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FLAG DESECRATION STATUTES: HISTORY AND ANALYSIS

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Since the turn of the century, almost forty decisions have been written in appeals involving violations of United States flag desecration statutes. The distribution of these cases, by decade, provides some striking features to lawyers, sociologists, and political scientists. Although almost every state has prohibited, for many years, various forms of flag abuse, almost three-fourths of these matters have been litigated within the last four years. The period of time around Pearl Harbor produced four such cases, but in the 25 year period, from 1942-1967, while flag desecration statutes were found among the laws of virtually every state, only one such case appeared.

For the most part, the flag cases have been associated with periods of national fervor, emotion, and, more recently, controversy of a political sort.

Under the greatly expanded doctrines of free speech or "symbolic" speech, violators of these statutes have come to seize upon flag desecration as a most dramatic means of exhibiting contempt for national policies and beliefs, and as a proven method of infuriating those to whom the flag is a symbol of profound national pride. The next several years will be a severe test for these laws upon the battlegrounds of patriotism and dissent, and will determine the viability of measures which seek to regulate those acts and expressions.

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Contempt for the flag, or protest against American institutions, depending on one's point of view, has been manifest in an extraordinary variety of acts including burning,[1] painting,[2] and tearing.[3] Some prosecutions or actions have been launched against defendants for lowering the flag;[4] subordinating it,[5] superimposing "peace symbols"[6] or slogans[7] upon it, or displaying it improperly on one's vehicle.[8]

Individuals have been prosecuted for wearing the flag as a vest,[9] a shirt,[10] a poncho,[11] a cape,[12] and for publishing depictions of the flag used to cover the private parts of an otherwise nude female.[13] It has been enlisted by defendants who sewed flag patches to the seats of their pants,[14] by one who, to dramatize what he termed an aggressive national policy, displayed the flag in the form of a male sexual organ,[15] and by another who wore it as his only article of clothing when appearing at the draft board.[16]

1. Street v. New York, 394 U.S. 576 (1968); Sutherland v. DeWolf, 323 F. Supp. 740 (S.D. Ill. 1971); Crosson v. Silver, 319 F. Supp. 1084 (D. Ariz. 1970); United States v. Ferguson, 302 F. Supp. 1111 (N.D. Cal. 1969); People v. Burton, 27 N.Y.2d 198, 316 N.Y.S.2d 217, 265 N.E.2d 266 (1970); Deeds v. State, 474 S.W.2d 718 (Tex. Crim. App. 1971); State v. Turner, 78 Wash. 2d 276, 474 P.2d 91 (1970).

2. People v. Verch, 63 Misc. 2d 477, 311 N.Y.S.2d 637 (Ct. of Spec. Sess. 1970).

3. Joyce v. United States, 259 A.2d 363 (D.C. Ct. App. 1969); Hinton v. State, 223 Ga. 174, 154 S.E.2d 246 (1967).

4. Hinton v. State, 223 Ga. 174, 154 S.E.2d 246 (1967); Lapolla v. Dullaghan, 63 Misc. 2d 157, 311 N.Y.S.2d 435 (Sup. Ct. 1970).

5. Hodsdon v. Buckson, 310 F. Supp. 528 (D. Del. 1970).

6. Long Island Vietnam Moratorium Comm. v. Cahn, 437 F.2d 344 (2d Cir. 1970), *aff'g on other grounds*, 322 F. Supp. 559 (E.D.N.Y. 1970); State v. Nicola, 182 N.W.2d 870 (N.D. 1971); State v. Liska, 26 Ohio Misc. 9, 268 N.E.2d 824 (Mun. Ct. 1970).

7. Commonwealth v. Janoff, 439 Pa. 212, 266 A.2d 657 (1970), *rev'g* 215 Pa. Super. 160, 256 A.2d 874 (1969).

8. Parker v. Morgan, 322 F. Supp. 585 (W.D.N. Car. 1971).

9. People v. Cowgill, 274 Cal. App. 2d 923, 78 Cal. Rptr. 853 (1969), *appeal dismissed*, 396 U.S. 371 (1970).

10. Hoffman v. United States, 445 F.2d 226 (D.C. Cir. 1971), *rev'g* 256 A.2d 567 (1969).

11. State v. Waterman, — Iowa —, 190 N.W.2d 809 (1971).

12. State v. Saionz, 23 Ohio App. 2d 79, 261 N.E.2d 135 (Ct. App. 1969).

13. People v. Van Rosen, 13 Ill. 2d 68, 147 N.E.2d 327 (1958); People v. Keough, 61 Misc. 2d 762, 305 N.Y.S.2d 961 (County Ct. 1969).

14. Cole v. Gray Graybeal, 313 F. Supp. 48 (W.D. Va. 1970); State v. Van Camp, 6 Conn. Cir. Ct. 609 (1971).

15. People v. Radich, 26 N.Y.2d 114, 308 N.Y.S.2d 846, 257 N.E.2d 30, *aff'd by an equally divided court*, 401 U.S. 531 (1970).

16. Commonwealth v. Sgorbati, 49 Pa. D. & C. 2d 173 (Ct. Comm. Pl. 1970).

While the acts which have been held to constitute flag desecration are many, there is little variance in the state statutes. New York's General Business Law[17] is a standard enactment, whose precursor[18] was the

17. N.Y. GEN. BUS. LAW § 136 (McKinney 1968):

Any person who: a. In any manner, for exhibition or display shall place or cause to be placed, any word, figure, mark, picture, design, drawing, or any advertisement, of any nature upon any flag, standard, color, shield or ensign of the United States of America, or the state of New York, or shall expose or cause to be exposed to public view any such flag, standard, color, shield or ensign, upon which after the first day of September, nineteen hundred and five, shall have been printed, painted or otherwise placed, or to which shall be attached, appended, affixed or annexed, any word, figure, mark, picture, design, or drawing, or any advertisement of any nature, or

b. Shall expose to public view, manufacture, sell, expose for sale, give away, or have in possession for sale, or to give away, or for use for any purpose, any article, or substance, being an article of merchandise, or a receptacle of merchandise or article or thing for carrying or transporting merchandise, upon which after the first day of September, nineteen hundred five, shall have been printed, painted, attached, or otherwise placed, a representation of any such flag, standard, color, shield or ensign, to advertise, call attention to, decorate, mark, or distinguish, the article or substance on which so placed, or

c. Shall print, engrave, or otherwise place or cause to be printed, engraved or otherwise placed on any blank check, bill head, letter head, envelope or other business stationery, a representation of any such flag, standard, color, shield or ensign, or shall use any such blank check, bill head, letter head, envelope or other stationery for business purposes or correspondence, or

d. Shall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by words or act, or

e. Shall raffle or place in pawn any such flag, standard, color, shield or ensign, or

f. Shall publicly carry or display any emblem, placard or flag which casts contempt, either by word or act, upon the flag of the United States of America, or

g. Shall publicly use or cause any such flag, standard, color, shield or ensign, to be publicly used as a receptacle for the placing, depositing or collecting of money or any other article or thing,

Shall be guilty of a misdemeanor.

The words flag, standard, color, shield or ensign, as used in this section, shall include any flag, standard, color, shield or ensign, or any picture or representation, of either thereof, made of any substance, or represented on any substance, and of any size, evidently purporting to be, either of, said flag, standard, color, shield or ensign, of the United States of America, or of the state of New York, or a picture or a representation, of either thereof, upon which shall be shown the colors, the stars, and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation may believe the same to represent the flag, colors, standard, shield or ensign of the United States of America or of the state of New York.

