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Draft Card Burning Denied Symbolic Speech Protection under Governmental Interest Rationale

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DRAFT CARD BURNING DENIED SYMBOLIC SPEECH PROTECTION UNDER GOVERNMENTAL INTEREST RATIONALE

On the morning of March 31, 1966, David O'Brien and three companions burned their draft cards[1] on the steps of the South Boston Courthouse in protest against the Selective Service System and the war in Viet Nam.[2] The District Court of Massachusetts rejected O'Brien's claim that his act was protected "symbolic speech" and convicted him of wilfully and knowingly mutilating and destroying by burning his Registration Certificate in violation of section 12(b)(3) of the Universal Military Training and Service Act, 50 U.S.C. App. § 462(b), as amended, 79 Stat. 586.[3]

The Court of Appeals for the First Circuit reversed the district court's free speech holding,[4] reasoning that since the conduct proscribed under the 1965 Amendment was already punishable under the possession regulation[5] the amendment must have been directed at public destruction and hence violated the first amendment by singling out for special treatment persons engaged

1. The term "draft card" refers to either the registration certificate or the classification certificate. Registrants with the Selective Service System are required to keep both certificates in their personal possession at all times. 32 C.F.R. § 1617.1 (1962) (Registration Certificates); 32 C.F.R. § 1623.5 (1962) (Classification Certificates).

2. O'Brien, who represented himself at trial, argued to the jury as follows:

> I am a pacifist and as such I cannot kill, and I would not cooperate.
>
> . . . .
>
> It is something that I felt I had to do, because I think we are basically living in a culture to-day, a society that is basically violent, it is basically a plagued society, plagued not only by wars, but by the basic inability on the part of people to look at other people as human beings, the inability to feel that we can live and love one another, and I think we can. [Record at 29].

3. With the words "knowingly destroys, knowingly mutilates" added by the 1965 Amendment, 50 U.S.C. App. § 462(b) presently provides:

> Any person . . . (3) who forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes any such certificate or any notation duly and validly inscribed thereon . . . (6) . . . shall upon conviction be fined not to exceed $10,000 or be imprisoned for not more than five years, or both.

4. O'Brien v. United States, 376 F.2d 538 (1st Cir. 1967), (The Circuit Court affirmed O'Brien's conviction, however, on the grounds that the violation of the possession regulation, 32 C.F.R. § 1617.1, was a lesser included offense of the crime defined by the 1965 Amendment.)

5. 32 C.F.R. § 1617.1 (1962).

in protest. Both the Government's and O'Brien's petitions for certiorari were granted.[6]

The Supreme Court *held*, reversed: Because the Government has a sufficient interest in assuring the continuing availability of Selective Service certificates, because the 1965 Amendment is an appropriately narrow means of protecting this interest, and because the noncommunicative impact of defendant's conduct frustrates the Government's interest, a sufficient governmental interest has been shown to justify O'Brien's conviction. *United States v. O'Brien*, 391 U.S. 367 (1968).

The subjective intent of the person engaged in conduct is not determinative as to whether that conduct will be classified as "speech."

> [W]hen '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. . . . [A] government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest.[7]

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6. The Government's petition claimed error in the Circuit Court's holding that the statute was unconstitutional and that the decision conflicted with the decisions in United States v. Miller, 367 F.2d 72, (2nd Cir. 1966), *cert. denied*, 386 U.S. 911 (1967), and Smith v. United States, 386 F.2d 529 (8th Cir. 1966), upholding the 1965 Amendment against identical "symbolic speech" challenges. O'Brien's cross petition urged error by the Circuit Court in sustaining his conviction, contending that it was a crime of which he was neither charged nor tried. 391 U.S. at 372.

7. 391 U.S. at 376-77. The other issue dealt with by the Court was O'Brien's reliance upon comments by Senator Thurmond, 11 CONG. REC. 19746, 20433 (1965), and by Congressmen Rivers and Bray, 11 CONG. REC. 19871-72 (1965), to support his claim that the 1965 Amendment was unconstitutional as enacted because its "purpose" was to suppress freedom of speech. The Court distinguished Grosjean v. American Press Co., 297 U.S. 233 (1936), and Gomillion v. Lightfoot, 364 U.S. 339 (1960), to reject this argument by saying: "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." 391 U.S. at 383. Since draft card burning was regarded as conduct and not expression, the 1965 Amendment did not have the "inevitable effect" of abridging personal liberties, as was the case in *Gomillion* where the legislative purpose was deemed irrelevant because the effect of redrawing municipal boundaries would deprive Negroes of their right to vote. *Id.* at 385.

