Note

FREEDOM OF SPEECH AND SYMBOLIC CONDUCT: THE CRIME OF FLAG DESECRATION

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> [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.[1]

In *Street v. New York*,[2] the United States Supreme Court declined to reach the issue of whether a statute prohibiting the physical desecration of the American flag in public[3] is constitutionally valid. Over the strong objection of four dissenters,[4] a majority of the Court determined that under the statute in question the defendant might have been convicted for casting contempt upon the flag by his words alone. Concluding that such a conviction was clearly unconstitutional, the Court reversed without passing upon the validity of the conviction to the extent that it was for burning the flag as an act of protest.[5]

As Chief Justice Warren argued in dissent, the majority appears to have "strained"[6] to reach the narrow conclusion it did. However valid the Court's reasons may have been for avoiding the broader question, it nonetheless remains unanswered by our highest tribunal.

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1 West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

2 394 U.S. 576 (1969).

3 The wording of the statute [Act of Mar. 25, 1922, ch. 270, § 1 (1922) N.Y. Laws 635 (repealed 1965) (now N.Y. GEN. BUS. LAW. § 136(d) (McKinney 1968)] was:

> Any person, who [s]hall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by words or act [any flag, standard, color, shield or ensign of the United States] . . . [s]hall be deemed guilty of a misdemeanor . . . .

4 Chief Justice Warren, Justices Black, White, and Fortas, each of whom argued that the conviction should have been sustained. 394 U.S. at 605, 610, and 615.

5 *Id.* at 594.

6 *Id.* The Court of Appeals of New York phrased the question presented by Street's appeal in the following terms: "We are called upon to decide whether the deliberate act of burning an American flag in public as a 'protest' may be punished as a crime." People v. Street, 20 N.Y.2d 231, 234, 229 N.E.2d 187, 189, 282 N.Y.S.2d 491, 493 (1967). The court, so viewing the question, answered it in the affirmative and affirmed the conviction. *Id.* at 237-38, 229 N.E.2d at 191, 282 N.Y.S.2d at 497. Dissenting from the Supreme Court's reversal, Chief Justice Warren pointed to this fact, to the terms in which the question had been presented by both the appellant and the state, and to the trial record, to argue that the Supreme Court was avoiding its duty in deciding the case on the more narrow grounds. 394 U.S. at 595-99, 605-09.

The question of the constitutionality of prohibiting public flag desecration is not whether a given act of flag desecration can be punished when it has an impact beyond mere expression, as, for example, when it takes the form of incitement to riot. Even verbal abuse of the flag can be punished when it has such an effect. Specifically, the question is whether or not public flag desecration can constitutionally be prohibited when it is done with an intent to communicate, in circumstances such as existed in *Street*, where there is no invasion of the governmental interest in preserving public order.

The emotions attached to flag and country cloud the issue presented by a prosecution such as Street's. In this time of widespread, vehement and, sometimes violent criticism of government policy, much public expression disregards traditional notions of patriotism and propriety. The offensive and distasteful nature and discomforting effect of such expression induces in many a visceral reaction that it should and can be suppressed. But the offensiveness of the expression is not enough and sound legal reasoning rather than emotional reaction must determine whether certain types of acts, such as all public flag desecration, may be constitutionally prohibited.

The importance of the issue *Street* avoided is great in terms of the implications for freedom of speech in general. The four dissenters who would have reached the issue would have upheld the constitutionality of the New York statute, but two of them have left the court and we do not have the benefit of the majority's view on this issue. The *Street* Court remanded the case for further proceedings not inconsistent with the opinion. Should Street be prosecuted again there is nothing in that opinion which would preclude his reconviction provided he be tried only for his actions and not for his speech and it appears likely that such a conviction would be affirmed by the Court of Appeals of New York.[7] Moreover, every other state has some form of statutory protection of the flag[8] and in 1968 Congress enacted federal legislation prohibiting desecration of the flag.[9] While lower courts have consistently upheld the constitu-

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[7] The court of appeals viewed Street's conviction as one for flag burning and on that basis upheld it. See note 6 *supra*. More recently and subsequent to the Supreme Court's decision in *Street*, the New York court of appeals in People v. Radich, 26 N.Y.2d 114, — N.E.2d —, 308 N.Y.S.2d 846 (1970), affirmed the conviction of an art dealer who displayed in his gallery an artist's "constructions" which were fashioned to protest the Vietnam war and "prominently incorporated the American flag" in configurations of, among others, "the male sexual organ, erect and protruding from the upright member of a cross; also, in the form of a human body, hanging from a yellow noose." *Id.* at 117, — N.E.2d at —, 308 N.Y.S.2d at 847.

[8] *See Hearings on H.R. 271 Concerning Desecration of the Flag Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 90th Cong., 1st Sess. ser. 4, at 324-46 (1967).

[9] 18 U.S.C. § 700(a) (Supp. IV 1965-68).

> Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it shall be fined not more than $1,000 or imprisoned for not more than

tionality of the state[10] and federal statutes,[11] a three-judge federal court for the district of Delaware recently found that state's flag desecration prohibition to be unconstitutionally overbroad.[12] It would seem probable, therefore, that the issue avoided in *Street* will come before the Supreme Court once again.[13]

VERBAL EXPRESSION OF CONTEMPT FOR THE FLAG

In discussing what became for the *Street* Court the ultimate issue in the case—whether or not New York could consitutionally punish the defendant for uttering words[14] which cast contempt upon the flag—the Court recognized four governmental interests which might conceivably justify Street's conviction:

> (1) an interest in deterring appellant from vocally inciting others to commit unlawful acts; (2) an interest in preventing appel-

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one year, or both.

