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Why Do You Speak That Way--Symbolic Expression Reconsidered

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Why Do You Speak That Way?—Symbolic Expression Reconsidered

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Introduction

Few areas of first amendment law are as confused, or as perplexing, as the case law involving the protection of "symbolic speech."[1] This confusion results from the Supreme Court's overly narrow analytical focus. While accepting the necessity of balancing competing interests of the government's need to regulate certain forms of expression against the speaker's first amendment freedoms,[2] the Court's discussions tend to concentrate primarily on the government's side of the balance—regulation[3]—rather than on the nature and extent of the speaker's interest.[4] The communications of all symbolic speakers cannot be grouped together as an undifferentiated mass of civil libertarian sentiments; the motivations of individual speakers vary widely.[5] The current focus of the Supreme Court fails to distinguish among speakers' motivations for employing symbolic speech, whereas recognition of these differences should constitute an important part of the Court's balancing test. The Court must first examine *why* an individual has chosen expressive conduct as his preferred form of communication; only then can it gauge the extent of his claim to first amendment protection.

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1. *See generally* M. NIMMER, FREEDOM OF SPEECH § 3.06 (1984); J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW §§ 16.48, 16.49 (3d ed. 1986) [hereinafter J. NOWAK].

2. For a discussion of the competing "absolutist" approach, see Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960).

3. *See infra* notes 6-23 and accompanying text.

4. For a discussion of balancing in first amendment cases, see M. NIMMER, *supra* note 1, §§ 2.02-2.06; Carrafiello, *Weighing the First Amendment on the Scales of the Balancing Test: The Choice of Safety Before Liberty*, 8 S.U.L. REV. 255 (1982); Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975); Gunther, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell*, 24 STAN. L. REV. 1001 (1972).

5. *See infra*, notes 36-40 and accompanying text.

This Article discusses the present state of symbolic expression under the First Amendment and the possible effect of judicial consideration of the speaker's motivation. Part I analyzes the present tests used by the Court and suggests that an inquiry into speaker motivation would actually further the policies underlying the present tests. Part II examines five possible motivations for expressive conduct and concludes that the courts should give these motivations great weight in determining whether the First Amendment protects certain types of symbolic speech.

I. Traditional Approaches To Symbolic Speech

A. The *O'Brien* Test: Fear of the Slippery Slope

In *United States v. O'Brien*[6] the Supreme Court developed criteria for reviewing government regulation of symbolic expression. In upholding O'Brien's conviction for publicly burning his draft card, the Court developed the following four-part test:

> [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 freedoms is no greater than is essential to the furtherance of that interest.[7]

In *O'Brien*, this proved to be an undemanding test. The Court declared relatively chimerical governmental interests to be substantial and subjected to little real examination the government's motivation *vel non* to suppress speech.[8] The Court clearly stated its apprehension: "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."[9]

Since *O'Brien*, commentators have advanced similar arguments, suggesting that once the Court starts down the path of fully protecting expressive conduct, no end exists to the kinds of laws that can be broken in order to make a point.[10] This fear of an unending slippery slope is, however, unfounded. Most antisocial conduct has little connection to protected first amendment activities.[11] Few violations of law appear mo-

6. 391 U.S. 367 (1968).

7. *Id.* at 377. *See* Ely, *supra* note 4, at 1483-84; Alfange, *Free Speech and Symbolic Conduct: The Draft Card Burning Case*, 1968 SUP. CT. REV. 1.

8. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-6 (2d ed. 1988).

9. *O'Brien*, 391 U.S. at 376.

10. *See* Ely, *supra* note 4, at 1487-88.

11. For a discussion of the types of crime prevalent in the United States, see U.S. DEP'T OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE—THE DATA (October, 1983).

tivated by an attempt to communicate ideas effectively.[12] Although it may sometimes be difficult to determine whether the offender intended to communicate ideas,[13] often the common-sense differences in communicative content clearly appear in various types of superficially similar conduct. As the late Professor Robert Cover stated:

> [M]any of our actions [can] be understood only in relation to a norm. . . . There is a difference between sleeping late on Sunday and refusing the sacraments, between having a snack and desecrating the fast of Yom Kippur, between banking a check and refusing to pay your income tax. In each case an act signifies something new and powerful when we understand that the act is in reference to a norm.[14]

The same can be said of symbolic expression. There is a difference between burning one's income tax records in order to destroy evidence of tax evasion and doing so in order to protest an oppressive tax system. In the rare cases that truly involve the latter scenario, courts cannot ignore first amendment considerations.