The recognition that non-verbal expression was includable under the first amendment's guarantee also brought with it the emphatic rejection "of the notion . . . that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct . . . as these amendments afford to those who communicate ideas by pure speech."[8] However, "[t]he range of symbolic conduct intended to express disapproval is broad; it can extend from a thumbs-down gesture to political assassination."[9] When conduct falls within this broad spectrum, the problem becomes the extent to which protection will be afforded the expressive element.

Recent cases have applied a balancing process in resolving conflicts between personal liberties and governmental interests.[10] Though not new,[11] this process is best articulated in *American Communications Ass'n v. Doubs*,[12] a case involving the validity of the non-Communist affidavit provision of the Taft Hartley Act.

> When particular conduct is regulated . . . and the regulation results in an indirect, conditional, partial abridgment of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection *under the particular circumstances presented.*[13]

That the balancing test is only implicitly[14] found in *O'Brien* evidences the flexibility of any general test and the inconsistencies

8. Cox v. Louisiana, 379 U.S. 536, 555 (1965).

9. United States v. Miller, 367 F.2d 72, 79 (2nd Cir. 1966), *cert. denied*, 386 U.S. 911 (1967).

10. Communist Party of U.S. v. Subversive Activities Control Bd., 367 U.S. 1 (1961); Konigsberg v. State Bar, 366 U.S. 36 (1961); United States v. Miller, 367 F.2d 72 (2d Cir. 1966); United States v. Cooper, 279 F. Supp. 253 (D.C.D. Colo. 1968).

11. Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949); United Public Workers v. Mitchell, 330 U.S. 75 (1947); Prince v. Massachusetts, 321 U.S. 158 (1944); Cox v. New Hampshire, 312 U.S. 569 (1941); Schneider v. State, 308 U.S. 147 (1939).

12. 339 U.S. 382 (1950).

13. *Id.* at 399 (emphasis added). For opinions critical of the balancing test *see* Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245; Cahn, *Mr. Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U.L. REV. 549 (1962); Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962); Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 912-14 (1963). Comments supporting the test include: Karst, *Legislative Facts in Constitutional Litigation*, 1960 Sup. Ct. Rev. 75; Kauper, Book Review, 58 MICH. L. REV. 619 (1960); Krislov, *Mr. Justice Black Reopens the Free Speech Debate*, 11 U.C.L.A.L. REV. 189 (1964).

14. 29 U. PITT. L. REV. 167 (1967). The author concludes that the balancing test is expressly or impliedly used in all free expression cases, with the other tests being supplementary factors to be considered.

forecast by the words "under the particular circumstances presented." The most potent of all authority—the war clause—was relied on as the source of the government's power to regulate issued Selective Service certificates. From this premise a "substantial governmental interest" in the non-destruction of draft cards was easily found.[15]

> We think it also apparent that the Nation has a vital interest in having a system for raising armies that functions with maximum efficiency and is capable of easily and quickly responding to continually changing circumstances. For these reasons, the Government has a substantial interest in assuring the continuing availability of issued Selective Service certificates.[16]

The mere "assumption" that O'Brien's conduct brought the first amendment into play, contrasted with the Court's extensive analysis of the administrative functions performed by Selective Service certificates,[17] indicates a preliminary balancing in favor of the government. The Court's adherence to these functions as essential to conscriptive procedure seems as "unrealistic" as was O'Brien's "unrealistic characterization of Selective Service certificates."[18] Draft procedures in effect prior to the 1965

15. *See* Meiklejohn, *The Balancing of Self Preservation Against Political Freedom*, 49 CALIF. L. REV. 4 (1961), for criticism of the balancing concept when the government asserts its right to self-preservation.

16. 391 U.S. at 381.

17. *Id.* at 378-80. Four purposes that would be defeated by the destruction of Selective Service certificates are suggested:

> (1) Certificates supply proof of registration and help relieve the burden which the System would otherwise have in verifying the registration and classification of all suspected delinquents;
>
> (2) The information contained on the certificates facilitates communication between registrants and their local boards;
>
> (3) Certificates continually remind registrants to notify their local boards of any changes in address or status;
>
> (4) The regulatory scheme helps detect alteration, forgery or similar misuse of certificates.