The statute thus avoids the contempt "by words" prohibition and is limited to public acts of desecration. The enactment specifically does not preempt state flag desecration statutes. 18 U.S.C. § 700(c) (Supp. IV 1965-68). Previous federal legislation on the subject was limited to the District of Columbia. *See* Act of July 30, 1947, ch. 389, § 3, 61 Stat. 642, *as amended* 4 U.S.C. § 3 (Supp. IV 1965-68).

[10] *See, e.g.*, People v. Cowgill, 78 Cal. Rptr. 853 (App. Dep't Super. Ct. 1969), *appeal dismissed*, Cowgill v. California, 90 S. Ct. 613 (1970).

[11] *See* United States v. Ferguson, 302 F. Supp. 1111 (N.D. Cal. 1969); Hoffman v. United States, 256 A.2d 567 (D.C. Mun. Ct. App. 1969). See notes 53 and 54 *infra* and accompanying text.

[12] Hodson v. Buckson, 7 CRIM. L. REP. 2025 (D. Del. March 18, 1970). See note 59 *infra* and accompanying text.

[13] In People v. Cowgill, 78 Cal. Rptr. 853 (App. Dep't Super. Ct. 1969), *appeal dismissed*, Cowgill v. California, 90 S. Ct. 613 (1970), the defendant's conviction for violating a state statute making it a misdemeanor to publicly mutilate, deface, defile or trample upon an American flag [WEST'S ANN. MILITARY & VETS. CODE § 614(d)] was affirmed. The conduct for which defendant was prosecuted was that of publicly wearing a vest cut and sewn from an American flag. The Supreme Court granted the motion to dismiss and dismissed the appeal, 90 S. Ct. 613 (1970). Mr. Justice Harlan, with whom Mr. Justice Brennan joined, concurred in the dismissal and added an explanation of his reasons for doing so. Starting from the proposition that "the issue tendered by appellant—whether symbolic expression by displaying a 'mutilated' American flag is protected from punishment by the Fourteenth Amendment—is one that I cannot regard as insubstantial," Justice Harlan nonetheless determined that the record before the Court was not "suitable for considering this broad question as it does not adequately flush the narrower and predicate issue of whether there is a recognizable communicative aspect to appellant's conduct which appears to have consisted merely of wearing a vest fashioned out of a cut-up American flag." *Id.* at 614. Justice Harlan noted that the more narrow issue, while "not insubstantial of itself," had not been before the Court in its previous "so-called 'symbolic speech' cases where the communicative content of the conduct was beyond dispute," and that

> [t]he Court has, as yet, not established a test for determining at what point conduct becomes so intertwined with expression that it becomes necessary to weigh the State's interest in proscribing conduct against the constitutionally protected interest in freedom of expression. *Id.*

Because of the absence of such a test and the fact that the stipulated statement of the facts of the case and the record indicated that the trial court had neither decided the more narrow issue nor been presented with either evidence thereon or a suggested standard therefor by the defendant, Justice Harlan concluded that the record was inadequate for a decision of the question presented.

[14] Street's utterances were: "We don't need no damn flag," and "If they let that happen to Meredith we don't need an American flag." 394 U.S. at 579, 590.

> lant from uttering words so inflamatory that they would provoke others to retaliate physically against him, thereby causing a breach of the peace; (3) an interest in protecting the sensibilities of passers-by who might be shocked by appellant's words about the American flag; and (4) an interest in assuring that appellant, regardless of the impact of his words upon others, showed proper respect for our national emblem.[15]

The Court did not find it necessary to elaborate at length in determining that the conviction could not be upheld on the basis of any of these governmental interests. As to the first interest of preventing incitement, while the Court found that Street's words urged no unlawful action, it went further and concluded that even assuming the words were an incitement when considered in conjunction with the flag burning, the conviction could not stand. The crucial defect was that the statute "does not purport to punish only those defiant or contemptuous words which amount to incitement, and there is no evidence that the state courts regarded the statute as so limited."[16]

The second interest was determined to be similarly incapable of supporting the conviction. Although the Court deemed it "conceivable" that Street's words would cause some who heard them to retaliate against him, it found it could not say that "appellant's remarks were so inherently inflamatory as to come within that small class of 'fighting words' which are 'likely to provoke the average person to retaliation, and thereby cause a breach of the peace.' "[17] Again, even if Street's words could be so classified, the Court considered it determinative that the statute's purview was not so limited.

The Court also concluded that the interest in protecting the sensibilities of passers-by could not justify the conviction. What the Court reaffirmed here was that the unpleasant nature of *ideas* does not justify their suppression:

> Except perhaps for appellant's incidental use of the word 'damn' . . . any shock effect of appellant's speech must be attributed to the content of the ideas expressed. It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.[18]

The Court added that even if the conviction might be upheld on the basis of the interest, the statute was not drawn only to protect that interest.