This section shall not apply to any act expressly permitted by the statutes of the United States of America, or by the United States army and navy regulations, nor shall it be construed to apply to a certificate, diploma, warrant, or commission of appointment to office, ornamental picture, article of jewelry, stationery for use in private correspondence, or newspaper or

model for most state statutes. It forbids, in its first section, defacing of the flag, by placing upon it words, marks, advertisements, or the like. The statute then prohibits affixation of the flag on articles of merchandise, or business documents. The heart of the statute is contained in subdivision (d). It fixes criminal responsibility on anyone who "shall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by words or act . . . ."[19] The statute embraces the United States "flag, standard, color, shield or ensign," or any representation thereof. By the language of the statute, "flag" is not limited to an accurate representation, but includes what would reasonably appear, without deliberation, to be the national flag, irrespective of the number of stars or stripes.

Certain exemptions are set forth, including its use on official documents, private stationery, newspapers, jewelry, and ornaments. A violation of the statute is a misdemeanor.

New York's statute has, except for punishment provisions, undergone no amendment of any substance since 1905. When first enacted it provided for a punishment of up to thirty days, with or without a fine of up to $100. Twelve years later its misdemeanor status was preserved, but the possible punishment was omitted. Thus, under New York's present Penal Law, conviction carries punishment of up to one year[20] plus a fine of up to $1,000.[21]

The Uniform Flag Law[22] postdated the New York flag statute; the two are virtually identical in language. The Uniform Law, which has

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periodical, on any of which shall be printed, painted or placed, said flag, standard, color, shield or ensign disconnected and apart from any advertisement.

The possession by any person, other than a public officer, as such, of any such flag, standard, color, shield or ensign, on which shall be anything made unlawful at any time by this section, or of any article or substance or thing on which shall be anything made unlawful at any time by this section shall be presumptive evidence that the same is in violation of this section, and was made, done or created after the first day of September, nineteen hundred five, and that such flag, standard, color, shield or ensign, or article, substance, or thing, did not exist on the first day of September, nineteen hundred and five.

18. Law of May 16, 1905, ch. 440, 1 [1905] N.Y. Laws 973.

19. N.Y. GEN. BUS. LAW § 136(d) (McKinney 1968).

20. N.Y. PENAL LAW § 55.10(2)(B), § 70.15(1) (McKinney 1967).

21. N.Y. PENAL LAW § 55.10(2)(B), § 80.05(1) (McKinney 1967).

22. The Uniform Flag Statute, 9B MCKINNEY'S UNIFORM LAWS ANN. 48.

§ 1. Definition.—The word flag, standard, color, ensign or shield, as used in this act, shall include any flag, standard, color, ensign or shield, or copy,

been adopted in a number of states, was approved in 1917 by the National Conference of Commissioners on Uniform State Laws. It appears that most of the flag law legislation occurred about the time of World War I. Interestingly enough, the early flag cases, few as they were, involved not mutilation or symbolic speech desecration, but improper use of the flag for purposes of advertising merchandise or trademarks.

Prior to that time it was not the least bit uncommon to observe the flag affixed to commercial goods, much in the same way as heraldic

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picture or representation thereof, made of any substance or represented or produced thereon, and of any size, evidently purporting to be such flag, standard, color, ensign or shield of the United States or of this state, or a copy, picture or representation thereof.

§ 2. Desecration.—No person shall, in any manner, for exhibition or display:

(a) place or cause to be placed any word, figure, mark, picture, design, drawing or advertisement of any nature upon any flag, standard, color, ensign or shield of the United States or of this state, or authorized by any law of the United States or of this state; or

(b) expose to public view any such flag, standard, color, ensign or shield upon which shall have been printed, painted or otherwise produced, or to which shall have been attached, appended, affixed or annexed any such word, figure, mark, picture, design, drawing or advertisement; or

(c) expose to public view for sale, manufacture, or otherwise, or to sell, give or have in possession for sale, for gift or for use for any purpose, any substance, being an article of merchandise, or receptacle, or thing for holding or carrying merchandise, upon or to which shall have been produced or attached any such flag, standard, color, ensign or shield, in order to advertise, call attention to, decorate, mark or distinguish such article or substance.

§ 3. Mutilation.—No person shall publicly mutilate, deface, defile, defy, trample upon, or by word or act cast contempt upon any such flag, standard, color, ensign or shield.

§ 4. Exceptions.—This statute shall not apply to any act permitted by the statutes of the United States (or of this state), or by the United States Army and Navy regulations, nor shall it apply to any printed or written document or production, stationery, ornament, picture or jewelry whereon shall be depicted said flag, standard, color, ensign or shield with no design or words thereon and disconnected with any advertisement.

§ 5. Penalty.—Any violation of Section Two of this act shall be a misdemeanor and punishable by a fine of not more than _____ dollars. Any violation of Section Three of this act shall be punishable by a fine of not more than _____ dollars, or by imprisonment for not more than _____ days, or by both fine and imprisonment, in the discretion of the Court.

§ 6. Inconsistent Acts Repealed.—All laws and parts of laws in conflict herewith are hereby repealed.

§ 7. Interpretation.—This act shall be so construed as to effectuate its general purpose and to make uniform the laws of the states which enact it.

§ 8. Name of Act.—This act may be cited as the Uniform Flag Law.

§ 9. Time of Taking Effect.—This act shall take effect _____ days after _____.

symbols are today. After a few vigorously contested proceedings, United States flags were no longer seen on beer cans, cigar labels, or other commercial items. After a lapse of some 50 years, during which such flag "advertising" was taboo, commercial use of the flag has been cautiously re-emerging, having its reincarnation in the form of political bumper strips and billboards, containing the flag, or a facsimile, and the candidate's name or picture.

ADVERTISING

The first reported case of flag use in a commercial setting was *Ruhstrat v. People.*[23] Ruhstrat was prosecuted and convicted for displaying the national flag on cigar boxes. One of the cigar labels was a pictorial representation, with a female head in the center and a picture of the American flag in the upper left hand corner. Another contained the likeness of the explorer, Nansen, in the center of a wreath, around which an American flag was entwined. Other cigar labels depicted the flag in the company of Lincoln, and the Capitol building. The statute[24] was directed only against commercial use of the flag. This legislation, therefore, predated those statutes involving burning, trampling, and similar acts that deal with the communication of an idea, as opposed to the promotion of a product.

The Illinois court declared the statute unconstitutional as a contravention of provisions concerning privileges and immunities, equal protection, and due process. By prohibiting the cigar seller from continuing his use of the flag on his labels, the state was, in the words of the court, depriving this citizen of the right to exercise his calling by arbitrarily, and under the guise of police power, passing a law which did not demonstrably promote the safety or welfare of the society.

The topic had begun to arouse some public discussion, generated by arrests or threatened arrest of businessmen who had been using the flag as a registered trademark.[25] A Chicago judge, in dismissing a case against a shirt manufacturer, had this to say:

> Wherein is the flag desecrated by making a lithograph or a picture thereof as a trade-mark? If the common use of the flag is to abate veneration for it, why did our solons pass a law making it compulsory

23. 185 Ill. 133, 57 N.E. 41 (1900).
24. Laws Ill. 1899, p. 234.
25. *See* N.Y. Times, Aug. 5, 1899, at 1, col. 3.

> upon those in charge to fly the national emblem from the flagstaff of every school house?
>
> We need no flag law in the State of Illinois to make men patriotic or to prevent men from desecrating the flag. Every man in all this land vies with his neighbor in showing devotion, loyalty, and reverence to the flag, and it is a reflection upon the names of Illinois's patriot dead to have enacted such a law.

New York's turn came next.

