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## Draft Card Burning

Robert M. Phillips\*

FOR THE FOURTH TIME in less than three years, an attack has been made in the courts upon the Universal Military Training and Service Act, as amended (1965),<sup>1</sup> alleging its unconstitutionality as applied to the First Amendment of the United States Constitution.<sup>2</sup> The cases in point are *United States v. Edelman, et al.*,<sup>3</sup> *Smith v. United States*,<sup>4</sup> *United States v. Miller*,<sup>5</sup> and *United States v. O'Brien*.<sup>6</sup> Of the few, only *United States v. O'Brien* has reached the Supreme Court of the United States.<sup>7</sup>

In the cases cited above, the defendant publicly burned his Selective Service Classification Card, *i.e.*, his draft card, primarily in "symbolic" protest over the government's involvement in the Vietnam Conflict.<sup>8</sup> In the first two cases, defendant alleges, *inter alia*, that the burning of his draft card was a form of speech protected under the First Amendment of the Constitution.<sup>9</sup> He further contends that the Universal Military Training and Service Act, as amended (1965), expressly prohibiting draft card destruction or mutilation, is an unconstitutional abridgment of his right to "symbolic" freedom of speech.<sup>10</sup>

It has long been recognized by the courts that not only written and spoken words,<sup>11</sup> but certain acts and conduct will likewise be considered a form of speech<sup>12</sup> protected under the First Amendment.<sup>13</sup> However, it has been difficult for the courts to determine exactly what type of conduct or action is acceptable and thus protected as "symbolic" speech,

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<sup>1</sup> Universal Military Training and Service Act, Sec. 12(b), 62 Stat. 604 (1948), 50 U. S. C. App. Sec. 462 (b) (3) (1965). "Any Person . . . (3) who forges, alters or 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 \$10,000.00 or be imprisoned for not more than five years or both."

<sup>2</sup> U.S. Const., Amend. I, "Congress shall make no law . . . abridging the freedom of speech."

<sup>3</sup> *United States v. Edelman*, 384 F.2d 115 (2d Cir. 1967).

<sup>4</sup> *Smith v. United States*, 368 F.2d 529 (8th Cir. 1966).

<sup>5</sup> *United States v. Miller*, 367 F.2d 72 (2d Cir. 1966); cert. denied 368 U.S. 911.

<sup>6</sup> *United States v. O'Brien*, 88 S. Ct. 1673 (1968).

<sup>7</sup> *Ibid.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *People v. Garcia*, 37 Cal. Sup. 753, 98 P.2d 265 (1939); *Hughes v. Superior Court in and for Contra Costa County*, 198 P.2d 885 (Cal. 1948).

<sup>12</sup> *Ibid.*

<sup>13</sup> *People v. Dail*, 22 Cal. App. 2d 642, 140 P.2d 828 (1943).

and those which are objectionable in that they contravene public policy.<sup>14</sup> This exact difficulty arose in two of the present cases. The *Miller* Court found that it could not determine whether willful burning of a draft card was speech; nevertheless it was punishable.<sup>15</sup> In *O'Brien*, the Court said it was speech, but still punishable.<sup>16</sup>

Not all conduct, be it private or public, can be interpreted as "symbolic" speech, nor does the First Amendment afford the same kind of freedom to those who would communicate ideas by violent conduct<sup>17</sup> as it affords to those who communicate by pure speech.<sup>18</sup> This is not to say, however, that a restriction is being placed upon the communication of ideas, but merely a partial restriction on the methods which may be used to communicate them.<sup>19</sup> 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.<sup>20</sup> As determined by the court in *People v. Doss*, "Freedom of speech (be it by words, actions, or both) is not an absolute right."<sup>21</sup> Therefore, having established that not all speech is protected, we must determine which will and which will not be protected.

### Balancing of Interests

One of the earliest tests devised to interpret the legality of certain speech was set forth by Chief Justice Holmes in his "clear and present danger test."<sup>22</sup> In applying this test, however, it is difficult to determine just when clear and present danger has resulted from speech, thus impeding remedial processes.<sup>23</sup>

More recently the balancing of interests test as enunciated in *American Communications Assn. C. I. O. v. Douds*<sup>24</sup> precludes the clear and present danger test in determining the constitutionality of legislation

<sup>14</sup> *Schneider v. State*, 308 U. S. 147 (1939).

<sup>15</sup> *United States v. Miller*, *supra* note 5 at 78.

<sup>16</sup> *United States v. O'Brien*, *supra* note 6.

<sup>17</sup> *Milk Wagon Drivers v. Meadowmoor Dairies, Inc.*, 312 U. S. 287 (1941).

<sup>18</sup> *Cox v. Louisiana*, 379 U. S. 536, 85 S. Ct. 453, 13 L. Ed. 2d 471 (1965).

<sup>19</sup> *Kovacs v. Cooper*, 336 U. S. 77, 69 S. Ct. 448, 93 L. Ed. 513 (1949).