In determining that the fourth possible state interest—in assuring

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[15] *Id.* at 591.
[16] *Id.*
[17] *Id.* at 592, quoting from Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942).
[18] 394 U.S. at 592. At this point the Court cited Cox v. Louisiana (I), 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963); Terminiello v. Chicago, 337 U.S. 1 (1949); and (*cf.*) Cantwell v. Connecticut, 310 U.S. 296 (1940).

that proper respect be shown for the flag—could not justify Street's conviction, the Court relied exclusively on *West Virginia State Board of Education v. Barnette*.[19] *Barnette* held a state requirement that all schoolchildren salute the American flag to be a violation of free expression guaranteed by the fourteenth amendment.[20] The *Street* Court quoted at length language it deemed "especially apposite":

> The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. . . . [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.[21]

Applying the *Barnette* reasoning to the facts as it viewed them, the *Street* Court drew its own conclusion:

> We have no doubt that the constitutionality guaranteed 'freedom to be intellectually and spiritually diverse or even contrary,' and the 'right to differ as to things that touch the heart of the existing order,' encompass the freedom to express publicly one's opinions about our flag, including those opinions which are defiant or contemptuous.[22]

SYMBOLIC EXPRESSION: THE O'BRIEN TEST

Since the verbal expression of contempt for the American flag, under circumstances such as were present in *Street*, is protected by the first amendment, why would a symbolic expression of contempt for the flag, in similar circumstances, not also be protected? The Supreme Court has held that symbolic conduct such as the display of a red flag "as a sign, symbol or emblem of opposition to organized government,"[23] picketing,[24] and the wearing of black armbands in protest[25] falls within the scope of first amendment protection. Sit-in demonstrations have also been held to deserve the protection afforded speech, although not in a majority opinion of the Court.[26] Despite this recognition, the question arises as to whether

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19 319 U.S. 624 (1943).

20 The suit which lead to the *Barnette* decision was brought by members of Jehovah's Witnesses seeking an injunction to restrain enforcement of the laws and regulations embodying the flag salute requirement against Jehovah's Witnesses on the grounds, *inter alia*, that the requirement was an unconstitutional denial of religious freedom. *Id.* at 629-30. The Supreme Court, however, did not view the issue as turning on a refusal to comply with the requirement on religious grounds. *Id.* at 634-35.

21 394 U.S. at 593, quoting from West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641-42 (1943) (footnote omitted).

22 394 U.S. at 593.

23 Stromberg v. California, 283 U.S. 359, 361 (1931).

24 Thornhill v. Alabama, 310 U.S. 88 (1940).

25 Tinker v. Des Moines School Dist., 393 U.S. 503 (1969).

26 *See* Brown v. Louisiana, 383 U.S. 131, 141-42 (1966) (Fortas, J., announcing

symbolic expression is afforded the same or a lesser degree of the protection afforded speech.[27]

In *United States v. O'Brien*,[28] the Supreme Court vacated a court of appeals decision[29] invalidating the 1965 amendment to the Universal Military Training and Service Act which prohibited the knowing destruction or multilation of any draft card,[30] and reinstated the defendant's conviction for burning his Selective Service registration certificate. In reaching its decision the Court seemed to feel that the initial question to be determined in symbolic expression cases is whether the conduct can be viewed as "speech."

> [O'Brien's] argument is that the freedom of expression which the First Amendment guarantees includes all modes of 'communication of ideas by conduct,' and that his conduct is within this definition because he did it in 'demonstration against the war and against the draft.'
>
> We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.[31]

The Court, however, did not resolve this question on the facts of *O'Brien* but rather assumed there was a communicative element in O'Brien's conduct which was sufficient to raise a first amendment issue. The Court went on to say:

> [I]t does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.[32]

An implication which can be derived from this language is that when nonspeech is combined with speech, *i.e.* in symbolic conduct, the presence of the nonspeech may justify what would otherwise be an impermissible limitation on pure speech. In other words, symbolic conduct is protected under the first amendment to a lesser extent than pure speech.

The Court directed however, that a "sufficiently important" governmental interest justify the regulation of the nonspeech. To insure that alleged interests are truly important, the Court fashioned a test against which the interest could be measured.

> [W]e think it clear that a governmental regulation is sufficiently justified [1] if it is within the constitutional power of the gov-

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the judgment of the Court and joined by Warren, C.J., and Douglas, J.) ("stand-in" in a public library); Garner v. Louisiana, 368 U.S. 157, 201-02 (1961) (Harlan, J., dissenting from the opinion of the Court but concurring in the judgment).

27 *See generally* Note, *Symbolic Conduct*, 68 COLUM. L. REV. 1091 (1968).

28 391 U.S. 367 (1968).

29 O'Brien v. United States, 376 F.2d 538 (1st Cir. 1967).

30 *See* 50 App. U.S.C. § 462(b)(3) (Supp. IV 1965-68).

31 391 U.S. at 376.

32 *Id.*

> ernment; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[33]

The questions resulting from *O'Brien*, caused by the Court's assumption of communication as an element of O'Brien's conduct, by the juxtaposition of speech and nonspeech, and by the creation of a test to measure governmental interests, can all be answered from the opinion itself. What emerges from an analysis of *O'Brien* is first the conclusion that when a first amendment claim is raised to protect conduct alleged to be symbolic expression, the Court's initial inquiry should be, and indeed actually is, to determine if there is a communicative aspect to the conduct. This in fact is where the *O'Brien* Court began, although it chose to assume an affirmative answer rather than resolve the question analytically. Had it done so, however, and found no communicative aspect, then of course the first amendment would be inapplicable. If there is a communicative aspect to the conduct, the next conclusion *O'Brien* requires is that despite the possible contrary inference, the first amendment protects such conduct to the same extent that it protects speech and the same standards that would be applied to determine if speech may be constitutionally restricted are applied to the communicative aspect of the conduct. This conclusion becomes clear when it is recognized that the test the Court devised for application to conduct wherein " 'speech' and 'nonspeech' elements are combined," in order to determine if there is "a sufficiently important governmental interest in regulating the nonspeech element [which] can justify incidental limitations on First Amendment freedoms," is no departure from the test the Court employed in *Street* to determine if speech itself can be limited.