On July 19, 1900, New York City police chief William S. Devery, acting under a communication by Manhattan District Attorney Asa Bird Gardiner, declared that all American flags, whether of cotton, silk, printed, painted, illuminated in electric lights, or of any other kind which contain anything in the way of an inscription or advertisement, will be hauled down by the police department. The order expressly included campaign banners. Chief Devery stated, however, that the proclamation does not refer to barber poles which, it was explained, do not resemble closely enough the national symbol. He did, nevertheless, refer to certain named products which would fall within the proscription of the order, namely, "Yankee Doodle Toothpicks", "Star Spangeline for the Bath", and a quaint advertisement which promised that "Uncle Sam Pills cure all Ills".[26]

Chief Devery's order was issued following his receipt of a letter from District Attorney Gardiner, who actually authored the legislation. "As a National Presidential election is approaching," Gardiner wrote, "there will undoubtedly be many violations of the statute by persons who do not know of its provisions, but who, upon being informed of the prohibition, will immediately conform."[27]

William McKinley and Theodore Roosevelt,[28] however, were not to be denied. During the 1900 presidential campaign their images were displayed on national flag banners. This writer cannot determine whether those banners were distributed in New York, but it does seem clear that the flag had, traditionally, played a prominent part in political campaigns at all levels. In striking down the present day version

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26. N.Y. Times, July 22, 1900, at 2, col. 6.

27. Letter from Asa Bird Gardiner to Police Chief William S. Devery, July, 1900.

28. When New York's first flag law was enacted the bill was signed by Gov. Theodore Roosevelt. Law of Feb. 22, 1899, ch. 12, § 1, 1 [1899] Laws of N.Y. 17 [now N.Y. GEN. BUS. LAW § 136 (McKinney 1968)].

of N.Y. Stat. L. 1899, ch. 12, the Second Circuit Court of Appeals in *Long Island Vietnam Moratorium Committee v. Cahn,*[29] made mention of these earlier practices, and referred to the appendix of defendant's brief, which contained a duplication of the McKinley-Roosevelt campaign banner.

New York's 1899 flag statute, which contained a provision essentially the same as existing Gen. Bus. Law § 136 in 1903 when Jacob H. McPike, manager of an established cigar business, was arrested for selling cigars, whose boxes, manufactured in Pennsylvania, contained representations of the flag upon them. The cigar boxes bore a "Betsy Ross" label and the flag was depicted beneath a medallion of Betsy Ross, and, in another place, the flag was shown carried by American soldiers in action.

After McPike's arrest and incarceration, the Appellate Division, by a divided court, reversed Special Term and granted habeas corpus, on the ground that the statute, by prohibiting the use of the label, unconstitutionally deprived McPike of a property right. "It was," the court said, "competent for the Legislature to make it a misdemeanor to publicly mutilate, deface, defy, defile, trample upon, or cast contempt, either by word or act, upon the National or State flag, and mutilation of the flag may mean the printing of an advertisement on the ensign itself. Such legislation is within the police power of the state, for it relates to the preservation of the peace."[30] But the portion of the statute under which McPike was arrested unjustly discriminated against businessmen, and in the court's view, was not defensible under the doctrine of police power. The Court of Appeals affirmed,[31] upon much narrower ground:[32] the unconstitutional *application* of the statute to articles lawfully in existence at the time of its passage. Following the Court of Appeals decision, the statute was cured (L. 1905, ch.

29. 437 F.2d 344 (2d Cir. 1970).

30. People *ex rel.* McPike v. Van De Carr, 91 App. Div. 20, 26, 86 N.Y.S. 644, 648 (1904).

31. People *ex rel.* McPike v. Van De Carr, 178 N.Y. 425, 70 N.E. 965 (1904).

32. An affirmance on narrower grounds nullifies the lower court decision only to the extent that it is not in conflict with the higher court. Thus, the Appellate Division decision would be fully binding within its own department, *e.g.*, Sullivan v. Sullivan, 73 N.Y.S.2d 547 (Sup. Ct. 1947), and, because the higher court ignored the broader issue, open to consideration at a later time. Brown v. Rosenbaum, 175 Misc. 295, 23 N.Y.S.2d 161 (Sup. Ct. 1940), *rev'd,* 262 App. Div. 136, 28 N.Y.S.2d 345 (1st Dept. 1941), *aff'd,* 287 N.Y. 510, 41 N.E.2d 77 (1942), *cert. denied,* 316 U.S. 689 (1942).

440) by limiting its application to possession after September 1, 1905.[33]

The Appellate Division decision is interesting from an historical point of view. Although we cannot discern how many members of the majority, if any, smoked Betsy Ross cigars, it is clear that they were not the least bit offended by the depiction of the flag on the cigar box. On the contrary, they considered it patriotic:

> The government of the United States has not prohibited the use of the flag in connection with advertisements. Trade labels, of which a representation of the national ensign forms a part, are accepted at the patent office, as appears upon the face of one of the labels annexed to the complaint in this matter. Such trade marks and labels have been of common use. "National flags are sometimes blended with other objects to catch the eye. They are admirably adapted to all purposes of heraldic display, and their rich glowing colors appeal to feelings of patriotism, and win purchasers of the merchandise to which they are affixed. * * * One flag printed in green may catch the eye of the son of the Emerald Isle; * * * another flag, with stars on a blue field and stripes of alternate red and white, may secure a preference for the commodity upon which it is stamped." (Browne Trade-Marks [2d ed.] § 265.) There is nothing in the use of a representation of the American flag as a trade mark or in connection with a trade mark or trade label that inspires the idea that that flag is degraded or belittled. On the contrary, the remark of Mr. Browne would seem to indicate the real situation, namely, that their rich glowing colors appeal to feelings of patriotism.[34]

The issues at the time were much more precise. The thornier concept of freedom of speech was not to appear until some years later. For example, McPike's argument in the Court of Appeals did not touch upon any such lofty principles, but was confined to technical constitutional arguments dealing with the doctrine of property rights, the commerce clause, and the exclusiveness of Federal regulatory powers. The People's brief in the Court of Appeals makes much of the right of the state government to enact legislation for the protection of the flag as a means of stimulating patriotism, protecting public displays, and supporting the military powers of the state. The People argued that the use of the flag for advertising purposes was an act of degradation and profanation over which the Federal government did not possess ex-

33. Law of May 16, 1905, ch. 440, 1 N.Y. Laws 973 (1905) (repealed 1965).

34. People *ex rel.* McPike v. Van De Carr, 91 App. Div. 20, 27-28, 86 N.Y.S. 644, 649 (1904).

clusive cognizance. Not a word was written concerning the first amendment issues of free speech.

In a parellel situation the Supreme Court of Massachusetts upheld a conviction for violating a statute forbidding the use of the great seal of the Commonwealth of Massachusetts for advertising or commercial purposes.[35] The Massachusetts high court held that the defendant's use of the great seal on business labels could be prohibited by the state. The court distinguished *McPike* on the ground that the Massachusetts statute specifically did not apply to articles manufactured before passage of the act. *Ruhstrat* was distinguished on the ground that that case turned on the absence of any national legislation restricting the use of the flag.

Any possible claim as to the powers of the state to prohibit the use of the flag for purposes of commercial advertising was positively set to rest in the landmark case of *Halter v. Nebraska.*[36] Halter, like McPike, was a businessman who had been selling items, in this case, beer and whiskey, whose bottles contained labels depicting the United States flag. Halter was prosecuted and convicted in Nebraska under a statute which closely resembled New York's law. Using the customary approach of the day, Halter argued that jurisdiction and control of the national flag has always been vested in the federal government and that the field is not amenable to divided jurisdiction. In the same technical vein, the defense asserted that congressional powers to regulate the use of the flag is exclusive and that the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions.