18. 391 U.S. 367, 378. The popular point of view is that Selective Service certificates provide information for the individual registrant and that they serve as an easy means of proof of identity and age. The purposes listed *supra* note 17, appear to be of superficial value, especially when it is considered that:

> (1) Local draft boards have easy access to their own records when verifying the registration and classification of suspected delinquents;
>
> (2) Addresses of local boards are as far away as the nearest phone;
>
> (3) It is not a certificate tucked away in a wallet, but "a reality of life" that reminds the registrant of his obligations to his draft board;
>
> (4) Records on file with draft boards are the proper regulatory scheme in detecting forgery or alteration.

Amendment had, after all, been thought adequate in assuring effective conscription procedures.[19] Although it could be said that the need for a non-mutilation statute did not arise until recently, it is probable that the pre-1965 regulations would have been sufficient to meet the challenge.[20] Under this view the non-mutilation amendment is deemed supplementary only and therefore insufficient to justify encroachments upon personal liberties.[21]

The Court's statement that "both the governmental interest and the 1965 Amendment are limited to the noncommunicative aspect of O'Brien's conduct"[22] gives rise to a dual misconception: First, that after the widespread publicity accorded similar incidents, the burning of one's draft card does not symbolize protest of the draft (and probably also of the war in Viet Nam);[23] and, secondly, that the restriction upon the right of free expression is merely "incidental" and "no greater than essential." The latter results from the Court's failure to determine whether the activity is essentially "conduct" or "expression."[24] This, in turn, may be shown by the Court's attempted analogy between laws prohibiting destruction of Selective Service certificates and laws prohibiting the destruction of drivers' licenses or tax records.[25]

Other prevalent registration statutes include those governing the registration of aliens within the United States, 8 U.S.C. § 1302. Wilful failure of an alien to register results in the rather mild penalty of a misdemeanor punishable by a fine not to exceed $1000 and/or imprisonment not more than six months, 8 U.S.C. § 1306(a), whereas counterfeiting is punishable by a fine not to exceed $5000 and/or imprisonment not more than five years. 8 U.S.C. § 1306(d).

19. *See* Note, *Symbolic Conduct*, 68 COLUM. L. REV. 1091, 1102 (1968).

20. Under the broad wording of 50 U.S.C. App. § 462(b)(3) prior to 1965, it would already have been an offense "to forge, *alter, or in any manner change* a certificate or any notation validly inscribed thereon"; (emphasis added). Selective Service regulations had made non-possession of one's draft card a criminal offense. 32 C.F.R. § 1617.1 (1962); 32 C.F.R. § 1623.5 (1962).

21. Sherbert v. Verner, 374 U.S. 398, 403 (1963); N.A.A.C.P. v. Button, 371 U.S. 449, 464 (1958).

22. 391 U.S. at 381-82.

23. Mr. Justice Jackson recognized the ability of communication by the use of symbols when he said, "[s]ymbolism is a primitive but effective way of communicating ideas." West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943).

However, a non-verbal act, initially without a fixed meaning in the public mind, must acquire such a *meaning* before it will qualify as a symbol. "[A] symbol must symbolize a specific idea or viewpoint. A symbol is merely a vehicle by which a concept is transmitted from one person to another; unless it represents a particular idea, a 'symbol' becomes meaningless. It is, in effect, not really a symbol at all." Davis v. Firment, 269 F. Supp. 524, 527 (D.C. La. 1967).

24. Emerson, *Freedom of Speech in Wartime*, 116 U. PA. L. REV. 975, 996-1003 (1968); Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 931-35 (1963).

25. 391 U.S. at 375.

Wherever free speech claims have been raised, they have generally merited some consideration. However, it seems that in *O'Brien* the outcome appeared so self-evident to the Court that it felt little necessity to articulate first amendment arguments. Add this failure to the Court's view that "when 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms,"[26] and the result becomes overly broad against a cherished background of the right to free expression.