In *Clark v. Community for Creative Non-Violence*,[15] the Court recognized the possibility that any type of conduct, if supported by the appropriate intent, might be protected expression. In *Clark*, demonstrators sought to focus attention upon the plight of the homeless by sleeping in Lafayette Park. The Court put to rest the spectre of endless numbers of scofflaws seeking protection of the First Amendment, raised earlier in *O'Brien*, simply by reallocating the burden of proof. The Court held:

> Although it is common to place the burden upon the Government to justify impingements on First Amendment interests, it is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies. To hold otherwise would be to create a rule that all conduct is presumptively expressive.[16]

Under this approach if a person proves that his conduct was "intended to be communicative and that, in context, it would reasonably be understood by the viewer to be communicative,"[17] it will be treated as speech.

Thus the Court took an essential first step toward adequately addressing the problems arising from symbolic speech. The decision in

12. While any theft offense *might* be interpreted as a communication of the offender's contempt for private property, we generally assume that an intent to *communicate* such ideas is not the offender's primary motive. Regarding the requirement for objective intent to communicate, see Note, *Symbolic Conduct*, 63 COLUM. L. REV. 1091, 1109-13 (1968).

13. *See*, M. NIMMER, *supra* note 1, § 3.06[c].

14. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 8 (1983).

15. 468 U.S. 288 (1984).

16. *Id.* at 293 n.5.

17. *Id.* at 294.

Clark opened the door to an approach in this area that recognizes the symbolic speaker's intent as a factor in determining when expression involved in certain symbolic conduct merits first amendment protection.

B. The Two-Track Analysis: The Reunification of First Amendment Theory

Clark signaled a new approach to symbolic expression cases by rejecting the notion of a separate body of jurisprudence for symbolic expression; instead it described the *O'Brien* test as "little, if any, different from the standard applied to time, place, and manner restrictions."[18] The Court thus assimilated symbolic expression into the broader body of first amendment jurisprudence. Applying the so-called "two-track" analysis,[19] the Court stated that restrictions on symbolic expression are "valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."[20]

The application of this "reasonable time, place, or manner" analysis to symbolic expression will permit courts to focus upon the generally-ignored, but crucial, question of why an individual chooses to express himself through symbolic conduct rather than through oral or written communication. The form of communication a speaker chooses generally will turn upon how the speaker thinks he can most effectively convey his meaning. Thus, just as a speaker might choose to address an immigrant audience in a foreign language, he might choose symbolic expression in order to assure effective communication in other situations. Indeed, it might well be argued that the First Amendment, in prohibiting government from "abridging" the freedom of speech, is directed primarily at limitations that reduce the effectiveness of speech. Courts should fully protect the symbolic speaker when equally effective means of communication are not available.

The Court's traditional two-track first amendment analysis points to the same conclusion. The state cannot justify even narrow and important content-neutral restrictions if adequate alternative channels of com-

18. 468 U.S. at 298. In the words of Justice Marshall, the inquiry is "whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." Grayned v. City of Rockford, 408 U.S. 104, 116 (1972). Other cases employing the "time, place, and manner" approach include United States v. Grace, 461 U.S. 171 (1983); Heffron v. International Society for Krishna Consciousness, 452 U.S. 640 (1981); Cox v. New Hampshire, 312 U.S. 569 (1941).

19. *See* L. TRIBE, *supra* note 8, § 12-2.