As in *McPike*, the broader issues of freedom of speech were latent; indeed the defense agreed that ". . . we apprehend that in all places where the flag is displayed by the sovereign power of the nation, the executive arm of the government has power to protect the flag in time of peace as well as in time of war, even to the killing of the person or persons who might haul it down, should it become necessary to resort to such harsh means."[37] This truly extraordinary statement is descriptive of the lack of any concern about the use of the flag for purposes of politics, dissent, or what has been termed symbolic speech.

35. Commonwealth v. R.I. Sherman Mfg. Co., 189 Mass. 76, 75 N.E. 71 (1905).
36. 205 U.S. 34 (1907), *aff'g* 74 Neb. 757, 105 N.W. 298 (1905).
37. Remarks of counsel cited unofficially in 51 L. Ed. 696, 698 (1907).

The United States Supreme Court could have simply affirmed the conviction by upholding the portion of the statute concerning advertising, without passing on the provision dealing with mutilation, trampling, and contempt. But the Court chose to address itself to the statute in its entirety and upheld the statute, and with it, approved the right of any state to legislate on the subject. The decision was clearly bottomed upon the interest of the government in protecting the flag from degradation, disgrace, or contempt, and that by this means, national partriotism and affection for the flag stood to be enhanced.

The following portion of Justice Harlan's opinion epitomizes the attitude of the high court:

> So, a state may exert its power to strengthen the bonds of the Union, and therefore, to that end, may encourage patriotism and love of country among its people. When, by its legislation, the state encourages a feeling of patriotism towards the nation, it necessarily encourages a like feeling towards the state. One who loves the Union will love the state in which he resides, and love both of the common country and of the state will diminish in proportion as respect for the flag is weakened. Therefore a state will be wanting in care for the well-being of its people if it ignores the fact that they regard the flag as a symbol of their country's power and prestige, and will be impatient if any open disrespect is shown towards it.[38]

The Court in *Halter* held that the use of the flag for commercial purposes tends to degrade and cheapen it in the estimation of people, and that the interdiction applies to the use of the flag as an advertisement on a beer bottle. The court similarly rejected any claim that Halter's property rights were abridged by simply saying that the flag is not a subject over which one can acquire a property right and, in any event, its use is subordinate to the government's police powers.

Halter, decided in 1907, is still the most frequently cited flag case and represents the sole occasion that a majority of the United States Supreme Court has spoken on the merits. Following *Halter* the various states began to enact legislation in the spirit of the New York and Nebraska statutes. Of all of the state statutes extant today, only a few words differentiate one from another. Instances of advertising, and the decisions of state courts applying the facts to the law, have periodically been litigated since the *Halter* decision. In 1942 the New York Court of Appeals affirmed a conviction for violating the then existing Penal

38. Halter v. Nebraska, 205 U.S. 34, 42 (1907).

Law § 1425(16) which prohibited the placing of any advertising upon the flag.[39] In an affirmance without opinion, the court, citing *Halter*, applied the statutory proscription to the operator of an automobile on which an American flag was painted. The flag contained an advertisement for a travel service, and the court rejected the defendant's equal protection argument.

The Attorney General has the authority and responsibility of rendering opinions concerning matters involving interpretation of various statutes. Accordingly, Attorneys General have had occasion to offer legal opinions to perplexed citizens who were contemplating the use of the flag and were fearful of prosecution. In New York, for example, the Attorney General was queried as to whether it would be unlawful to cover any part of the flag by picture or other printed matter when depicted in a magazine.

He rendered an opinion[40] pointing out that the statute is designed to protect the national emblem from desecration and commercial exploitation and that it is not unlawful to represent the flag in a newspaper or periodical disconnected or apart from any advertisement. Three years before that the Attorney General's office rendered an opinion[41] discouraging the use of the flag in an advertisement of a business, to be used in connection with Flag Day, 1940. The flag was to appear in the newspaper above the words "God Bless America", as sponsored by a business firm.

Other state Attorneys General have encountered similar problems. For example, the Kentucky Attorney General opined[42] that a statutory violation would occur if the American flag was used as a designated symbol of a political group on the ballot; that it would constitute a form of advertising prohibited by Kentucky statute. Similarly, the Iowa Attorney General rendered a decision[43] declaring that it would be improper for a bank to include a depiction of the flag in an advertisement in which the bank proposed to give away a United States flag to persons opening a savings account. Again, in 1916 the Iowa Attorney General suggested[44] that the use of the stars and stripes by a moving

39. People v. Picking, 288 N.Y. 644, 42 N.E.2d 741, *aff'g* 263 App. Div. 366, 33 N.Y.S.2d 317 (1942), *aff'g* 23 N.Y.S.2d 148 (1940).

40. 1943 N.Y. Att'y Gen. Rep. 90.

41. 63 N.Y. Att'y Gen. Informal Op. 127 (1940).

42. 1959 Ky. Att'y Gen. Op. 43, 847.

43. 1916 Iowa Att'y Gen. Rep. 73.

44. 1916 Iowa Att'y Gen. Rep. 219.

company would be a statutory violation, pointing out that such a representation would be unlawful, irrespective of the color, or number of stars or stripes to be used.

Distinctions, of course, have always been made between commercial use and private use of the flag. The use of a flag on a letterhead has always been considered lawful.[45]

The Louisiana Attorney General, under a statute containing language which parallels the New York law, reached exactly the opposite result as his New York counterpart when he advised one writer that there was no objection to depicting the flag on goods offered for sale when the same is not used as a trademark or for advertising purposes[46] and again when the Louisiana office ruled that no provision in their Act would prevent a company from selling the United States flag or from displaying an illustration of the flag in advertising the same.[47] This ruling is precisely contrary to the one made in New York.[48]

The shifting emphasis and the enforcement of flag statutes undoubtedly reflect public attitudes. The genesis of the flag legislation generally took place during the early part of this century, when the politicization of the flag was virtually unknown.

Insults against the flag usually involved degradation or cheapening in the form of advertising. Curiously, a situation has now developed in which physical acts of desecration and destruction of the flag have, to some degree, been protected by the first amendment, whereas the very type of advertising at one time felt to be patriotic, is still prohibited. A bold advertiser occasionally represents the flag on an item of goods offered for sale, but the decisions have had the odd effect of licensing the more demonstrable acts of contempt for the flag while restraining those most easily restrained, namely, the business community. Thus, flag burners have frequently taken refuge in the bill of rights; flag advertisers have not.

After the decisions in *Halter*, *Sherman*, *McPike*, and *Ruhstrat*, flag advertising generally subsided and a new species of flag litigation emerged. About ten years after *Halter* the first appellate decision appeared involving a prosecution for flag contempt.[49] Not surprisingly,

45. 1916-18 La. Att'y Gen. Rep. & Op. 851.
46. 1934-36 La. Att'y Gen. Rep. & Op. 515.
47. 1938-40 La. Att'y Gen. Rep. & Op. 411.
48. 63 N.Y. Att'y Gen. Informal Op. 127 (1940).
49. State v. Shumaker, 103 Kan. 741, 175 P. 978 (1918).

this case occurred during the first world war. By this time a great many states had begun to enact provisions making it a crime to "cast contempt, either by words or act, upon the United States flag." This was the basis of the prosecution in *Shumaker.* Indeed, following the court of appeals decision in *McPike,* New York amended its statute to include this very language.