<sup>20</sup> *United States v. O'Brien*, *supra* note 6.

<sup>21</sup> *People v. Doss*, 382 Ill. 307, 46 N.E. 2d 984, 989 (1943); *L'Hommedieu v. Board of Regents of University of State of N.Y.*, 95 N.Y.S.2d 443, 457 (1941); *State v. Chaplinsky*, 18 A.2d 754 (N. J. 1941).

<sup>22</sup> *Schenk v. United States*, 249 U. S. 47, 39 S. Ct. 247, 63 L. Ed. 470 (1919); *Wood v. State*, 141 P.2d 309 (1943); *Dennis v. United States*, 71 S. Ct. 857 (1951).

<sup>23</sup> *Whitney v. California*, 274 U. S. 357 (1927).

<sup>24</sup> *American Communications Assn. C. I. O. v. Douds*, 339 U. S. 382, 399, 70 S. Ct. 674, 94 L. Ed. 925 (1950). *Schneider v. State*, *supra* note 14.

which indirectly restricts free speech.<sup>25</sup> The balancing test involves a weighing of each parties' interests, thereby determining whose interest should be advanced in light of the most good for the most people in view of the prevailing facts and circumstances.<sup>26</sup> When applied to facts related to the destruction of draft cards, in whose favor does the balancing scale tend—the government's or the defendant draft card burner? Let us first look at the comparative interests of each party:

*Defendant:* a) communication of an idea; b) dissatisfaction with governmental policies; c) objection to war in total, or to a particular war.

*Government's:* a) uniform military classification; b) smooth functioning of the selective service system; c) maintaining an integral part of the overall national defense posture.

Herein then, lies the crux of the entire matter, defendants' interests compared to the government's interests. It seems rather apparent that the government's position carries more weight. After all, defense of the nation still is more important than defense of the privilege (or, if you prefer, even the right) of an individual to speak freely about an opinion that is debatable. The sheer magnitude of the governmental interests alone leaves little room for speculation on this point. Moreover, the defendants' acts are related to the individual and affect only the individual, or those who deem it necessary to follow suit. Contrariwise, the governmental interests are concerned with the overall aspects of a group of individuals. The government has endeavored to set up a uniform system of classification for all male citizens. It may not be the best system; nonetheless it would prove invaluable in time of emergency mobilization to determine whether or not certain persons were physically qualified to perform assigned tasks. Certainly the destruction of an individual's personal copy of this classification cannot be considered protected under the First Amendment. Thus, I do not think it can be validly argued that defendant's burning his draft card was *the* way to express protest. "Political assassination is a gesture of protest, too, but no one is disposed to work up any First Amendment enthusiasm for it."<sup>27</sup>

Nor can we overlook the alternate routes available to defendants by which they could have pursued their communicative desires. Destruction of a "symbolic" slip of paper to effect their "symbolic" speech, peaceful sit ins, sit downs, and organized marches, are but a few alternatives.

Therefore, in applying the balancing test, it is rather clear at this point that the government's position is paramount as a matter of at least necessity. This is not so because it is the government versus an individual

<sup>25</sup> Sobel, Constitutional Law—Draft Card Burning—Symbolic Expression Not in Public Interest, 16 DePaul L. Rev. 485 (1967).

<sup>26</sup> American Communications Assn., C.I.O. v. Douds, *supra* note 24.

<sup>27</sup> Kalven, The Negro and the First Amendment 133 (1965).

or a small group of individuals, but rather because it is the government versus the acts of a few individuals multiplied a number of times if the problem is left unremedied. The proper functioning of the Selective Service System depends upon the aggregate consequences of individual acts.<sup>28</sup> One or two draft card burnings will not materially hamper the system. However, the same act committed by a relatively small percentage of the total number of registrants could severely handicap an otherwise efficient system. It should be noted that it is only common sense to view this controversy in light of foreseeable results, not merely present results.<sup>29</sup> The "public policy" of the government is not limited to such matters as are considered injurious to the public interests at present, but any acts reasonably tending to have that effect may be prohibited by statute, and thereupon they are in derogation of public policy.<sup>30</sup>

### Public Policy

This naturally leads up to the next area of concern, that of contravention of public policy merely because certain acts tend to be bad for the public's welfare in general. Public policy is not to be found in a book of codified law. This then precludes an elemental test to determine when certain acts fall within or without what is considered good public policy. However, when considering whether a certain act does contravene public policy, the act must be examined in the face of all relevant factors and issues existing in and around the public at the time of the act.<sup>31</sup>

In viewing defendants' acts, we must look at them against the background of current local and national circumstances. These circumstances are that this country is, at present, in the throes of both internal turmoil and external turmoil. That external strife, whether we like it or not, is war<sup>32</sup>; not a declared war nor a declared national emergency, but nonetheless a real war. American blood is once again soaking into foreign real estate. Some say the war is right and others say it is wrong; the fact remains that our government has elected this course of foreign policy and we, the people, have elected our government. This is not to advocate that we need accept, and blindly follow, all tenets set forth by the nation's leaders. But that is to say that change in national policies will not be wrought through the destruction of government property.<sup>33</sup> Nor will

<sup>28</sup> *United States v. O'Brien*, *supra* note 6.