20. 468 U.S. at 293.

munication are unavailable to the speaker. An alternative is adequate only if it is approximately as effective in conveying the speaker's message as the regulated channel of communication. The Supreme Court made this connection in *City Council v. Taxpayers for Vincent*,[21] when it upheld a Los Angeles ban on the posting of signs on public property. The Court observed:

> While the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places, . . . a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate. . . . Notwithstanding appellees' general assertions in their brief concerning the utility of political posters, nothing in the findings indicates that the posting of political posters on public property is a uniquely valuable or important mode of communication, *or that appellees' ability to communicate effectively is threatened* by ever-increasing restrictions on expression.[22]

Courts can realistically appraise the effectiveness of alternative channels of communication in symbolic expression cases only after they have acknowledged that often a speaker initially chooses to use symbolic speech because other forms of expression would ineffectively convey his point.[23]

C. The Speech-Conduct Distinction: A Troubling Irrelevance

Much of the writing on symbolic expression focuses upon the distinction between speech and conduct.[24] A rather simple syllogism follows from this approach: the First Amendment protects speech, not conduct. Symbolic expression is in part conduct. Therefore, symbolic expression is less protected than pure speech.[25] With *Clark*'s implicit invalidation of this syllogism's major premise,[26] courts and commentators should take a different approach.

The results of many of the symbolic expression cases can be justified without relying on the speech-conduct distinction. First, the "clear and present danger" test prohibits incitement to imminent illegal action, even

21. 466 U.S. 789 (1984).

22. *Id.* at 812 (emphasis added).

23. In Clark v. Community for Creative Non-Violence, it appears that respondents did not argue that the restriction there imposed on symbolic expression impaired the effectiveness of their speech. The majority stated, "Respondents do not suggest that there was, or is, any barrier to delivering to the media, or to the public by other means, the intended message concerning the plight of the homeless." 468 U.S. 288, 295 (1984).

24. The distinction is spelled out most elaborately in T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION *passim* (1970). *See also* Ely, *supra* note 4, at 1493-96.

25. T. EMERSON, *supra* note 24, at 17-18.

26. *See supra* note 16 and accompanying text.

when the incitement arises from pure speech.[27] Furthermore, when the speech falls outside the core area of political discussion,[28] the Court has applied less exacting standards to uphold prohibitions on encouragement of illegal action. In such cases the Court has not insisted upon a showing of clear and present danger as it has in order to justify the suppression of political speech. For example, all recent commercial speech cases reaffirm the holding of *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*[29] by refusing to protect commercial speech when it proposes or advertises an illegal activity.[30]

When individuals have undertaken to advocate illegal conduct through symbolic speech, the courts have sometimes failed to recognize the analogy to *Pittsburgh Press*. When that advocacy takes the form of something beyond the speaker on the soap box or the pamphleteer, courts have often described the situation as one involving "speech plus"[31] or "speech brigaded with illegal action."[32] Most of these cases involve labor picketing. Courts view the picketers' illegal secondary boycotts, violation of other laws, or violation of valid labor agreements as illegal activities subject to regulation.[33] The problem here, however, is not the "plus" part of the speech. In *NAACP v. Claiborne Hardware*,[34] the Court viewed the fact that speech had been "brigaded by illegal action" as irrelevant to the protection of the portion of activity that involved lawful encouragement of a valid boycott. Thus, the central issue of the "speech-plus" cases is not the symbolic form of the speech, but whether speakers have violated or incited violation of labor relations laws or other valid regulations. An illegal secondary boycott, for example, receives no greater first amendment protection when it is imposed through speech

27. Brandenburg v. Ohio, 395 U.S. 444 (1969). *See also* Greenawalt, *Speech and Crime*, 1980 AM. B. FOUND. RES. J. 645.

28. For a discussion of the types of speech that fall within this core area, see Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245, 255-57.

29. 413 U.S. 376 (1973) (refusing to protect commercial speech when it proposes and advertises an illegal activity).

30. *See, e.g.*, Central Hudson Gas & Elec. Corp. v. New York Public Serv. Comm'n, 447 U.S. 557, 566 (1980) (for commercial speech to be protected, it at least must concern "lawful activity").

31. Brandenburg v. Ohio, 395 U.S. 444, 455 (1969) (Douglas, J., concurring). *See also* International Brotherhood of Teamsters v. Vogt, 354 U.S. 284 (1957).