It is clear that in *Street* the Court actually applied an *O'Brien* analysis when it decided that the particular verbal expressions of contempt for the flag which were in issue could not be punished under the New York statute. The following examination of the *O'Brien* analysis when viewed together with the *Street* Court's interest analysis will reveal that public flag desecration, absent a substantial invasion of a legitimate governmental interest such as the preservation of public order, is expression which is fully protected by the first amendment and cannot be suppressed.

The result reached in *O'Brien* is not wrong. The Court's decision, however, avoided the threshold issue which should be treated whenever the Court must determine the constitutionality of prohibiting conduct alleged to be symbolic expression.[34] When the Court began its determination it fell back on the assumption that the alleged communicative ele-

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[33] *Id.* at 377.

[34] For a critique of the *O'Brien* analysis, see Alfange, *Free Speech and Symbolic Conduct: The Draft-Card Burning Case*, 1968 SUP. CT. REV. 1.

ment in O'Brien's conduct was sufficient to bring into play the first amendment, and thus avoided the opportunity for establishing

> a test for determining at what point conduct becomes so intertwined with expression that it becomes necessary to weigh the State's interest in proscribing conduct against the constitutionally protected interest in freedom of expression.[35]

The avoided question is crucial since once a communicative aspect to alleged symbolic expression is recognized, the four-point *O'Brien* test affords it the full protection of speech.

It is submitted that whenever one acts with an intent to thereby express an idea, that conduct is symbolic and is protected by the first amendment. For example, had the *O'Brien* Court analyzed the conduct there involved, it would have found that the communicative or speech element in O'Brien's conduct was an intended and recognizable protest against the draft and the Vietnam war. But as *O'Brien* shows, even affording first amendment protection to all symbolic conduct does not mean that such conduct may never be proscribed. The noncommunicative or nonspeech element in O'Brien's conduct was the destruction of his draft card. The presence of the speech element did not prevent the proscription of this nonspeech aspect of the conduct. When such expressive conduct is treated as speech and governmental regulation of it is judged by the same standards as is governmental regulation of speech, the individual's freedom of expression is afforded the protection it deserves and all legitimate governmental interests are adequately protected from invasion by the noncommunicative impact of the conduct.

It may be argued that speech is speech and conduct is conduct and the first amendment protects only the former. We are reminded, however, that "all speech is necessarily 'speech plus.' If it is oral, it is noise and may interrupt someone else; if it is written, it may be litter."[36] When conduct is used to express an idea the speech element is that expression and the nonspeech element is the impact of the conduct. When verbal expression is used to convey an idea, the speech element is the utterance of words and the nonspeech element is the impact those words may have. When the impact of symbolic conduct is the destruction of a draft card, or when the impact of verbal expression is the incitement of a riot, the governmental interest in preventing such results justifies an infringement of the expression itself. Thus, the conclusion which follows the Court's assumption is correct—the guarantee of free speech does not mean that draft card burning cannot be prohibited—but not because symbolic conduct is not deserving of first amendment protection or is protected to any lesser extent than verbal expression. When the Court assumed the pres-

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[35] Cowgill v. California, 90 S. Ct. 613, 614 (1970) (Harlan, J., concurring). See note 13 *supra*.

[36] Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 23.

ence of a communicative aspect to O'Brien's conduct, it then judged the constitutionality of the prohibition of that conduct as it would judge the constitutionality of an infringement of speech.

The first requirement of the four-part *O'Brien* test is that the regulation in question be within the constitutional power of government. As to the draft card amendment the Court found the requisite constitutional power to be that of Congress "to raise and support armies and to make all laws necessary and proper to that end."[37]

The last three requirements of the *O'Brien* test are that the regulation further an "important or substantial governmental interest" which is "unrelated to the suppression of free expression," and that "the incidental restriction on alleged First Amendment freedoms [be] no greater than is essential to the furtherance of that interest."[38] It is important to note that the latter two requirements do not mean that the *regulation* has to be unrelated to the suppression of expression but that the *interest* which justifies the regulation must not be directed toward the suppression of ideas. In this regard, however, the test is not satisfied merely because another form of expression is available to the individual; rather the inquiry is to determine whether or not another form of regulation is available which can adequately protect the governmental interest and minimize the restriction on expression.

In *O'Brien* the justifying governmental interest was held to be that of assuring the continuing availability of issued Selective Service certificates in furtherance of the smooth and proper functioning of the Selective Service System,[39] and the Court's discussion indicates it was satisfied that this interest was "unrelated to the suppression of free expression."[40] The Court's treatment of this requirement overlaps with its consideration of the

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37 391 U.S. at 377.

38 *Id.*

39 *Id.* at 377-78, 382.