<sup>29</sup> *Wickard v. Filburn*, 317 U. S. 111, 127-128, 63 S. Ct. 82, 87 L. Ed. 122 (1942).

<sup>30</sup> *United States v. Musgrave*, 160 F. 700, 702 (D. C. Ark. 1908).

<sup>31</sup> *Velvel, Freedom of Speech and the Draft Card Burning Cases*, 16 Kan. L. Rev. 149, 150 (1968).

<sup>32</sup> *N. Y. Times*, Jan. 1, 1964, p. 1, col. 1, President Pledges Full Support to S. Vietnam; *N. Y. Times*, Feb. 2, 1964, p. 1, col. 8, President Sees No Chance of Negotiating Peace and Pledged Greater War Effort.

<sup>33</sup> *People v. Street* (N. Y. C. Crim. Ct., Kings Co., July 26, 1966, Appeal pending, App T., 2d Dept.) burning of an American Flag.

existing laws and statutes be altered by the planned violation of those laws.<sup>34</sup>

The law cannot be an instrumentality of which willful violation provides the impetus to change that law. To use a well worn phrase, the law is the law, and I think this especially true when *ad hoc* legislative enactments have spawned that law.<sup>35</sup> It is not for the courts to decide positively why Congress has enacted specific legislation. Let it suffice that the Congress has seen fit to so act.<sup>36</sup> And if there is to be a change in the law or the policies regarding the powers of Congress in our government, such change can only come about through the means provided by our constitution, and those means are peaceful assembly<sup>37</sup> and the ballot box.<sup>38</sup>

If we then place defendants' acts in their proper perspective, it is clear that such acts would tend to disrupt the public morale by implanting useless additional seeds of unrest during a period of existing unrest. It could be argued that such isolated acts may tend to incite rather than disrupt morale in our public, but consideration of the issue does not stop on the home front. Due regard must be given the men in the field, both our own and those of our allies, as well as the enemy. A few indiscriminate news reports, especially when read or heard out of context, may have a deleterious effect on at least a small part of the overall war effort. In other words, a man fighting for his country abroad cannot help but feel a growing dissatisfaction with his efforts when he is periodically informed of his countrymen's disdain for those efforts. Again, this is not to debate the merits of the war *per se*, but rather to point out the need for American solidarity, necessitated by changing times. Patriotic? Perhaps. But does not patriotism any longer fit into the fundamental scheme of the American ideal? It fits right alongside free speech, dissent, minority opinions, revolution, and the rest of the inherent and man-made virtues that have made this nation great. Success in any endeavor is predicated on a unified and spirited effort by all concerned.

## Conclusion

In conclusion, I for one think it safe to say that the *willful* destruction of draft cards, or other similar government certificates for that matter, may be considered symbolic speech, but that destruction simply is not within the best interests of public policy, and, is therefore, criminal.

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<sup>34</sup> *Smith v. United States*, *supra* note 4.

<sup>35</sup> 111 Cong. Rec. 19135 (daily ed. Aug. 10, 1965) (Hon. Mendall Rivers introduced bill before the House).

<sup>36</sup> *People v. Stover*, 240 N.Y.S. 2d 734 (1963); *Barenblatt v. United States*, 360 U.S. 109 (1959); *Sonzinsky v. United States*, 300 U.S. 506 (1937).

<sup>37</sup> U.S. Const. Amend. I.

<sup>38</sup> *Sobel*, *op. cit. supra* note 25.

1) it is violative of Congressional enactment, 2) it is deliberate destruction of government property, and 3) considering the relevant factors pertaining to our foreign involvement, it is an abuse of a constitutionally conferred right, *i.e.* Freedom of Speech.

As the court so ably stated in *United States v. O'Brien*, the now-leading case in this area of constitutional law:

The many functions performed by Selective Service Certificates establish beyond doubt that Congress has a legitimate and substantial interest in preventing their wanton and unrestrained destruction and assuring their continuing availability by punishing people who knowingly and willfully destroy or mutilate them.<sup>39</sup>

It is interesting to note that the defendant in *United States v. O'Brien*,<sup>40</sup> had his six-year prison term revoked, and was instead placed on a three-year probationary period on condition that he work as a civilian at Massachusetts General Hospital. The defendant, a pacifist, had had a "change of attitude" about the legality of the draft.<sup>41</sup>

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<sup>39</sup> *United States v. O'Brien*, *supra* note 6.

<sup>40</sup> *Ibid.*

<sup>41</sup> *N. Y. Times*, Nov. 14, 1968, p. 28, col. 2.