Shumaker's conviction could not possibly survive the appellate processes today. His conduct involved no act of physical desecration or mutilation, but consisted merely of using contemptuous words about the flag, in the presence of others. The Kansas Supreme Court found the language contemptuous of the flag and affirmed the conviction.

Two years later the first federal court decision involving flag contempt was decided.[50] The defendant was convicted, under a Montana statute, for uttering "contemptuous and slurring" language about the flag. His language was as follows:

> What is this thing anyway? Nothing but a piece of cotton with a little paint on it and some other marks in the corner there. I will not kiss that thing. It might be covered with microbes.[51]

Tried and convicted, Starr was sentenced to the Montana State Penitentiary for a term of 10 to 20 years hard labor.

The federal district court denied habeas corpus in spite of its finding that the sentence was "horrifying," and that Starr was intimidated, by a crowd, into making the utterance. In a decision marked by its literary references to the Inquisitition, Salem, St. Bartholomew, heresy hunters, witch burners, French, English, German courts, and George Bernard Shaw, the Court found the state law valid and the imprisonment "not repugnant to the Federal constitution."[52]

In retrospect, and with all of the confidence of hindsight, one could identify a decision such as this as generating the sort of thinking which has produced the paradoxes of this day.

In the period between World War I and World War II, no reported flag case arose. Pearl Harbor produced a national intensity that resulted in more litigation on this subject. It is, of course, not unnatural that the country should look to the national symbol during times of internal or international stress. A necessary concomitant of nationality

50. *Ex parte* Starr, 263 F. 145 (D. Mont. 1920).
51. *Id.*
52. *Id.* at 147.

is the selection of a national symbol or flag, and its importance in developing a sense of loyalty to a national entity is without question. Thus, a United States District Court noted:

> Countries and movements of whatever political persuasion adopt a banner in their incipient stages because of its psychological impact upon those who would serve in their behalf. Our own country was no exception to this fundamental rule during the early efforts of the Constitutional Congress to forge a union, the Congress, less than one year after declaring its independence, provided on June 14th, 1777, that "the flag of the United States be thirteen stripes, alternate red and white, that the Union be thirteen stars, white in a blue field, representing a new constellation.[53]

It was not until 1967 that the Congress concerned itself with the enactment of a national flag statute. Up until that time the matter was left exclusively to the states. Congress had, nevertheless, in 1942, enacted legislation dealing with those patriotic customs which include flag etiquette.[54] It thus appeared that the Congress was content to leave criminal enforcement entirely to the states while setting down certain suggested guidelines to promote national respect for the flag. Significantly, the chapter including these provisions is entitled "Patriotic Customs," thereby confirming the view that the matter of *criminal* enforcement was to reside with the states. At the outset of the enactment of this federal law, arguments were made asserting that any acts associated with the flag, whether criminal or otherwise, are exclusively within the domain of the Federal Government. No court has ever adopted this view.[55] Ironically, the cases decided during the Pearl Harbor era produced decisions which, because of their extreme holdings, weakened the foundations of flag statutes generally. For example, the Arkansas statute contemplates, as does New York's, contempt by *word* or act. Upon a prosecution for words alone the Arkansas Supreme Court affirmed a conviction for a purely verbal insult to the flag.[56]

The Supreme Court of Maine, in the same year, reversed a conviction based on oral utterances directed against the flag,[57] only because the

53. United States v. Ferguson, 302 F. Supp. 1111, 1114 (N.D. Cal. 1969).

54. 36 U.S.C. §§ 170-86 (1971).

55. It was rejected flatly in People v. Von Rosen, 13 Ill. 2d 68, 147 N.E.2d 327 (1958).

56. Johnson v. State, 204 Ark. 476, 163 S.W.2d 153 (1942).

57. State v. Peacock, 138 Me. 339, 25 A.2d 491 (1942).

words were not spoken publicly. In *State v. Schleuter*,[58] New Jersey's Supreme Court upheld the conviction of a young woman who tore and crumbled an American flag and threw it to the ground. She evidently did so in an effort to persuade a group of men that she was a Nazi.

In the late 1960's a new and enormous body of flag law emerged, bringing into play legal doctrines that affect the core of a free society. It called into question the reasons surrounding the very existence of these laws.

PATRIOTISM, NATIONAL WELFARE, AND PUBLIC ORDER

After the United States Supreme Court reversed itself in *West Virginia Board of Education v. Barnette*[59] by overruling *Minersville School District v. Gobitis*,[60] it became clear that the advancement of patriotism, by statutory enactment, was not a constitutionally approved governmental objective. *Barnette*, of course, involved a compulsory flag salute, which, as a coerced expression of respect, is quite different from a voluntary gesture of contempt. But the government, in dealing with attitudes of citizens toward the flag, was about to undergo its first real crisis. The distinction has remained generally intact: the government cannot extract positive declarations, but may prohibit certain physical acts, even though the subject matter happens to be the same.[61]

From the point of view expressed in *Barnette* it is manifest that the judiciary, or at least that portion of it which has sought to uphold the flag statutes, has justified these laws on the safest ground remaining, namely, the police power as it involves the prevention of disruptions.

It may be seen at a glance that this was not the design of the authors of these statutes. The laws were clearly examples of pride in the flag, and evinced a desire to avoid its cheapening at a time when flag burning and the public disruptions that surround such acts, were all but unheard of. To be sure, affronts to the flag have always been a source of belligerencies. But the *Halter* Court settled any doubt as to the true purposes of these statutes:

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58. 127 N.J.L. 496, 23 A.2d 249 (1941).

59. 319 U.S. 624 (1943).

60. 310 U.S. 586 (1940).

61. The dichotomy between words and acts is as old as the Constitution itself. Any restraint on the former, absent compelling factors, introduces the most time honored guarantees of free speech, much in the same way as the distinction between beliefs and practices in religious affairs. 2 T. JEFFERSON, WRITINGS 300-03 (Monticello ed.). *See also* 7 WRITINGS OF GEORGE WASHINGTON 13 (Ford ed. 1890).

> As the statute in question evidently had its origin in a purpose to cultivate a feeling of patriotism among the people of Nebraska, we are unwilling to adjudge that in legislation for that purpose the state erred in duty or has infringed the constitutional right of anyone. On the contrary, it may reasonably be affirmed that a duty rests upon each state in every legal way to encourage its people to love the Union with which the state is indissolubly connected.[62]

Sixty years after *Halter* the courts are now struggling to sustain the constitutionality of statutes after the rationale for their enactment has been all but repudiated. Four courts have refused to do so and the statutes have there been declared facially unconstitutional.[63]

The court in *Parker v. Morgan* made this comment:

> . . . Enacted in 1917 during a period of national chauvinistic fervor, it is an uncommonly bad statute. Despite our respect, and indeed love, for these symbols of state and nation, we are compelled to hold the statute unconstitutional.[64]

Of course, other cases have declared the statute to be unconstitutional as applied, a topic which will be covered below. In *Crosson v. Silver* the court specifically rejected the existence of a "constitutionally recognized state power to prohibit flag desecration based on an interest in preserving loyalty or patriotism."[65] It did, however, recognize that the state has substantial interest in preventing the kind of public disorder that could attend flag desecration. Nevertheless, the court struck down the statute because it was drawn to include within its prohibition acts of a type that would not predictably cause public disruption.

The same legitimacy of purpose was noted in *Long Island Vietnam Moratorium Committee*, wherein the Second Circuit Court of Appeals invalidated much of New York's statute which proscribed the placing of any mark on the flag (here, a "peace symbol") on the grounds that the subsection was not designed to deter onlookers from doing unlawful acts.

Other courts have echoed words found in *Halter* urging that "insults to the flag have often been the cause of war, and indignities put upon it

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62. Halter v. Nebraska, 205 U.S. 34, 43 (1905).