32. *See* Roth v. United States 354 U.S. 476, 514 (1957) (Douglas, J. dissenting) (citing Giboney v. Empire Storage & Ice Co., 336 U.S. 480, 498 (1949); NLRB v. Virginia Electric & Power Co., 314 U.S. 469, 477-78 (1941)).

33. *See generally* J. NOWAK, *supra* note 1, § 16.55.

34. 458 U.S. 886 (1982). *See also* Brown v. Louisiana, 383 U.S. 131 (1966).

without picketing than when it is effectuated by speech plus picketing.[35]

The existence of or incitement to illegal action is thus the determining factor in both the speech-plus cases and in the more traditional clear-and-present-danger cases. The presence of communicative conduct rather than oral or written communication is not the relevant issue. Therefore, the speech-plus cases should not stand as an impediment to developing an approach to symbolic speech that focuses upon the speaker's concern about communicating effectively. The issue of effective communication parallels the requirement for effective alternative channels of communication in the "time, place and manner" test applied in more general first amendment contexts involving access to streets, sidewalks, or parks for expressive purposes.

II. A New Approach to Symbolic Expression Cases

The importance of symbolic expression lies in its ability to enhance the speaker's effectiveness in reaching his audience or in making his point. At least five different types of motivations exist for employing symbolic expression rather than other types of speech: (1) expressive conduct better encapsulates an idea;[36] (2) expressive conduct is more socially acceptable;[37] (3) expressive conduct attracts media attention;[38] (4) expressive conduct creates a greater feeling of self-fulfillment;[39] and (5) expressive conduct facilitates other forms of speech.[40] Whether a speaker could convey his message as effectively through oral or written speech depends on his motivation for choosing symbolic speech. In deciding the extent to which the first amendment should protect symbolic speech, courts should consider a symbolic speaker's *motivation* for choosing that medium as a determining factor.

A. Capsuling An Idea

The Supreme Court has often extended the highest level of first amendment protection to cases in which symbolic speech is closely akin to pure speech—where it is clear that the idea itself could not be as concisely or clearly communicated through mere words. In such cases, as Justice Brennan observed in a slightly different context, expressive con-

35. *See* Harrah's Club v. NLRB, 446 F.2d 471 (9th Cir. 1971), *cert. denied*, 404 U.S. 912 (1971) (a union's sending telegrams to its members urging them to support a strike by another union's members constitutes an unfair labor practice).

36. *See infra* pp. 593-95.

37. *See infra* pp. 595-97.

38. *See infra* pp. 597-98.

39. *See infra* pp. 599-600.

40. *See infra* pp. 600-01.

duct has "a unique capacity to capsule an idea, evoke an emotion, or conjure up an image."[41]

In *Stromberg v. California*,[42] defendant, supervisor of a Young Communist League summer camp, directed children in a ceremony raising a red flag, in violation of a statute that prohibited such a display "as a sign, symbol or emblem of opposition to organized government or as an invitation or stimulus to anarchistic action . . . ."[43] Here it was apparently clear to the legislature that enacted the statute that the red flag was a concise and powerful symbol of an idea. In reversing the conviction of the defendant, the Court upheld the use of such a symbol as part of the peaceful and orderly discussion of ideas.[44] Four decades later, Harold Spence was similarly seeking the right "words" in displaying an American flag to which he had affixed a large peace symbol.[45] The Supreme Court found that Spence's purpose was to associate the American flag with peace rather than with war and violence.[46] No typeset pamphlet could make the point as vividly as this display. Again the Court recognized this fact and on first amendment grounds reversed Spence's conviction for improper use of the American flag.