40 At the time the 1965 amendment was enacted by Congress, regulations already existed which required that Selective Service registrants keep their registration and classification certificates in their "personal possession at all times." 32 C.F.R. §§ 1617.1 & 1623.5 (1962). The court of appeals held that in light of the prior regulations the 1965 amendment must have been "directed at public as distinguished from private destruction" and thus was prohibited by the first amendment. The court, however, affirmed O'Brien's conviction viewing violation of the possession regulation, proscribed and made punishable under 50 App. U.S.C. § 462(b)(6) (Supp. IV 1965-68), as a lesser included offense of the mutilation and destruction offense set out in the 1965 amendment. O'Brien v. United States, 376 F.2d 538, 541 (1st Cir. 1967). In its opinion the Supreme Court pointed out that the amendment did not distinguish between public and private destruction, 391 U.S. at 375, and that the possession regulations and the 1965 amendment protected "overlapping but not identical governmental interests," *id.* at 380, since the 1965 amendment was not concerned with possession as such and would punish the destruction by anyone of another's certificates—an act not reached by the possession requirement. *Id.* at 380-81. As Alfange points out, under either the possession or the destruction provision, "[t]he government's interest is still the same, preventing nonpossession." Alfange, note 34 *supra*, at 47 n.161. The 1965 amendment, however, reaches conduct which invades that interest yet is not a violation of the possession requirement.

narrowness requirement—that the "incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest:"[41]

> We perceive no alternative means that would more precisely and narrowly assure the continuing availability of issued Selective Service certificates than a law which prohibits their wilful mutilation or destruction. . . . The 1965 Amendment prohibits such conduct and does nothing more. In other words, both the governmental interest and the operation of the 1965 Amendment are limited to the noncommunicative aspect of O'Brien's conduct. The governmental interest and the scope of the 1965 Amendment are limited to preventing harm to the smooth and efficient functioning of the Selective Service System. When O'Brien deliberately rendered unavailable his registration certificate, he wilfully frustrated this governmental interest. For this noncommunicative impact of his conduct, and for nothing else, he was conivcted.[42]

SYMBOLIC EXPRESSION OF CONTEMPT FOR THE FLAG

Under the above analysis of the *O'Brien* test, it, and thus the protection afforded speech, is applicable to conduct alleged to be symbolic expression whenever there is a recognizable communicative aspect to that conduct. Indeed, despite Mr. Justice Harlan's reservations,[43] it is submitted that when symbolic conduct involves an American flag, the communicative content of the conduct is beyond dispute. The inherent communicative element in the use of the flag was recognized by the Court in *Barnette:*

> There is no doubt that, in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. . . . A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn.[44]

It logically follows that a public act of flag desecration which clearly expresses disrespect for the flag is as equally recognizable as a form of utterance as is the flag salute which expresses respect for the flag. Just as individuals may have different notions of patriotism in mind when they salute the flag, the particular grievances which motivate given acts of flag desecration may vary. Such conduct however is manifestly expressive and conveys an unmistakable notion of dissatisfaction with conditions as they are.

The idea thus expressed is the communicative or speech element in

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41 391 U.S. at 377.
42 *Id.* at 381-82.
43 *See* Cowgill v. California, 90 S. Ct. 613, 614 (1970), and note 13 *supra.*
44 319 U.S. at 632-33.

an act of public flag desecration. The noncommunicative or nonspeech element of such conduct is the impact of that conduct on the flag, *i.e.*, desecration. That there is a communicative aspect to flag desecration does not mean that such conduct can never be prohibited, but once the communicative aspect is recognized an application of the *O'Brien* test becomes necessary to determine if there is "a sufficiently important governmental interest in regulating the nonspeech element" which justifies a prohibition.[45]

In applying the four parts of the *O'Brien* test to statutes which prohibit the desecration of the flag the first inquiry is as to whether or not such a statute is within the constitutional power of government. The presence or absence of the requisite power depends upon the purpose of the enactment and whether the regulation is federal or state. The police power of the state or a corollary power of the federal government will justify prohibition of such conduct where, for example, an interest in preserving order is involved. The question then is, absent this type of interest which has traditionally been held to justify restriction on first amendment protection, whether there is something unique about the national flag which can, despite the first amendment, legitimatize a prohibition against its public desecration?

The most commonly advanced justification for such a prohibition is based on the notion that the flag as a national emblem is deserving of proper respect. That this is a constitutional power on which either federal or state regulation of flag desecration could be based is effectively refuted by *Barnette*. *Barnette* did not deny that government may encourage patriotism—"National Unity as an end which officials may foster by persuasion and example is not in question";[46] and such encouragement is commonplace.[47] Of course, the distinction is apparent that what the Court refused to allow in *Barnette* was compulsion of an affirmative expression of respect for the flag, not prohibition of disrespect. But the

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[45] Even if the suggested analysis—wherein the crucial step is determining whether or not conduct alleged to be symbolic expression has a recognizable communicative aspect—is not accepted, or if the seemingly undeniable communicative aspect of flag desecration is not openly recognized, the *O'Brien* test is still applicable when the alleged symbolic conduct is flag desecration. The recognition of a flag's symbolism would seem to make it clear that the destruction of one with intent to communicate is no less expressive than the destruction of a draftcard. While it is true that from the *Street* Court's avoidance of the issue an inference can be made that the Court is unwilling to characterize flag burning as symbolic, if the Court saw fit to make the assumption that the "alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment," the same assumption is even more appropriately made in the case of public flag desecration.