63. Long Island Vietnam Moratorium Comm. v. Cahn, 437 F.2d 344 (2d Cir. 1970); Parker v. Morgan, 322 F. Supp. 585 (W.D.N.C. 1971); Crosson v. Silver, 319 F. Supp. 1084 (D. Ariz. 1970); Hodsdon v. Buckson, 310 F. Supp. 528 (D. Del. 1970).

64. 322 F. Supp. 585, 586-87 (W.D. N.C. 1970).

65. 319 F. Supp. 1084, 1087 (D. Ariz. 1970).

in the presence of those who revere it, have often been resented, and some times punished on the spot."[66] In reliance upon this language the court, in *Cowgill*, upheld the statute on the basis of the states' interests in preserving public order. The Illinois Supreme Court in *Von Rosen* placed its holding on the same grounds, as did the New York Court of Appeals in *Radich* despite Judge Gibson's statement that the cultivation of patriotism, rather than the fear of public disorder was the dominant legislative purpose.[67]

Certainly, that is the case. The American Bar Association approved the uniform flag law in a report that leaves no doubt as to the purpose of the legislation. The following language appears in the report accompanying the approval of the law:

> We cannot refrain from noting the exceeding timeliness of the proposed legislation. The flag is the symbol of sovereignty, and at no time has the sovereignty of this government been so assertive and conspicuous, in the place which it occupies in the sun which lights the world. It is essential to the maintenance of its power and prestige among the nations of the world, that it shall be respected among the peoples at home, and that the insidious encroachments of treason which strike at the symbol and at the sovereignty symbolized, shall be speedily and effectively suppressed, to the end that this nation, self-respecting and respected, shall, with the other forces of righteousness, with which it is now allied, secure that, "peace which passeth (the) understanding," of the German lords, and over-lords, who know no peace, save that of abject subjection to the tyranny of force.[68]

The United States District Court for the Delaware District, in *Hodsdon*, also perceived a dual purpose in the statute: protecting the national symbol through the encouragement of patriotism, as well as the prevention of breaches of the peace, but held that the statute struck indiscriminately where no interest was served other than curtailment of nonverbal expression. The United States Court of Appeals for the District of Columbia took a somewhat more generous view, recognizing the interest of government in protecting the flag from desecration, but reversed a conviction for wearing a flag as a vest, holding that this was not the sort of contempt envisioned by the statute.[69]

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66. Halter v. Nebraska, 205 U.S. 34, 41 (1905).

67. People v. Radich, 26 N.Y.2d 114, 119, 257 N.E.2d 30, 34, 308 N.Y.S.2d 846, 850 (1970).

68. Report of the Comm. on Uniform State Laws, 4 A.B.A.J. 527, 528 (1918).

69. Hoffman v. United States, 445 F.2d 226 (D.C. Cir. 1971), *rev'g* 256 A.2d 567 (1969).

It thus appears that some shift in judicial reasoning has been taking place. In the early cases, the statute was defended essentially on patriotic grounds, *e.g.*, *Halter*, *Johnson*, *Shumaker*, but by *Barnette's* time, the doctrine of public disorder gained prominence as the foundation upon which the constitutionality of these statutes rested.

While some courts still regard the enhancement of patriotism, or the development of a sense of loyalty to a national entity, as a perfectly sufficient justification for the statute,[70] other courts have abandoned reliance upon this purpose in favor of the less lofty and more easily defensible grounds of public peace and the prevention of violent disturbances. In light of *Street v. New York*[71] such a retreat is not surprising. The Supreme Court, in reversing a conviction for flag burning on the grounds that the jury may have convicted Street for uttering the contemptuous words that accompanied the act, said the following:

> Finally such a conviction could not be supported on the theory that by making . . . remarks about the flag appellant failed to show the respect for our national symbol which may properly be demanded of every citizen . . . .[72]

While this may be read, as did the court in *Crosson,* as eliminating flag respect as a basis for prohibiting *physical* as well as *verbal* desecration of the flag, it need not be so expanded. The course that is most consistent with *Street*, and does least violence to the true history and purpose of the statute, is the one which recognizes that the flag laws spring fundamentally from a desire to protect the national symbol, while at the same time, preventing outbreaks of disorder resulting from physical acts of abuse. This duality of purpose was acknowledged not only in *Radich,* but in other post-*Street* cases, including *Sutherland* and *Van Camp.*

In order for the statutes to become operative, public acts of desecration are contemplated. This means that preservation of the national symbol is not the sole object of the law. For if it were, the word "public" could be safely read out of the statute. It seems clear then, that the statute is designed to do more than simply gain control of

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70. United States v. Ferguson, 302 F. Supp. 1111 (N.D. Cal. 1969); Deeds v. State, 474 S.W.2d 718 (Tex. Crim. App. 1971).

71. 394 U.S. 576 (1969), *rev'g* 20 N.Y.2d 231, 229 N.E.2d 187, 282 N.Y.S.2d 491 (1967).

72. *Id.* at 593.

men's minds. While the statutes may have been devised to elevate the national symbol, it was done with the knowledge that this very spirit of national ardor would be the basis of a breach of the peace were the flag to be publicly desecrated. Consequently, some courts have endeavored to discern whether a particular act was "public" or "private" within the meaning of the statute.

DESECRATION—PUBLIC AND PRIVATE

At the beginning of the second world war, two cases appeared in which contempt for the flag was exhibited in the presence of a small number of people. The consideration confronting appeals courts, in reviewing the judgments of convictions, was the issue of whether the act was public in nature. In *Shumaker*, the defendant was in a blacksmith shop in Nemaha County, Kansas, when he was heard to utter indecent language about the flag. The court did not print the language used, but described it as vulgar, holding that:

> . . . In response, it must be said that it is hard to conceive of language that would express greater contempt for the flag of the United States than that used by defendant. Such language will not, cannot, be used by any man in any place concerning our flag, if he has proper respect for it. The man who uses such language concerning it either in jest or in argument, does not have that respect for it that should be found in the breast of every citizen of the United States. Such language concerning our country's flag will not be used except for the purpose of casting contempt upon it.[73]

The court made no mention of the number of people present in the blacksmith shop when the utterance was made, but held that a blacksmith shop is a place to which the people of the community resort for the purpose of having machinery and tools repaired and ironwork done, and is therefore a public place within the meaning of the statute.

In *Peacock*, the defendant in Plymouth, Maine on June 13th, 1940, was heard to say:

> What is the flag anyway? It is nothing more than a piece of rag. If I had an American flag here now I would strip it up and trample it under my feet.[74]

He then moved his hands in front of him as though he were tearing an object and pretended to then stamp on it with his feet. This di-

73. State v. Shumaker, 103 Kan. 741, 742, 175 P. 978, 979 (1918).
74. State v. Peacock, 138 Me. 339, 341, 25 A.2d 491, 493 (1942).

atribe occurred in the complainant's home in the presence of another. The court, without considering the first amendment, held that the statute was designed to prevent that which would shock the public sense, because the publicity accompanying acts of flag desecration would be likely to result in breaches of the peace. If, therefore, the words were spoken in the privacy of one's home, albeit in the presence of two other people, the utterance is not within the ambit of the statutory proscription. The court refused to adopt the contention of the state that anything done or said in the company of others is "public". It thus becomes clear that acts of contempt for the flag must be, if prosecutable, of a sort that would predictably result in public disorder. Whether there was such a disturbance is quite beside the point.