That symbolic conduct was entitled to first amendment protection was first recognized in *Stromberg v. California*[27] and *West Virginia Bd. of Educ. v. Barnette*.[28] In *Stromberg*, a California statute prohibiting the display of a red flag as a symbol of opposition to organized government was held unconstitutional because of overbreadth and as an infringement on defendant's freedom of expression. Twelve years later in *Barnette* a state statute requiring all public school children to salute the flag and pledge allegiance was held unconstitutional as an abridgment of freedom of speech and religion. Significant in *Stromberg* and *Barnette* was the fact that both involved conduct universally symbolizing allegiance to a nation and its ideology; and also that no significant state interest in regulating the conduct existed.

In *People v. Street*,[29] defendant, a World War II veteran, publicly burned an American flag to express his indignation and outrage at the sniper shooting of civil rights leader James Meredith. His conviction for violation of a state statute making it a misdemeanor to "publicly burn" a United States flag was upheld, since his conduct was an "act of incitement, literally and figuratively 'incendiary.' "[30] Although witnesses attacked O'Brien after the burning incident, the Court did not rely on the *Street* rationale for restricting expressive conduct.[31]

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26. *Id.* at 376.

27. 283 U.S. 359 (1931).

28. 319 U.S. 624 (1943).

29. 20 N.Y.2d 231, 229 N.E.2d 187, 282 N.Y.S.2d 491 (1967), *appeal docketed*, No. 688, U.S. Sup. Ct. Oct. 5, 1967.

30. *Id.* at 237, 229 N.E.2d at 191, 282 N.Y.S.2d at 496.

31. In Milk Wagon Driver v. Meadomoor Dairies, Inc., 312 U.S. 287 (1941), the Supreme Court distinguished Thornhill v. Alabama, 310 U.S. 88 (1940), and Carlson v. California, 310 U.S. 106 (1940), in sustaining an injunction against the union's claim of

In *People v. Stover*,[32] defendants hung rags, tattered clothing, underwear, old uniforms and scarecrows from clotheslines in the front yard of their home in a pleasant residential district as "peaceful protest" against high city taxes. After six years of this protest an ordinance was enacted prohibiting the erection and maintenance of clotheslines in front and side yards. The court held that aesthetic zoning was a reasonable exercise of the police power and a permissible infringement of free expression.

The concept of "substantial governmental interest" has also been accorded significant recognition when challenged by free expression contentions in cases involving: maintenance of public order;[33] regulations of commercial activity;[34] regulations of time, place,[35] purpose,[36] and manner[37] of speaking; violations of court orders;[38] and school regulations.[39] However, it has been held that

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infringement of free speech and held that there was no free speech protection for an "utterence in a context of violence."

> It was in order to avert force and explosions due to restrictions upon rational modes of communication that the guarantee of free speech was given a generous scope. But utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force. Such utterance was not meant to be sheltered by the Constitution.

312 U.S. at 293.

32. 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734 (1963) *app. dismissed for lack of fed. question*, 375 U.S. 42 (1963). *See* Comment, *Zoning, Aesthetics, and the First Amendment*, 64 COLUM. L. REV. 81 (1964).

33. In Zwicker v. Boll, 270 F. Supp. 131 (D.C. Wis. 1967), persons accused of violating the Wisconsin disorderly conduct statute were denied injunctive relief, the court holding that the statute did not clearly deny their right to peacefully express unpopular ideas. "The power and the duty of the State to take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of its residents cannot be doubted." Thornhill v. Alabama, 310 U.S. 88, 105 (1940).

34. In Valentine v. Christensen, 316 U.S. 52 (1942), the Supreme Court held that a city could validly prohibit distribution of circulars containing both commercial advertisement and protest, finding that the protest was a mere sham to avoid the ordinance.

35. Cox v. New Hampshire, 312 U.S. 569 (1941).

36. "[P]icketing is not beyond the control of a State if the . . . purpose which it seeks to effectuate gives ground for its disallowance." Hughes v. Superior Court, 339 U.S. 460, 465-66 (1950); Amalgamated Food Employees v. Logan Valley Plaza, 391 U.S. 308 (1968).

37. Kovacs v. Cooper, 336 U.S. 77 (1949).

38. Thomas v. Collins, 323 U.S. 516 (1945) (dissenting opinion).

39. In Tinker v. Des Moines Independent School Dist., 258 F. Supp. 971 (S.D. Iowa 1966), a school regulation forbidding the wearing of black arm bands was upheld against defendants' claim that the arm bands were symbolic protest against the war in Viet Nam. Important factors to the court were that circumstances justified the fear that continued wearing of arm bands "would be likely to disturb the disciplined atmosphere required for any classroom" and, secondly, that freedom of speech was infringed upon only slightly since the students were free to wear arm bands off school premises.