As *Stromberg* and *Spence* illustrate, the Courts have had little trouble upholding protection of "symbolic speech" that is motivated by the speaker's desire to express an idea effectively when alternative forms of communication fail to convey the same idea. The Court's major concern in these cases is determining whether the speaker's motivation was in fact one of finding the right "words." This was an important issue in *Clark v. Community for Creative Nonviolence*.[47] Was sleeping in Lafayette Park a communicative re-enactment of the central reality of homelessness (as Justice Marshall suggested),[48] or was it merely facilitative, that is, a plan to encourage more people to demonstrate (as Justice White suggested)?[49]

When alternative modes of expression are insufficient to "capsule" the speaker's idea, the courts should subject even content-neutral regulation to the strictest standards of first amendment scrutiny. Appeals to "time, place, and manner" fail in these situations because alternative

41. FCC v. Pacifica Foundation, 438 U.S. 726, 773 (1978) (Brennan, J., dissenting).
42. 283 U.S. 359 (1931).
43. *Id.* at 361.
44. *Id.* at 369.
45. Spence v. Washington, 418 U.S. 405 (1974).
46. *Id.* at 408.
47. 468 U.S. 288 (1984).
48. *Id.* at 303 (Marshall, J., dissenting).
49. *Id.* at 296. For further discussion of facilitative speech, see *infra* pp. 600-01.

channels of communication cannot adequately convey the speaker's message. Regulation of symbolic conduct that capsules an idea should be permitted only if the state meets the heavy burden of the "clear and present danger" test applied in the context of content-based regulation.

B. Playing Within the Rules

Many may perceive expressive conduct as particularly disruptive. Those who engage in symbolic speech—especially those expressing a minority viewpoint—may be looked upon as nonconformists who refuse to employ "normal" channels of verbal communication. In fact, quite the contrary is frequently true.

Dissidents are often not as brave as we might like to envision. The Supreme Court's historic concern with legislation that "chills" expression stands witness to this reality.[50] Sometimes dissidents understand, pragmatically, that their ideas will not prevail if expressed too stridently.[51] In various contexts, expressive conduct is a more acceptable and less disruptive method of expressing ideas than is verbal speech. For example, in *Tinker v. Des Moines Independent Community School District*,[52] John Tinker's wearing an armband to class in order to protest the Vietnam War was certainly less disruptive than a vocal protest in the middle of his classes would have been. Similarly, picketing to protest a public speaker is more acceptable than engaging in heckling, even though heckling could be considered verbal speech.[53] In each of these situations, symbolic expression is the less disruptive alternative.

Historically, the Supreme Court has concentrated on the speech-conduct dichotomy in a way that has obscured the reality that symbolic conduct is often less disruptive than pure speech. In the leading case of

50. *See, e.g.*, Lamont v. Postmaster General, which struck down a requirement that addressees of certain Communist political propaganda could receive it only by affirmatively requesting the post office to deliver it. The Court noted that "any addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as 'communist political propaganda.'" 381 U.S. 301, 307 (1965). *See also* Note, *The Chilling Effect In Constitutional Law*, 69 COLUM. L. REV. 808 (1969).

51. *See, e.g.*, Taylor, *Civil Disobedience: Observations on the Strategies of Protest*," *reprinted in* H. BOSMAGIAN, DISSENT-SYMBOLIC BEHAVIOR AND RHETORICAL STRATEGIES 86 (1972).

52. 393 U.S. 503 (1969).

53. *See In re* Kay, 1 Cal. 3d 930, 464 P.2d 142, 83 Cal. Rptr. 686 (1970). In *Kay*, the California Supreme Court interpreted a statute that prohibited the disturbance of a lawful meeting. In light of first amendment considerations the California court found the statute applied only to situations in which hecklers intentionally violated explicit rules or implicit customs and usages pertaining to the meeting, rules or customs the hecklers knew or should have known, and then only when the heckling substantially impaired the conduct of the meeting.

Cox v. Louisiana,[54] the Court focused on types of conduct that are *more* disruptive than oral or written speech:

> One would not be justified in ignoring the familiar red light because this was thought to be a means of social protest. Nor could one, contrary to traffic regulations, insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech or assembly. . . . We emphatically reject the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech.[55]

Acceptance of the *Cox* paradigm paves the way for diminished protection of symbolic conduct. When expressive conduct is the least socially disruptive mode of communication, however, application of a lower level of protection makes no sense. To protect greater disruption and encourage more significant departures from the norms of civilized debate in the name of a meaningless speech-conduct distinction is to lose sight of the government's valid regulatory goals, such as the maintenance of order in public places.