It is axiomatic that crime, even in the privacy of one's quarters, is, in the words of the United States Supreme Court, of grave concern to society, and the law determines such crime to be reached upon proper showing.[75] But while this may be true as a general principle, some behavior may be rendered criminal merely because of its public character, such as the common law crime of affray, and the crimes of riot, disorderly conduct, and the like.

It is difficult to guess what the Maine Supreme Court would have done had these words been uttered publicly. Today such utterances would be wholly protected under the first amendment[76] but this has been a relatively new doctrine.

A similar instance occurred in Arkansas in June of 1941. Joe Johnson was convicted in a lower court in Searcy County, Arkansas, for verbally abusing to the flag at a welfare commissary in Marshall, Arkansas. The conviction was appealed to the state's highest court,[77] where it was noted that Johnson was charged with violating the statute when he got into an argument with someone in charge at the commissary after being asked to salute the flag in order to dispel a rumor that he was unpatriotic. He refused to do so, saying that he would die before he would and that:

> You can't get anything here unless you salute the flag. It don't have eyes and can't see and has no ears and can't hear, and no mouth and can't talk. . . . It doesn't mean anything to me. It is only a rag.[78]

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75. Johnson v. United States, 333 U.S. 10, 14 (1948).
76. Street v. New York, 394 U.S. 576 (1969).
77. Johnson v. State, 204 Ark. 476, 163 S.W.2d 153 (1942).
78. *Id.* at 478, 163 S.W.2d at 153-54.

This exchange occurred in the presence of a large number of people in the commissary at the time. The Arkansas court, over the dissenting opinion of its chief judge, affirmed the conviction and expressed its displeasure with defendant in the following admonition:

> It seems to us that it would be difficult to imagine a state of facts under which contempt for the flag could be more convincingly demonstrated in public than in the circumstances here. The strange and unnatural conduct of this man at the very time he was receiving, from the hands of a most generous government, supplies to aid him in sustaining a large family, may not be explained away on the grounds of ignorance or religious beliefs. It is one thing to be given the privilege of refusing to salute the flag, but quite another when one by word or act publicly exhibits contempt for the flag. Here appellant after refusing to salute the flag, as was his privilege, proceeded to address a large number of people and tell them than [sic] the flag meant nothing to him and was only a "rag". Webster's dictionary defines "rag" as "A waste piece of cloth torn or cut off, a shred or tatter, something resembling or suggesting a rag or rags and considered of little worth or service;—used contemptuously, jocularly, or ironically as of a flag, newspaper, etc." We think appellant's statement clearly evinces contempt for the flag within the terms of the statute in question.[79]

The court gave no attention to any first amendment issue but affirmed the conviction, rejecting Johnson's contention that he was following the biblical admonition prohibiting the paying of homage to earthly objects. This decision is perhaps the product of an attitude prompted by our involvement in a conflict with a foreign power.

In *Radich* the exhibit in which the flag was represented in the form of a male sexual organ was displayed on the second floor of a Madison Avenue art gallery. The New York Court of Appeals held that the exhibit was public despite the contention that it was an art form in the quiet surroundings of the upstairs art gallery. The court did not deal specifically with this issue, although it was mentioned in the dissent. The majority ostensibly based its holding on the fact that the so-called artistic construction was in a display window.[80]

EXPRESSION

The first amendment is couched in terms of freedom of speech,

79. *Id.* at 481, 163 S.W.2d at 154.

80. People v. Radich, 26 N.Y.2d 114, 119, 257 N.E.2d 30, 32, 308 N.Y.S.2d 846, 851 (1970).

not freedom of action. The framers of the Constitution believed that a free society could be expected to flourish through the communication of ideas—a possibility most readily achieved by means of speech, either verbal or written. A deed, as opposed to a spoken or written word, may, with equal effectiveness, convey an idea, but there is far greater risk that a deed will produce additional results. For example, one may wish to demonstrate dissatisfaction with the Selective Service by writing a letter to a newspaper editor. The same thought may be conveyed, to put an extreme case, by executing the director of Selective Service or, in diminishingly drastic means, by destroying the building, destroying the records, or by merely blocking access to the building. These acts, although they all may be intended as a means of expression, affect not only the minds of third persons, as do mere utterances, but the safety, limbs, and even lives of others, much in the same way that a person may be endangered by a fire from an automobile burned as a protest against vehicular pollution. Thus if any act is such that it might pose a predictable danger to another, it cannot be afforded governmental protection, and, indeed, merits governmental sanction.

Any statute which attempts to inhibit thought, speech, or expression, is not acceptable unless it is limited to prohibiting conduct that may affect the persons or properties of others. It follows, therefore, that the restraint to be placed upon conduct must be no greater than is necessary to meet the government's interest of protecting others not from the impact of an idea, but from the direct consequences of the act itself. Of course, there are instances in which the government may curtail speech, as in the case of "fighting words" which would produce a riot,[81] or noise which assaults one's privacy,[82] but as a rule it is not speech, but expressive acts that have presented the most perplexing challenges to the first amendment.

This brings us to a discussion of what may be a clear case of expression—flag burning—in which third persons are endangered not by the act itself, but by the conduct which it predictably provokes.

It is, one would suppose, possible to argue that flag burners have not produced riots, but that they merely burn the flag while others riot. If, for example, the American-Nazi party applied for a permit to conduct a parade adjoining the picnic grounds of the American Le-

81. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).
82. Kovacs v. Cooper, 336 U.S. 77, *rehearing denied*, 336 U.S. 921 (1949).

gion or the Jewish War Veterans, the proponents of the permit would be heard to assert that their parade is protected by the first amendment and that any violence would necessarily be ignited by unreasonable people who are given to violence. Similarly, one who undertakes a public act of flag burning may foreseeably incite the outbreak of violence by others. In this context, one can hardly ignore the widespread tendencies on the part of most Americans to be outraged by such a public act. If, as Justice Harlan noted in *Halter*, wars have been inaugurated because of assaults upon the flag, one cannot totally set aside human nature and ignore the possibility of the outbursts which it will promote. And if, as Justice Harlan and Judge Gibson wrote, insults to the flag have been the cause of large-scale hostilities, a legislature might well find that one may cause a panic, in a crowded place, by burning a flag as well as by shouting "fire".[83]

Nor should "actual disturbance" be the test. If any act is *likely* to provoke a breach of the peace, such an act may properly be prohibited. The reasons for this are three-fold:

By prohibiting acts which *may* produce violence or a breach of the peace, the government deters both these acts and, proportionately, a smaller number of outbursts that the acts may produce.

Secondly, it is appropriate for the government to set certain standards of conduct in order to guide members of the community as to those acts that ought to be punished.

Finally, an act of flag desecration, with no resulting violence, is similar to an act of driving while intoxicated with no ensuing accident. Drunk driving is to be discouraged because the possibility of danger increases when drivers are drunk, much in the same way that certain anti-social acts may result in violence.

This reasoning parallels the rationale applied in cases of disorderly conduct or breach of the peace, in which the actual occurrence of a breach of the peace is not relevant. In those instances, criminality is not made to depend on the reaction of another to a defendant's conduct, but on the objective nature of the conduct itself.[84] In New York convictions for breaches of the peace have been sustained even

83. Schenck v. United States, 249 U.S. 47, 52 (1919).
84. People v. Harvey, 307 N.Y. 588, 123 N.E.2d 81 (1954).

where no actual breach occurred, but when defendants engaged in behavior of the sort proscribed by the statute.[85]

The distinction between "words" and "deeds" would seem to provide a ready formula for the application of the first amendment. The distinction, however, blurs at the first difficult hypothetical. If the test were measured by so simple a rule of thumb, one who silently stuck his tongue out at the flag would be within the teeth of the statute, unable to gain shelter under the first amendment's *speech* guarantee. Similarly, one who performed obscene gestures or thumbs one's nose at the flag would be guilty of acts of non-verbal contempt. Yet, no free society could abide a statute that allows the incarceration of an individual who failed to show proper reverance for the flag. And so the first amendment has stood as a defense against statutes that make punishable forms of conduct that are not, strictly speaking, "speech" but which, nevertheless, clearly involve expression or communication.