Cases involving the wearing of freedom buttons by students have had varying results.

"particular considerations surrounding a specific act justify clothing it in the concept of speech."[40] This has been the case only where the activity is a natural extension of the verbal expression,[41] where the verbalization would lose meaning,[42] where the acts are the traditionally recognized equivalent of verbal statements,[43] or where no reasonably alternative methods of communication are available.[44] Thus, the peaceful display of banners or pamphlets in opposition to management,[45] "protest by silent and reproachful presence"[46] and "[d]oor to door distribution of circulars"[47] have been held protected exercises of free expression. The communicative

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In Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966), the court held that a regulation banning the wearing of freedom buttons unconstitutionally infringed upon the students' right of free expression since there was no showing that these buttons tended to distract the minds of the students from their teachers. Similar facts resulted in a contrary holding in Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749 (5th Cir. 1966), where it was found that the wearing of buttons caused student disorder and disrupted classroom procedure.

In Davis v. Firment, 269 F. Supp. 324 (D.C. La. 1967), the suspension of a student because he didn't comply with regulations governing haircuts was upheld over his plea that choice of hair style constituted symbolic expression. *See also* Leonard v. School Committee of Attleboro, 349 Mass. 704, 212 N.E.2d 468 (1965); Finot v. Pasadena City Bd. of Educ., 250 Cal. App. 2d 189, 58 Cal. Rptr. 520 (2d Dist. Ct. App. 1967).

40. United States v. Miller, 367 F.2d 72, 79 (2nd Cir. 1966), *cert. denied*, 386 U.S. 911 (1967).

> 41. There is no doubt that, in connection with the pledges, the flag salute is a form of utterance . . . Symbols of State often convey political ideas just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or bared head, a bended knee.

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943). *cf.* Stromberg v. California, 283 U.S. 359 (1931).

> 42. Thornhill v. Alabama, 310 U.S. 88 (1940).
>
> Such a demonstration, in the circumstances of these two cases, is as much a part of the 'free trade in ideas', Abrams v. United States, 250 U.S. 616, 630 (Holmes, J., dissenting), as is verbal expression more commonly thought of as 'speech'. It, like speech, appeals to good sense and to 'the power of reason as applied through public discussion', . . . just as much as, if not more than, a public oration delivered from a soapbox at a street corner.

Garner v. Louisiana, 368 U.S. 157, 201 (1961)(concurring opinion); *See* N.A.A.C.P. v. Button, 371 U.S. 415 (1963).

43. N.A.A.C.P. v. Button, 371 U.S. 415 (1963); Martin v. Strutners, 319 U.S. 141 (1943); Abrams v. United States, 250 U.S. 616 (1919); Landry v. Daley, 280 F. Supp. 938 (N.D. Ill. 1968).

44. In Kovacs v. Cooper, 336 U.S. 77 (1949), the Court, in a 5 to 4 decision, upheld a city ordinance forbidding use of public streets by sound trucks or other vehicles which emitted "loud and raucous" noises. The manner of conducting expression was said to be subject to reasonable limitation *when other "easy means of publicity are open"* (emphasis added).

45. Thornhill v. Alabama, 310 U.S. 88 (1940); Carlson v. California, 310 U.S. 106 (1940).

46. Brown v. Louisiana, 383 U.S. 131, 142 (1966).

47. Martin v. Struthers, 319 U.S. 141, 146 (1943).

element in these cases was judged to be paramount. Noticeably absent were those types of action having a *destructive* nature; rather, the conduct constituted *interference* at most. Further, since there were no reasonably alternative methods of conveying the ideas, regulation of conduct meant destruction of the right to free expression. Professor Thomas Emerson has suggested that, in determining whether regulations are actually aimed at the expressive element, consideration be given to forms of action traditionally subject to regulation and to the types of sanctions imposed.[48] Ultimately, however, whether an activity constitutes conduct or expression is dependent upon an inherently subjective analysis.

Meaningful, therefore, in the above instances are the purposes to which the protests were directed. Dissent against social and economic inequalities has been granted a more enviable position than dissent against established mores.[49] It is submitted that, absent the war-time environment surrounding *O'Brien*, the Court would have been faced with a more perplexing problem.