The Supreme Court took note of this anomaly in *Grayned v. City of Rockford*.[56] In assessing the constitutionality of an ordinance that prohibited noise or other diversions that might disturb classes in nearby schools, Justice Marshall wrote:

> The nature of a place, "the pattern of its normal activities, dictate[s] the kinds of regulations of time place and manner that are reasonable." Although a silent vigil may not unduly interfere with a public library, . . . making a speech in the reading room almost certainly would. That same speech should be perfectly appropriate in a park. The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.[57]

The speaker who has engaged in symbolic conduct because it is less disruptive than verbal speech has discovered the norms that Robert Kalven has called "Robert's Rules of Order" for the public forum.[58] Such a speaker ought not to be at a disadvantage over his counterpart who is more disruptive. The nondisruptive speech should enjoy greater protec-

54. 379 U.S. 536 (1965).

55. *Id.* at 554-55.

56. 408 U.S. 104 (1972).

57. *Id.* at 116 (citation omitted).

58. Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 12.

tion than disruptive speech, regardless of the *form* of expression the speaker has chosen.

C. Gaining Media Coverage

One touchstone of a speech's effectiveness is the speaker's ability to disseminate his ideas to a wide audience. Certainly no vehicle more effectively reaches the public than the mass media.[59] The law has, however, created little in the way of affirmative rights to media access.[60] Individuals must often resort to self-help by choosing a mode of communication that will attract the media. This is precisely what David Paul O'Brien, a young anti-war protester, did when he burned his draft card on the steps of the South Boston courthouse in 1966.[61]

Participation in a "media event" affords a speaker cheap and effective access to large audiences. As early as the mid-1960s, commentators observed:

> Civil rights demonstrations on public streets and highways are not directed to reshaping any immediate local attitudes. Instead, they are aimed at the metropolitan, national, and international opinion markets, largely controlled by the mass media of TV, radio, newspapers and national magazines. Sit-downs in Times Square . . . or the picketing of the private residences of mayors . . . must be appraised, not as appeals to immediate spectators and listeners, but as gambits to secure space in newspapers, coverage on radio and on television.[62]

This observation remains at least as true in the 1980s as it was when it was written.

The media do not like "talking heads." In order to maintain the interest of their viewers they prefer "scenes of action so as to heighten the

59. In Buckley v. Valeo the Supreme Court stated, "The electorate's increasing dependence on television, radio, and other mass media for news and information have made these expensive modes of communication indispensible instruments of effective political speech." 424 U.S. 1, 19 (1976).

60. *See* Barron, *Access To The Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967). The rights provided by the FCC's now repealed "fairness doctrine" were of limited use to a speaker, since the broadcaster retained broad discretion in selecting the subject matter that would be presented over the airwaves. Indeed, the FCC concluded that its fairness requirements in fact discouraged broadcasters from airing more than the minimally required amount of programming on controversial issues. FCC, General Fairness Doctrine Obligations of Broadcast Licensees, 47 C.F.R. § 73.1910 (1986). The fairness doctrine was repealed in August, 1987. Syracuse Peace Council v. Television Station WTVH, 2 F.C.C. Rcd 5043 (1987). *See also* Report on Fairness Doctrine Alternatives, 2 F.C.C. Rcd 5272 (1987).

61. United States v. O'Brien, 391 U.S. 367 (1968). *See* Velvel, *Freedom of Speech and the Draft Card Burning Cases*, 16 U. KAN. L. REV. 149, 152-53 (1968).

