actually been mistreated have a constitutional right to use the public streets, buildings, and property to protest whatever, wherever, whenever they want, without regard to whom it may disturb." *Id.* at 162.

[26] "It is an unhappy circumstance in my judgment that the group, which more than any other has needed a government of equal laws and equal justice, is now encouraged to believe that the best way for it to advance its cause, which is a worthy one, is by taking the law into its own hands from place to place and from time to time. Governments like ours were formed to substitute the rule of law for the rule of force. Illustrations may be given where crowds have gathered together peaceably by reason of extraordinarily good discipline reinforced by vigilant officers. 'Demonstrations' have taken place without any manifestations of force at the time. But I say once more that the crowd moved by noble ideals today can become the mob ruled by hate and passion and greed and violence tomorrow. If we ever doubted that, we know it now. The peaceful songs of love can become as stirring and provocative as the Marseillaise did in the days when a noble revolution gave way to rule by successive mobs until chaos set in. The holding in this case today makes it more necessary than ever that we stop and look more closely at where we are going." *Id.* at 167-68.

Florida,[27] upholding the trespass convictions of thirty-two demonstrators who remained on the ground of a county jail yard after the sheriff ordered them to leave. Petitioners, students at Florida A & M University, had gone to the jail to protest the incarceration there of fellow students who had been arrested during demonstrations at public theatres. Justice Black followed the thrust of his opinions in *Cox* and *Brown*, distinguishing a jail house from the State Capitol grounds involved in *Edwards v. South Carolina*.[28] The demonstrators in *Edwards*, whose convictions were reversed by the Supreme Court, had been convicted under a broadly drawn breach of the peace statute, while the demonstrators in *Adderley* were convicted under a narrowly drawn trespass statute. More importantly, it seems, state capitol grounds are traditionally open to the public; jails, maintained for security purposes, are not. The demonstrators at the Capitol in the *Edwards* case entered through a public driveway and, as they went in, were told by state officials that they had a right as citizens to visit the grounds of the State House as long as they were peaceful. In *Adderley*, the demonstrators entered the jail grounds through a driveway used only for jail purposes without giving warning to, or gaining permission from, the sheriff;[29] and once there, according to the majority Justices, the demonstrators blocked vehicular access to the jail. What the *Adderley* majority holds is that under the circumstances of the case petitioners had no constitutional right to remain on the jail premises over the protests of the jail custodian. And, it is fair to conclude that Justice Black and the majority would have found such an obligation to depart even if petitioners had not been blocking access to the jail.

The determination of Justice Black not to contort constitutional principles, as he conceives them, to protect racial or other demonstrators who violate the law, was also illustrated in *Hamm v. City of Rock Hill*,[30] where the Supreme Court held that the passage by Congress of the Civil Rights Act of 1964 had operated to terminate all pending prosecutions of public-accommodations demonstrators for violation of state trespass statutes. Justice Black dissented, delivering in conclusion what must stand as one of the classic indictments of a Supreme Court majority for statutory misconstruction:

> Nothing in the language or history of the 1964 Act makes the Court's reading into it of a purpose to interfere with state laws "inevitable" or even supportable, nor in any way justifies the Court's offhand assertion that it is carrying out the "legislative purpose." For I do not

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[27] 87 Sup. Ct. 242 (1966).
[28] 372 U.S. 229 (1963).
[29] 87 Sup. Ct. 242, 247 (1966).
[30] 379 U.S. 306 (1964).

> find one paragraph, one sentence, one clause, or one word in the 1964 Act on which the most strained effects of the most fertile imagination would support such a conclusion. And in what is perhaps the most extensive and careful legislative history ever compiled, dealing with one of the most thoroughly discussed and debated bills ever passed by Congress, a history including millions and millions of words written on tens of thousands of pages contained in volumes weighing well over half a hundred pounds, in which every conceivable aspect and application of the 1964 Act were discussed *ad infinitum*, not even once did a single sponsor, proponent or opponent of the Act intimate a hope or express a fear that the Act was intended to have the effect which the Court gives it today.[31]

What, then, do his "sit-in" opinions reveal of Justice Black? Not unexpectedly, they show for one thing a jurist committed to absolute freedoms[32] but nonetheless one who recognizes the importance of the definitional task which necessarily precedes any affirmation of absolutes. The precise line beyond which protected speech becomes "action" susceptible to regulation will vary with the subject involved and with the judgment of the individual. What Justice Black did in the "sit-in" cases was to draw that line firmly with reference to the facts at hand, and his firmness and precision in doing so were impressive.