Assuming the existence of a legitimate and substantial governmental interest in the maintenance of issued Selective Service certificates, it remains to be considered whether, in light of the "speculative nature" of the possibility of damage to draft procedures,[50] the imposition of severe punishment upon those who burn draft cards as symbolic speech is violative of the eighth amendment. In prohibiting cruel and unusual punishment, the eighth amendment has left to the Supreme Court the task of articulating appropriate standards. In *Trop v. Dulles*, Mr. Chief Justice Warren said that "[this] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[52] As an aid in determining these

48. Emerson, *Freedom of Expression in Wartime, supra* note 24 at 997.

49. Mr. Justice Jackson has warned that:

> As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. . . . Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only unanimity of the graveyard.

West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943).

50. Note, *Symbolic Conduct, supra* note 19.

51. 356 U.S. 86 (1958).

52. *Id.* at 101. The *Trop* court went on to hold that denationalization as punishment for a military deserter in time of war was cruel and unusual punishment barred by the eighth amendment. Denationalization would have subjected defendant to a "fate of ever-increasing fear and distress." *Id.* at 102.

contemporary "standards of decency," O'Brien's counsel suggested a comparison with the statutes governing alien registration certificates.

> Had respondent been convicted of destroying an alien registration certificate, rather than a Selective Service System certificate, he would have been subject to disproportionately different punishment. Conviction of failure to possess an alien registration certificate is a misdemeanor carrying a maximum sentence of thirty days imprisonment and/or $100 fine. Immigration and Nationality Act of 1952, § 264(c); 8 U.S.C. § 1304[e]. An alien who wilfully fails to register, still a misdemeanor, is subject to a maximum sentence of six months imprisonment and/or $1,000 fine. Ibid., § 266(a); 8 U.S.C. § 1306(a). Only if the defendant has been found guilty of counterfeiting alien registration certificates, can he receive the felony punishment of up to five years imprisonment and/or $5,000 fine. Ibid., § 266(d); 8 U.S.C. § 1306(d).[53]

The argument concludes that the punishment meted out to O'Brien "does not meet these standards because it is 'so disproportionate to the offense committed as to shock the moral sense of the community***.' "[54] Although authorized by statute, a sentence that is clearly disproportionate to the offense may be barred by the eighth amendment.[55]

This argument, however, was not discussed in the *O'Brien* opinion.[56] Regardless of its validity, the contempt for draft protesters is evident. The supporting comments by Representative Rivers exemplify the atmosphere in which the amendment was passed:

> The purpose of the bill is clear. It merely amends the draft law by adding the words 'knowingly destroys and knowingly mutilates' draft cards. A person who is convicted would be subject to a fine up to $10,000 or imprisonment up to 5 years [or both]. It is a straight forward clear answer to those who would make a mockery of our efforts in South Vietnam by engaging in the mass destruction of draft cards.

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53. Brief for Respondent at 73-74.

54. *Id.* at 75.

55. Weems v. United States, 217 U.S. 349, 367 (1910). Generally, however, opinions in regard to the severity of punishment are questions of legislative policy, not subject to judicial review. Gore v. United States, 357 U.S. 386 (1958).

56. *See* material cited note 7 *supra*, for a discussion of the Court's rationale for not examining the legislative history of the 1965 Amendment.

> . . . This is the least we can do for our men in South Vietnam fighting to preserve freedom, while a *vocal minority* in this country *thumb their noses at their own Government.*[57]

An act of recognized expressive significance was thus, by its inclusion in a section chiefly concerned with the knowing issuance, transfer or possession of forged Selective Service certificates, made comparably severe and comparably punishable.

The result in *O'Brien* appears to be an unequivocal answer to those who would engage in similar acts of civil disobedience claiming "symbolic speech" protection. However, in view of the recognition that modern first amendment guarantees protect the communication of ideas of public interest, the Court's hasty dismissal of defendant's symbolic speech claim is not justified. The finding of a significant governmental interest is by itself insufficient to preclude examination of good faith free speech issues.[58] The balancing test will be validly applied to "symbolic speech" situations only when the Court proceeds to thoroughly examine the substantiality of the alleged expressive element.

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57. 111 CONG. REC. 19871 (1965) (emphasis added).

58. For the view that the clear and present danger test is applicable to draft card burning cases *see* Emerson, *supra* note 24, at 998.