62. Kamin, *Residential Picketing and the First Amendment*, 61 NW. U.L. REV. 177, 214 (1966).

visual effect."[63] Similarly, even reporters of print media are more attracted to dramatic media events. The following excerpt from a newspaper story aptly illustrates this phenomenon:

> "Hot Sex in Bangkok" has never been hotter than it was yesterday when Ron Anderson burned it along with 50 other X-rated movies from his video store. . . . For Mr. Anderson, the statement is simple enough: pornography is bad, and he doesn't want to make money from it. . . . Mr. Anderson made no secret of the reason he decided to burn the movies. "If I didn't destroy something of value, the news media wouldn't have come," he said. "I wanted people to know what I was doing."[64]

The media event is the modern analogue to the sound truck[65] or door-to-door leaflet distribution;[66] it provides the poor man with access to his audience.[67] As Justice Black has succinctly observed:

> There are many people who have ideas that they wish to disseminate who do not have enough money to own or control publishing plants, newspapers, radios, moving picture studios, or chains of show places. Yet everybody knows the vast reaches of these powerful channels of communication which from the very nature of our economic system must be under the control and guidance of comparatively few people.[68]

Government regulation of conduct designed to attract media coverage should meet at least as heavy a burden of justification as does government regulation of direct spending to gain access to the media. Just as *Buckley v. Valeo*[69] required a compelling interest in order to restrict direct political expenditures, so too the courts should require a compelling interest in order to restrain a speaker's use of a "media event" to gain access to an audience. In *Buckley*, the Court attempted to distinguish O'Brien's burning of his draft card from the expenditure of money, holding that the latter constituted speech.[70] However, the Court failed to examine the motive behind O'Brien's choice of symbolic expression. When one recognizes the draft card burning as a media event, the analogy between burning a draft card and spending money is persuasive.

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63. E.J. EPSTEIN, NEWS FROM NOWHERE—TELEVISION AND THE NEWS 176 (1973).

64. Toledo Blade, Nov. 1, 1986, at 15, col. 1.

65. *See* Kovacs v. Cooper, 336 U.S. 77 (1949); Saia v. New York, 334 U.S. 558 (1948).

66. *See* Martin v. City of Struthers, 319 U.S. 141, 146 (1943) ("Door to door distribution of circulars is essential to the poorly financed causes of little people.").

67. *See Kovacs*, 336 U.S. 77, 100 (Black, J., dissenting).

68. *Id.* at 102.

69. 424 U.S. 1 (1976).

70. *Id.* at 16-17.

D. Self-Fulfillment

In *Street v. New York*[71] a man reacted angrily to a radio report of the shooting of civil rights leader James Meredith. Bringing his American flag to a nearby intersection, he burned it, saying, "[W]e don't need no damn flag."[72] The Supreme Court's opinion does not relate everything Street said, but one can guess, indeed can almost hear, another sentence crying out: "I feel better now that I did that!" Professor Emerson has identified Street's probable feeling as one of "self-fulfillment."[73] The protection of self-fulfillment is one of the purposes underlying the First Amendment.[74] In many symbolic speech cases, the individual's expressive conduct similarly is more cathartic than communicative.[75] These cases pose some of the most analytically difficult problems in the law governing symbolic expression.

For Professor Emerson, determining the role of self-fulfillment in symbolic expression law is comparatively simple. His self-fulfillment theory draws a sharp line between speech and conduct, protecting self-fulfilling speech but not conduct.[76] The theory would protect the primal scream, but would protect little that goes beyond the vocal cords and printing press. As support for the speech-conduct distinction wanes,[77] however, the self-fulfillment theory poses a difficult dilemma. In the words of Professor Gunther, a first amendment claim based on self-fulfilling conduct is virtually "indistinguishable from the autonomy aspects of substantive due process," that is, from the claim that " 'liberty' is broad enough to protect all individual behavior that does not harm others."[78]

This insight is at the core of Professor Schauer's definition of freedom of speech as freedom to communicate.[79] It suggests that the Court should permit greater governmental control of symbolic expression when it is not communicative, when it is motivated primarily by a desire to achieve self-satisfaction rather than to communicate to others.[80] Otherwise we must resort to drawing an artificial line between speech and con-

71. 394 U.S. 576 (1969).

72. *Id.* at 578-79.

73. T. EMERSON, *supra* note 24, at 6. *See also* M. NIMMER, *supra* note 1, § 1.03.

74. Self fulfillment also has other aspects. Emerson refers to it as "the realization of [man's] character and potentialities as a human being." T. EMERSON, *supra* note 24, at 6.