[46] 319 U.S. at 640.

[47] There is frequent participation by government officials in parades, Fourth of July ceremonies, speeches, etc.; the trappings of the Presidency and other federal and state offices include flags, bands and symbolism. Also, there are federal statutes setting forth requirements for proper display of the flag in public. *See* 36 U.S.C. §§ 174-77 (1964). All these statutes, however, are phrased in terms of "should" rather than "must" or "shall be."

rationale of *Barnette* was followed by the Court in *Street* in disallowing a prohibition of disrespect. The *Street* Court's disregard for any such distinction coupled with the conclusion that *O'Brien* requires first amendment protection for symbolic conduct consonant with that given speech precludes the recognition of patriotism as a constitutional underpinning of a state or federal governmental power to prohibit conduct which expresses contempt for the flag.[48]

However, assuming arguendo that a statute prohibiting such expression is within the constitutional power of government, the first amendment as applied through the *O'Brien* test also requires that the statute further a substantial governmental interest unrelated to the suppression of free expression, and restrict first amendment freedoms no more than is essential to further the interest. The *Street* Court recognized governmental interests in preventing a riot or a breach of the peace that might conceivably justify a prohibition of expressing verbal contempt for the flag. The Court in effect found that a statute protecting these interests satisfied the first three requirements of the *O'Brien* test but when the statute punished *all* verbal expressions of contempt for the flag, it was not drawn only to protect the legitimate interests and thus would not satisfy the narrowness requirement of *O'Brien.*

Were symbolic expression to be substituted in *Street* for verbal expression, the result reached in terms of these two interests would be the same. For the result to be different flag desecration would have to be determined to be somehow inherently incitive to unlawful action or so inherently inflamatory that it would be *likely* to provoke retaliation, thus

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[48] Nonetheless, federal courts have upheld the federal flag desecration statute by application of the *O'Brien* test and thus have had to discern a constitutional basis for the provision. In United States v. Ferguson, 302 F. Supp. 1111 (N.D. Cal. 1969), the court relied on the necessary and proper clause in determining that the first requirement of the *O'Brien* test was satisfied. United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) and Burnet v. Brooks, 288 U.S. 378 (1933), were cited as support for the recognition of "sovereign powers. . . . [which] have been defined as 'the natural and necessary concomitants of nationality.'" 302 F. Supp. at 1114. From these, the *Ferguson* court derived a constitutional basis for the prohibition of flag desecration:

> Among these natural and necessary concomitants of nationality is the selection of a national symbol or flag. The importance of a flag in developing a sense of loyalty to a national entity is without question. . . .
>
> The power to select a flag carries with it the power to do whatever is necessary and proper for carrying into effect this selection. Certainly this would include the power to protect it from contemptuous destruction. *Id.*

The first sentence of the above quotation is undoubtedly true. *Curtiss-Wright* and *Brooks,* however, the only two cases cited by the court on this point, both explicitly dealt only with a recognition of nonenumerated powers in foreign affairs and do not support the court's "necessary and proper" non sequitur.

In Hoffman v. United States, 256 A.2d 567 (D.C. Mun. Ct. App. 1969), the District of Columbia Municipal Court of Appeals also upheld the federal statute in a prosecution for wearing a shirt resembling the American flag. The court bluntly stated that "[t]he First Amendment protects freedom of speech and not freedom of conduct," quoted the *O'Brien* test and completely ignored its first requirement. *Id.* at 569.

justifying a sweeping prohibition against it. The facts in *Street*, however, are a case in point that flag desecration has no such inherent characteristics. Although Street burned a flag there was no unlawful action incited and his conduct did not provoke others to retaliate against him. The *O'Brien* Court upheld the 1965 draft card amendment as protecting only the government's legitimate interest in assuring the smooth functioning of the Selective Service System.[49] This rationale would not support a statute prohibiting all public flag desecration since such a statute goes beyond a protection of the government's interest in preserving order in light of the demonstrated fact that public flag desecration in itself does not invade that interest. Thus, it seems clear that although the governmental interest in preserving order can justify restriction of symbolic expression of contempt for the flag which invades that interest, that interest cannot justify prohibition of all flag desecration since such a prohibition does not qualify as an "incidental restriction on alleged First Amendment freedoms . . . no greater than is essential to the furtherance of that interest."[50]

Can there be a governmental interest which justifies the prohibition of physicial flag desecration, yet not of verbally expressed contempt for the flag, apart from an interest in preserving order which can justify a prohibition of both?

Clearly an interest in protecting the sensibilities of passers-by cannot justify such a prohibition when it could not justify the conviction in *Street*.[51] Such an interest is not one of regulating the nonspeech element in the symbolic expression, as is the interest in preserving order, and thus cannot meet the third requirement of the *O'Brien* test that it be unrelated to the suppression of free expression. Further, there can be no merit to a contention that the symbolic conduct can be prohibited because the mental discomfort of passers-by is its noncommunicative impact. No conceiveable assault the expression may have on sensibilities is of a type beyond the protection of the first amendment:

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.[52]

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[49] See text accompanying note 42 *supra*.

[50] 391 U.S. at 377. A governmental interest in preserving order would, if at all, only justify punishment for flag desecration under existing "incitement to riot" or "breach of the peace" statutes, or under a statute specifically prohibiting flag desecration intended to invade the legitimate interest. A conviction under such a statute would no doubt be constitutional if the defendant's proven conduct was the burning of an American flag at an American Legion convention. Prosecutions under such statutes would be subject to limitations of fair application. *See, e.g.*, Brown v. Louisiana, 383 U.S. 131 (1966).