Nevertheless, we must be wary of implying that the differences between Justice Black and the majority Justices in these cases are greater than they actually are. In none of the cases did the majority adopt a wholly absolute view of freedom of expression. Rather, as in *Cox v. Louisiana* and *Brown v. Louisiana*, the prevailing Justices seemed to rest upon the conclusion that the conduct in question did not amount to a sufficient threat to the peace to sustain a constitutional application of the statute.[33] Mr. Justice Fortas, in writing the prevailing opinion for himself, the Chief Justice, and Justice Douglas in *Brown v. Louisiana*, was not without some precedent for his evaluation of the facts in that case. It appears that the demonstrators in *Brown* did not subjectively intend to create a disturbance amounting to a breach of the peace, and further that their conduct was objectively less provocative than that of the demonstrators, for example, in *Garner v. Louisiana*[34]

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[31] *Id.* at 321-22.

[32] See Black & Cahn, *Justice Black and the First Amendment "Absolutes": A Public Interview*, 37 N.Y.U.L. REV. 549 (1962).

[33] "If we compare this situation with that in *Garner*, we must inevitably conclude that here, too, there is not the slightest evidence which would or could sustain the application of the statute to petitioners. The statute requires a showing either of 'intent to provoke a breach of the peace,' or of 'circumstances such that a breach of the peace may be occasioned' by the acts in question. There is not in this case the slightest hint of either." 383 U.S. at 139.

[34] 368 U.S. 157 (1961).

and *Taylor v. Louisiana*[35] where the convictions were reversed by the Supreme Court.[36]

The prevailing opinion of Justice Fortas and the separate concurrences of Justices Brennan and White in the *Brown* case do not assert or even imply that demonstrators protesting against alleged racial discrimination possess an absolute immunity to regulation of their conduct. Rather, the Fortas opinion seems to imply that the demonstrators' speech and conduct would enjoy an immunity only so long as they were orderly and not boisterous; and the prevailing opinion in *Brown* regarded the demonstrators' conduct as sufficiently orderly and silent to be insulated from punishment.[37]

Justice Black, on the other hand, found it irrelevant to a proper construction of the Louisiana statute whether the demonstrators "who do not want library service stay there an unusually long time after being ordered to leave, make a big noise, use some bad language, engage in fighting, try to provoke a fight, or in some other way become boisterous."[38] Rather, the Black opinion relied upon that portion of the Louisiana statute which, in his words, "makes it an offense to disturb the peace by congregating in a public building over the protest of a person rightfully in charge of the building."[39]

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[35] 370 U.S. 154 (1962).

[36] The Fortas opinion in *Brown* draws the comparison in this way: "The library room was empty, except for the librarians. There were no other patrons. There were no onlookers except for the vigilant and forewarned sheriff and his deputies. Petitioners did nothing and said nothing even remotely provocative. The danger, if any existed, was surely less than in the course of the sit-in at the 'white' lunch counters in *Garner*. And surely there was less danger that a breach of the peace might occur from Mrs. Katie Reeves and Mrs. Perkins in the adult reading room of the Clinton Branch Library than that disorder might result from the 'restless' white people in the bus depot waiting room in *Taylor*, or from the 100 to 300 'grumbling' white onlookers in *Cox*. But in each of these cases, this Court refused to countenance convictions under Louisiana's breach of the peace statute." 383 U.S. at 140.

[37] "We are here dealing with an aspect of a basic constitutional right—the right under the First and Fourteenth Amendments guaranteeing freedom of speech and of assembly, and freedom to petition the Government for a redress of grievances. The Constitution of the State of Louisiana reiterates these guarantees. See Art. I, §§ 3, 5. As this Court has repeatedly stated, these rights are not confined to verbal expression. They embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be, the unconstitutional segregation of public facilities. Accordingly, even if the accused action were within the scope of the statutory instrument, we would be required to assess the constitutional impact of its application, and we would have to hold that the statute cannot constitutionally be applied to punish petitioners' actions in the circumstances of this case. See *Edwards v. South Carolina*. . . . The statute was deliberately and purposefully applied solely to terminate the reasonable, orderly, and limited exercise of the right to protest the unconstitutional segregation of a public facility." *Id.* at 141-42.

[38] *Id.* at 162.