75. *Id.* § 1.03. *See also* Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. Rev. 964 (1978).

76. T. EMERSON, *supra* note 24, at 8-9.

77. *See supra* notes 24-35 and accompanying text.

78. G. GUNTHER, CONSTITUTIONAL LAW 979, 1089 n.12 (11th ed. 1985). *See also* F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 50-59 (1982).

79. *See* F. SCHAUER, *supra* note 78, at 53.

80. *Id.* at 92-106.

duct to prevent the First Amendment from undermining the legitimate exercise of governmental police powers. Some case law supports this analysis. For example, in *Kelley v. Johnson*,[81] the Supreme Court rejected a policeman's due process attack on hair grooming regulations imposed by the county police commissioner. The Court indicated that it would strike down the regulations only if the plaintiff demonstrated that "there is no rational connection between the regulation . . . and the promotion of the safety of persons and property."[82] The Court did not treat the case as one involving hair length as protected expression of the policeman's personality which could be censored only under the traditional first amendment criteria.[83]

In most symbolic expression cases the courts have not inquired whether communication or self-fulfillment was the actor's primary motivation. Making such an inquiry would substantially further the development of an appropriate symbolic expression doctrine.

E. Facilitative Conduct

In *Clark v. Community for Creative Non-Violence*,[84] the majority drew a sharp distinction between expressive conduct and conduct that merely facilitates effective speech. The Court stated:

> [A]lthough we have assumed for present purposes that the sleeping banned in this case would have an expressive element, it is evident that its major value to this demonstration would be facilitative. Without a permit to sleep, it would be difficult to get the poor and homeless to participate or to be present at all.[85]

In other areas, however, the Court has fully protected facilitative speech. For example, in *Buckley v. Valeo*,[86] the Court specifically refused to treat the expenditure of money to produce speech as expressive conduct. It held instead that the fact that an individual's communication depended on the expenditure of money did not introduce a non-speech element.[87] More recently, in *Meyer v. Grant*[88] the Court struck down a Colorado statute prohibiting payment to persons employed to circulate

81. 425 U.S. 238 (1976).

82. *Id.* at 247.

83. *See* Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970) (right to wear one's hair at any length may be a right protected within the penumbras of first amendment freedom of speech).

84. 468 U.S. 288 (1984).

85. *Id.* at 296.

86. 424 U.S. 1 (1976).

87. *Id.* at 16-17.

88. 108 S. Ct. 1886 (1988).

initiative petitions for voter signatures, finding that the restriction upon such payment unconstitutionally restricts political expression.

The standard of protection for activities that facilitate expression is far from clear.[89] This issue deserves closer examination than the Court's perfunctory analysis in *Clark*. Courts should examine the extent to which speech truly would be deterred if related facilitative conduct were not protected. As the facilitative conduct becomes more essential to the production of speech, they should require a more compelling governmental interest.[90]

Conclusion

Current law governing symbolic expression asks the wrong questions. Courts have focused solely on governmental motivation, rather than considering the speaker's purpose as well. Determining why the speaker has chosen a particular mode of expression would more effectively protect the goals underlying the First Amendment.

Courts and commentators often rely on the speech-conduct dichotomy to determine the boundary between free expression and more general due process claims.[91] The general inadequacies of this approach[92] suggest that a different line needs to be drawn. The use of speaker motivation to establish a judicial balance of first amendment interests is a solution more in tune with our traditions of protecting "uninhibited, robust, and wide-open" debate.[93]

89. *Cf.* Pell v. Procunier, 417 U.S. 817 (1974) (newsmen have no constitutional right of access to prisons beyond that afforded to the general public).

90. But *compare* the standard used in *Clark with* that in *Buckley*, 424 U.S. at 19 (striking down restrictions on direct spending "because virtually every means of communicating ideas in today's mass society requires the expenditure of money").

91. *See supra* notes 7-9 and accompanying text.

92. *See supra* notes 36-40 and accompanying text.

93. New York Times v. Sullivan, 376 U.S. 254, 270 (1964).