[51] See text accompanying note 18 *supra*.

[52] Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

Despite the clear conflict with first amendment freedoms, the prohibition of conduct expressing contempt for the flag has nonetheless been upheld in decisions superficially resolving the constitutional issues. Treatment in lower federal courts has included simply begging the questions of whether the federal statute prohibiting acts which cast contempt upon the flag furthers a substantial governmental interest unrelated to the suppression of free expression. One district court recognized an interest, sufficient to satisfy the *O'Brien* test, "in preserving the loyalty and patriotism represented by the flag."[53] Another court had an even easier answer: "Surely the Government has a substantial, genuine and important interest in protecting the flag from public desecration by contemptuous conduct."[54] This leads to a discussion in terms of the *O'Brien* requirements of the final interest analyzed in *Street* and dismissed as incapable of ever being a substantial governmental interest supporting restriction of first amendment protection.

Certainly the government and those who lead it are expected to and should foster patriotism and loyalty in America. There is indeed a genuine governmental interest in having the loyal support of the citizenry so that dissatisfaction with given policies can be channeled into constructive attempts to improve rather than destroy the society. Under our Constitution, however, there is no governmental power to enforce a particular norm of patriotism, no matter how desirable it might appear to be.

The Supreme Court in *Barnette* recognized that patriotism as a governmental interest is not sufficient to justify its compulsion in violation of the first amendment. The Court first dismissed the notion that the preservation of our society was dependent on compelling patriotism:

> [W]e apply the limitations of the Constitution with *no fear* that freedom to be intellectually and spiritually diverse or even contrary *will disintegrate the social organization.*[55] (emphasis added).

After thus removing patriotism as a penumbral element of the legitimate governmental interest in preserving the social order, the Court could consider it in isolation and dismiss it as a candidate for constitutional status to support compelled orthodoxy:

> If there is any fixed star in our constellation, it is that no official, high or petty, can prescribe what shall be orthodox in

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[53] United States v. Ferguson, 302 F. Supp. 1111, 1114 (N.D. Cal. 1969). The only authority cited for this proposition in *Ferguson* is Halter v. Nebraska, 205 U.S. 34 (1907). In *Halter* the Supreme Court upheld a Nebraska statute prohibiting and punishing the "desecration" of the American flag by its exploitation in commercial advertising. There was no first amendment claim raised in *Halter*, and while it stands for the proposition that there is a governmental interest which justifies the protection of the flag from commercial exploitation, when a first amendment claim is raised, the *O'Brien* test requires greater justification for the regulation involved.

[54] Hoffman v. United States, 256 A.2d 567, 569 (D.C. Mun. Ct. App. 1969).

[55] 319 U.S. at 641.

> politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.[56]

The last sentence of this quote naturally gives rise to the question whether prohibition of disrespect for the flag, rather than compulsion of respect for the flag, could be an exception to the nonavailability of patriotism as an interest sufficient to satisfy the *O'Brien* test. Insofar as verbal disrespect is concerned, *Street*, relying on *Barnette*, has answered in the negative:

> We have no doubt that the constitutionality guaranteed 'freedom to be intellectually and spiritually diverse or even contrary,' and the 'right to differ as to things that touch the heart of the existing order,' encompass the freedom to express publicly one's opinions about our flag, including those opinions which are defiant or contemptuous.[57]

It is clear from the previous discussion that desecration of an American flag contains a communicative aspect. Further, as symbolic conduct, it is extended full first amendment protection by *O'Brien* and to invade this protection the government must demonstrate a substantial interest. These considerations, in light of the discussion of patriotism in *Street* and *Barnette*, lead to the following conclusions in regard to symbolic expressions of contempt for the flag. First, the *Street* Court's disregard of a possible distinction to be drawn from *Barnette* between affirmative compulsion and negative prohibition directs the conclusion that patriotism as an interest is insufficient to support a negative prohibition against expressing disrespect for the flag. Second, symbolic expression must be included in the *Street* Court's "opinions about our flag" since the *O'Brien* first amendment protection of symbolic conduct is indistinguishable from the *Street* first amendment protection of speech. Therefore, patriotism cannot meet the sufficient interest requirement of *O'Brien* and cannot be used to support prohibition of flag desecration.

Finally, however, again assuming for discussion purposes the substantiality under *O'Brien* of the governmental interest in fostering patriotism and assuring proper respect for the flag, it is inescapably clear that such an interest is inextricably intertwined with, rather than unrelated to, the suppression of free expression. The *O'Brien* requirements, as previously noted, do not invalidate the statute because it suppresses expression if it does so only to the extent essential to protect the governmental interest from the noncommunicative impact of the conduct. The interest itself, however, to be unrelated to the suppression of free expression, must be only in the regulation of the nonspeech element of the conduct.

Respect for the flag as well as contempt is manifested by expression.

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[56] *Id.* at 642.
[57] 394 U.S. at 593.

An interest which, in the name of patriotism, allegedly justifies the prohibition of conduct disrespectful of the flag is directly concerned with what that conduct expresses. Indeed the only person the federal statute punishes is one who intentionally expresses a view that others will perceive: "Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it . . . ."[58] On these grounds, then, it is clear that a prohibition of the expression of contempt for the flag by conduct cannot further an interest unrelated to the suppression of the expression and as such violates the first amendment.