[39] *Id.* at 155. The statute involved in *Brown* read:

Whoever with intent to provoke a breach of the peace, or under circum-

In his factual interpretation, Justice Black found that the conduct of the library demonstrators, even though not boisterous or loud, entailed a sufficient risk of a breach of the peace to justify the convictions. Therein he differed from the three plurality Justices, Justice White, and apparently Justice Brennan.[40] Justice Black, in finding a sufficient risk of breach of the peace, "balanced" the interests involved by concluding that far less of a disturbance would suffice to support such a finding in the case of a public library than, for example, in the case of the street demonstrations involved in *Cox v. Louisiana*.[41] Having found that the circumstances in *Brown* were such that, in the words of the statute, "a breach of the peace may be occasioned thereby," Justice Black went on to state that in such a case there is a duty to obey a properly given order to leave the public library; or, conversely, that there is no right to remain there indefinitely as a manifestation of protest. In this respect, it must be said that the Black analysis is more realistic than the open-ended license conferred on the demonstrators by Justice Fortas in his plurality opinion. For, Justice Fortas seems to imply that, given the peaceable and orderly manner of the demonstrators' protest, they had a right to remain in the building all day.[42] When one considers the possible applications and extensions of the Fortas view, the Black analysis takes on an added attraction.[43]

This discourse on *Brown v. Louisiana* will hopefully serve to show that much of the difference between Justice Black and his colleagues is factual. But not all of it. For, the factual interpretations in a case such as *Brown* are inevitably formed in part by the values of the individual interpreters. And in Justice Black's view

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stances such that a breach of the peace may be occasioned thereby . . . congregates with others . . . in any . . . public building . . . and who fails or refuses to . . . move on, when ordered so to do by any law enforcement officer of any municipality . . . or any other authorized person . . . shall be guilty of disturbing the peace. LA. REV. STAT., § 14:103.1 (Cumulative Supp. 1962).

[40] Justice Brennan, having decided that the statute on its face was too broadly drawn, did not evaluate the demonstrators' conduct on its factual merits beyond his conclusion that it was not the sort of "hard-core conduct" that would obviously be prohibited under any construction of the statute. *Id.* at 147-48.

[41] *Id.* at 144.

[42] *Id.* at 141.

[43] Justice Douglas, writing in dissent for himself, the Chief Justice and Justices Brennan and Fortas in Adderley v. Florida, 87 Sup. Ct. 242 (1966), viewed the convictions of the jail yard demonstrators as interfering with a constitutionally protected petition for redress of grievances. "The jailhouse," Douglas wrote, "like an executive mansion, a legislative chamber, a courthouse, or the statehouse itself . . . is one of the seats of government whether it be the Tower of London, the Bastille, or a small country jail. And when it houses political prisoners or those whom many think are unjustly held, it is an obvious center for protest." *Id.* at 248. The dissenters, though, did acknowledge that some public places such as the Senate gallery, may be out of bounds for noisy demonstrations. *Id.* at 251.

of society, the notion of responsibility and duty would seem to play a larger role than in the views of his colleagues who appear to emphasize personal liberties and rights to such an extent that the emphasis could imperil that security and order without which those rights are merely conceptual. Moreover, the intensity of Justice Black's convictions on this score may be judged from his readiness, as in *Cox* and *Brown*, to admonish minority groups that they, above all, need the protection of a rule of law. And it is fortunate that such a warning should come from one such as he who surely cannot be faulted as an enemy of equal rights for all races.

Although the civil rights demonstrations and campaigns of "civil disobedience"[44] over the past ten years have served to focus public attention on the real problems of racial discrimination, they appear to have transgressed the point of diminishing returns and may be justly criticized. For one thing, mass or provocative demonstrations do carry, immediately or cumulatively, a potential of violence.[45] But on another and more important level, the campaign of "civil disobedience" has advanced the corrosive doctrine of selective obedience to law. Basically, the campaign of "civil disobedience" tends to engender a disrespect for law by the implication that the forms of representative government and judicial process are incapable of affording racial justice unless stimulated or coerced by mass pressure.

A moment's reflection will reveal the inherently disintegrating tendency which follows upon the general practice of a doctrine of selective obedience to law. If one man is to claim the right to pick and choose what laws he will obey, why not every other man as well? And, of course, to concede a general right to be selective in obedience to law is to begin the descent to chaos and anarchy. This is not to imply that Justice Black would agree with these personal observations. Rather, my purpose is to emphasize that it is fortunate that a jurist such as Justice Black has expressed so forcefully in his own way that the rights of expression and protest, however worthy the cause in which they are asserted, are bounded at their outer limits by the dictates of an orderly society under the constitutional rule of law.[46]

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[44] The term "civil disobedience" is a misnomer when applied to deliberate violations of criminal laws. What is involved is basically not civil but criminal disobedience of law.

[45] Justice Black commented in *Brown v. Louisiana* on the potentiality of peaceful demonstrations to degenerate into violence. 383 U.S. at 168.

[46] It is a particular pleasure to offer this evaluation of Justice Black's sit-in opinions because I have on other occasions criticized what to me appears to be his unrealistic application of the definition of speech and its susceptibility to regulation in cases involving subversive activities. See RICE, FREEDOM OF ASSOCIATION 127-75 (1962).