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The First Amendment and Nonverbal Expression

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70. Case Note, 6 VILL. L. REV. 257 (1961) [*Evidence—Discovery—Right of Accused to Inspect Pretrial Statements of State's Witnesses*].
71. Case Note, 8 VILL. L. REV. 110 (1962) [*Criminal Procedure—Discovery—Right of Prosecution to Discover Evidence Defendant Intends to Use in Support of Affirmative Defense*].

VII. COMPARATIVE LAW DEVELOPMENTS

72. Shalgi, *Criminal Discovery in Israel*, 4 AM. CRIM. L. Q. 155 (1966).
73. Traynor, *Ground Lost and Found in Criminal Discovery in England*, 39 N. Y. U. L. REV. 749 (1964).

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CONSTITUTIONAL LAW: THE FIRST AMENDMENT AND NONVERBAL EXPRESSION

It is well established that an idea conveyed by conduct—a nonverbal expression—may be afforded protection under the first and fourteenth amendments as a form of speech.[1] It is equally well established that freedom of speech is not unlimited.[2] Courts have not found it easy to determine the limitations on free speech where verbal expression is concerned.[3]

[1] Brown v. Louisiana, 383 U.S. 131 (1965); Cox v. Louisiana, 379 U.S. 559 (1965); Garner v. Louisiana, 368 U.S. 157 (1961); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Carlson v. California, 310 U.S. 106 (1940); Stromberg v. California, 283 U.S. 359 (1931). *See generally* McKay, *Protest and Dissent: Action and Reaction*, 1966 UTAH L. REV. 20, 29; 34 FORDHAM L. REV. 717 (1966).

[2] *See, e.g.*, Roth v. United States, 354 U.S. 476 (1957); Dennis v. United States, 341 U.S. 494 (1951); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[3] *See, e.g.*, Emerson, *Toward a General Theory of the First*

When nonverbal expression is introduced the problem becomes even more difficult.

The case of *People v. Street*[4] is typical of several recent cases which have dealt with this problem.[5] In *Street* the defendant, after hearing that James Meredith had been shot by a sniper in Mississippi, stepped upon a street corner and stated that "[i]f they allow that to happen to Meredith we don't need an American flag."[6] In a public display of protest and indignation he then ignited an American flag. The defendant was subsequently arrested, tried and convicted under a New York statute which made it a crime to "publicly mutilate" the flag.[7]

On appeal the defendant advanced the argument that his act was symbolic speech, a protest against the inhumane treatment of a civil rights worker. Under these circumstances the application of the flag law would result in punishment in contravention of his constitutionally protected freedom of speech.[8] The court rejected this theory and affirmed the conviction. It

Amendment, 72 YALE L. J. 877 (1963); Lusk, *The Present Status of the "Clear and Present Danger Test"—A Brief History and Some Observations,* 45 KY. L. J. 576 (1957).

[4] 28 App. Div. 2d 734, 229 N.E.2d 187, 282 N.Y.S. 2d 491 (1967).

[5] *See* United States v. Smith, 368 F.2d 529 (8th Cir. 1966); United States v. Miller, 367 F.2d 72 (2d Cir. 1966).

[6] 229 N.E.2d at 189, 282 N.Y.S.2d at 493.

[7] N. Y. GEN BUS. LAW § 136 (d) (McKinney Supp. 1967), *formerly* N. Y. PENAL LAW § 1425 (16) (d) (McKinney 1944). All fifty states have laws similar to the New York statute. People v. Street, 229 N.E.2d 187, 190, 282 N.Y.S.2d 491, 495 (1967). Most of these statutes provide that one who mutilates a flag shall be guilty of a misdemeanor. After the rash of flag burnings in 1967, the Oklahoma legislature made such an act a felony punishable by a fine of three thousand dollars, or three years imprisonment, or both. Ch. 298, [1967] Okla. Laws 481, *amending* OKLA. STAT. tit 21, §§ 372-73 (1961).

[8] Similar arguments have been advanced by defendants in the much publicized draft card burning cases. *See* cases cited note 5 *supra. See also* McKay, *supra* note 1.

quoted *Halter* v. *Nebraska*[9]: "insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot." Street's conduct was characterized as "an act of incitement, literally and figuratively 'incendiary' and as fraught with danger to the public peace as if he had stood upon the street corner shouting epithets at passing pedestrians."[10] Thus the court rested its decision on the fact that the burning of an American flag might have resulted in a breach of the public peace. The state could legitimately proscribe such conduct in the interest of the public "peace, security and well being" of its citizens.[11]

The court reached the correct decision in the *Street* case. However, the persuasiveness of the decision was unnecessarily weakened by the court's reliance upon its assertion that the conduct might have resulted in a breach of the public peace. If it be said that the burning of the flag is nonverbal expression, then, arguably, the mere fact that it might have resulted in a breach of the peace would not seem to be so compelling a reason as to justify criminal punishment. In fact, Street's act did not cause a breach of the peace.[12] The Supreme Court in *Edwards v. South Carolina*[13] noted that because expression may "stir people to anger" or brings "about a condition of un-

[9] 229 N.E.2d at 190, 282 N.Y.S.2d at 495, *quoting* Halter v. Nebraska, 205 U.S. 24, 41 (1906).

[10] 229 N.E.2d at 191, 282 N.Y.S. 2d at 495.

[11] *Id.* at 190, 282 N.Y.S.2d at 494.

[12] The New York court did not find this fact persuasive. In cases involving the first amendment and breaches of peace, the Supreme Court often emphasizes that no breach actually occurred. *See, e.g.,* Edwards v. South Carolina, 372 U.S. 229, 236 (1963).

[13] 337 U.S. 1, 4 (1949). (indeed, ". . . a function of free speech is to invite dispute. It may . . . 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 . . . .

rest" is not sufficient reason to sustain a criminal conviction and thereby abridge freedom of expression.

Moreover, without questioning the assertion that such an act might result in violence,[14] how would this reasoning work in a case where the act is criminal, but no such assertion can reasonably be made? For example, in Oklahoma it is a crime to destroy state property.[15] If an individual, motivated as was the defendant in *Street*, publicly burns some insignificant piece of property, such as a ball-point pen, in protest of waste in state government, it would be unreasonable to argue that such a nonverbal expression might result in a breach of the peace. On the other hand it would be unreasonable to argue that the state could not punish an individual for such an act.

Indeed, the state can punish a person for destroying state property, or for burning a flag, if those acts are made criminal by the legislature. That type of conduct can be punished regardless of the "symbolic significance" ascribed to it by the individual. The court in *Street* observed this principle when it said that the first and fourteenth amendments protect the "substance rather than the form of communication".[16]

In *Cox v. Louisiana*[17] the Supreme Court said that the first and fourteenth amendments do not "afford the same kind of

That is why freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.") In *Street* the court did not specifically mention the "clear and present danger" test as developed by the Supreme Court.

[14] Where freedom of speech is involved it would seem that such an assertion would involve an examination of the duty of those persons who witness such an act to refrain from violence. *See* Ashton v. Kentucky, 384 U. S. 195 (1966).

[15] *See,* OKLA. STAT. tit 21, § 1760 (1961).

[16] 229 N.E.2d at 190, 282 N.Y.S.2d at 494.

[17] 379 U.S. 536, 555 (1965).