CONCLUSION

The application of the *O'Brien* test to the prohibition of symbolic expression of contempt for the flag thus results in the same conclusion the *Street* Court reached when it examined New York's prohibition of verbally expressed contempt for the flag in light of the first amendment protection afforded speech. The fact is that in *O'Brien*, without admitting it, the Court set up a test which affords full first amendment protection to symbolic conduct once its communicative aspect is recognized.

Recently in *Hodsdon v. Buckson*[59] a three-judge federal court for the district of Delaware unanimously declared the Delaware statutory prohibition of flag desecration to be unconstitutionally overbroad. The party who challenged the statute, which is phrased in virtually the same terms as the federal statute, had flown the United Nations flag in the right-hand position of honor of at his home while flying the American flag in the subordinate left-hand position at half-staff. In reaching its decision the court discussed *Street*, the four interests that case considered, and the conclusion of the *Street* Court as to the protected nature of verbally expressed contempt for the flag.

Turning to symbolic expression the *Hodsdon* court took note of *Stromberg v. California*[60] and *Tinker v. Des Moines School District*[61] and then stated:

> [A]lthough acts are not beyond regulation because they have symbolic components, in the absence of factors justifying limitation, symbolic speech is constitutionally protected. This Court takes judicial notice of the symbolic significance of flying the American flag.[62]

To this point, the court followed the analysis this note has suggested by first deciding the threshold question, albeit by judicial notice, of whether the conduct in question involved a communicative aspect and

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58 18 U.S.C. § 700(a) (Supp. IV 1965-68). See note 9 *supra*.
59 310 F. Supp. 528 (D. Del. 1970).
60 283 U.S. 359 (1931). See note 23 *supra* and accompanying text.
61 393 U.S. 503 (1969). See note 25 *supra* and accompanying text.
62 310 F. Supp. at 533 (footnote omitted).

thus brought the first amendment into issue. An affirmative answer necessitated, as the court recognized, an application of the *O'Brien* test to determine if the state's intrusion into this protected area was justified.

In its application of *O'Brien*, however, the court failed to analyze and apply the first two elements, *i.e.*, a constitutionally based power and a sufficient governmental interest. Rather, it made the unwarranted assumption that

> the state has an interest in the preservation of the national symbol . . . . [and] the interest permits some types of regulation, to the detriment of asserted freedoms.[63]

This seems to imply that desecration of the flag, as opposed to merely flying it, could be prohibited consonant with *O'Brien's* power and interest requirements. However, subsequent discussion by the court indicates that this interest in the preservation of the flag was tied to the state's legitimate interest in preserving public order, which has traditionally justified infringement of otherwise protected expressions.[64] In other words, the opinion can be read to mean that a state has the power to proscribe and an interest in preventing flag desecration only when such conduct threatens to incite unlawful action or create a breach of the peace. This conclusion is reinforced by the court's notation that *Barnette* and *Stromberg* "compel the conclusion that the punishment of *peaceful* symbolic acts rejecting the political ideas bespoken by the flag is . . . alien to the mandate of the First Amendment . . . ."[65] Thus, it would seem that *Hodsdon* correctly applied *O'Brien's* first two elements, although somewhat indirectly.

In any event, the *Hodsdon* court concluded that the Delaware statute, whatever legitimate interest it may have sought to protect, failed to meet the last two *O'Brien* requirements. The court found that although nonspeech elements were present in the conduct regulated, the statute was so broad it could not be construed as regulating only those elements. Further, since this overbreadth necessarily struck at the protected speech element involved in the conduct, the court concluded that the statute intruded into an area where no state interest other than the suppression of expression could be involved.

This reasoning is a long step toward an understanding that when first amendment claims are raised in opposition to government prohibition of conduct alleged to be symbolic speech, the proper inquiry is to determine if there is in fact a communicative element. Whenever there is, and it should not be difficult to recognize, the first amendment applies to that communicative element and it will either protect it or not depending upon the extent to which the conduct's nonspeech element infringes upon a

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[63] *Id.* at 534.
[64] *Id.* at 534-35.
[65] *Id.* at 535 (emphasis added).

legitimate governmental interest.

More specifically *Hodsdon* has set the issue of flag desecration as expression in proper perspective. The conduct in *Hodsdon,* however, was mild in demeanor and one senses that to no small extent the state's prosecution of this very restrained behavior caused the statute's unconstitutional overbreadth to be so obvious.

It is by no means apparent that other courts will follow the *Hodsdon* lead, nor of course is it at all predictable what the Supreme Court will decide if it faces the question. It is to be hoped, at least, that the Court will decide the issue without falling back upon the disconcerting and unnecessary type of assumption it made in *O'Brien.*

Should the straightforward treatment of the issue lead, as it is submitted, to the conclusion that statutes prohibiting all desecration of the flag are unconstitutional, the true strength of the nation will not be weakened. The freedom to be diverse, even when such diversity reaches extremes which are deplorable to the vast majority, is the hallmark of our constitutional democracy and that aspect of life in America which sets us apart from those nations where "respect" for governmental institutions is compelled. The first amendment protection which in some circumstances allows the dissenter, who can find no more constructive mode of expression, to desecrate the flag, is the same protection we all enjoy from enforced adherence to any spiritual or political norms.