The last prosecution for flag abuse by word alone occurred in 1942. Incredible as it seems, the first amendment was never mentioned by any court during the years that purely verbal abuse to the flag resulted in convictions. When expression took other forms, the first amendment arguments began to develop. Thus, the first amendment, having been dormant during prosecutions for verbal flag abuse, has been steadily advanced, under the theory of symbolic speech, in resisting prosecutions for burning flags, both physically,[86] and by depicting the burning of a flag on a magazine cover.[87] It has also been advanced in defense of prosecutions for superimposing upon it peace symbols,[88] and the words "make love not war."[89] *Hoffman, Cowgill, Van Camp,* and *Waterman* sought its protection when arrested for wearing the flag as an article of clothing, as did Joyce for tearing it, Verch for painting it, and Radich for draping it in the form of a male sexual organ. *Keogh, Von Rosen, Parker,* and *Hodsdon* also contended that their treatment of the flag was designed to communicate an idea.

The United States Supreme Court has made it abundantly clear that speech and expression are not unconditionally protected, but are sub-

85. People v. Squires, 135 Misc. 214, 238 N.Y.S. 151 (Ct. Spec. Sess. 1929); People v. Yergan, 164 Misc. 83, 299 N.Y.S. 248 (City Magis. Ct. 1937).

86. *See* note 1 *supra.*

87. Korn v. Elkins, 317 F. Supp. 138 (D. Md. 1970).

88. *See* note 6 *supra.*

89. Commonwealth v. Haugh, 439 Pa. 212, 266 A.2d 647 (1970), *rev'g* 215 Pa. Super. 160, 256 A.2d 874 (1969).

ject to reasonable regulation upon compelling state or federal interests. Although a minority of the Court has been of the view that the first amendment literally prohibits any restraints upon speech,[90] even Mr. Justice Black would distinguish between "pure" speech and conduct that is said to be "symbolic" speech. Justice Black noted this difference when, writing for the majority, the Court held that the communication of grievances by trespatory picketing on jail grounds does not merit first amendment shelter[91] and when he joined the majority in generally rejecting the notion that a limitless variety of conduct can be labelled "speech" whenever the actor intends thereby to express an idea.[92]

Through the years the court has carved out certain well-recognized exceptions to the absoluteness of first amendment guarantees. It is obvious that a person is not free to speak encouragement of crime,[93] or to utter in certain contexts "fighting"[94] or explosive words.[95] Similarily, obscenity, notwithstanding its varying definitions, is not within the protection of the first amendment.[96] Plainly put, the view that the first amendment is limitless "cannot be reconciled with the law relating to . . . misrepresentation . . . false advertising, conspiracy, and the like . . . ."[97] Other exceptions include libel,[98] revolutionary incitation,[99] criminal syndicalism,[100] undue pre-trial publicity,[101] dissemination of magaznes by uninvited peddlers,[102] disclosure of troop movements,[103] raucus sound trucks,[104] extrajudicial statements punish-

90. *E.g.*, Mr. Justice Black in Ginzburg v. United States, 383 U.S. 463, 476 (1966).

91. Adderley v. Florida, 385 U.S. 39 (1966), *rehearing denied*, 385 U.S. 1020 (1967).

92. United States v. O'Brien, 391 U.S. 367, 376 (1968).

93. Fox v. Washington, 236 U.S. 273 (1915).

94. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

95. Milk Wagon Drivers, Local 753 v. Meadowmoor Dairies, 312 U.S. 287, *rehearing denied*, 312 U.S. 715 (1941).

96. Roth v. United States, 354 U.S. 476 (1957).

97. Konigsberg v. State Bar of California, 366 U.S. 36, 49 n.10 (1961).

98. Beauharnais v. Illinois, 343 U.S. 250 (1952), *rehearing denied*, 343 U.S. 988 (1952).

99. Yates v. United States, 354 U.S. 298 (1957); Dennis v. United States, 341 U.S. 494 (1951).

100. Whitney v. California, 274 U.S. 357 (1927).

101. Sheppard v. Maxwell, 384 U.S. 333 (1966).

102. Breard v. City of Alexandria, 341 U.S. 622 (1951).

103. Near v. Minnesota, 283 U.S. 697, 716 n.6 (1931), *citing* Z. CHAFEE, FREEDOM OF SPEECH 10 (1920).

104. Kovacs v. Cooper, 366 U.S. 77 (1949), *rehearing denied*, 336 U.S. 921 (1949).

able by contempt if they present a clear and present danger of obstructing the administration of justice[105] or if they are in violation of a court order restricting pre-trial public discussion.[106] The first amendment has also abided the licensing requirements for outdoor worship[107] and has not been extended to protect disruptive conduct in a public welfare office, even though the conduct was said to be an exercise of the right to petition and to express grievances.[108] To be sure, the guarantees have safeguarded the rights to picket peaceably in labor movements[109] and social protests,[110] but the expression of speech through picketing will not be protected if its not peaceful.[111] Moreover, broadcasting from,[112] or picketing in front of a courthouse is not protected at all.[113] Thus, where there is expression combined with some act that is disruptive of public order, the first amendment will not be inducted into service, as where an individual positions himself across a sidewalk, in obstruction of pedestrian movements.[114] Nor is there any right to monopolize broadcasting frequencies,[115] to speak interminably on a party line in the face of an emergency,[116] or to engage in unrestrained speech and abusive conduct within a court of law.[117]

ART

Artistic expression is embodied within the concept of first amendment guarantees, and as such, is subject to the same protections and limitations. Accordingly, artistic forms will be inhibited only when in conflict with some overriding government interest. Obviously, a

105. Bridges v. California, 314 U.S. 252 (1941).

106. United States v. Tijerina, 412 F.2d 661 (10th Cir. 1969).

107. Poulos v. New Hampshire, 345 U.S. 395 (1953), *rehearing denied,* 345 U.S. 978 (1953).

108. Hurley v. Hinckley, 304 F. Supp. 704 (D. Mass. 1970), *aff'd,* 396 U.S. 277 (1970).

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

110. Cox v. Louisiana, 379 U.S. 536 (1965); Shuttlesworth v. Ctiy of Birmingham, 394 U.S. 147 (1969).

111. Hughes v. Superior Court, 339 U.S. 460, 464-66 (1950).

112. Estes v. Texas, 381 U.S. 532 (1965), *rehearing denied,* 382 U.S. 875 (1965); N.Y. CIV. RIGHTS LAW § 52 (McKinney Supp. 1971).

113. Cox v. Louisiana, 379 U.S. 559 (1965).

114. Bachellar v. Maryland, 397 U.S. 564, 571 (1970).

115. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 387 (1969).

116. N.Y. PENAL LAW § 270.15 (McKinney Supp. 1971).

117. Illinois v. Allen, 397 U.S. 337 (1970), *rehearing denied,* 398 U.S. 915 (1970).

visual display, however artistic, may not be used as a means to maliciously libel another[118] or to unlawfully invade one's privacy.[119] Similarly, a forged painting may well qualify as a work of art, but the artist could hardly insulate himself from criminal responsibility by invoking the first amendment. With these principles in mind, some cases of flag desecration have been adjudicated upon a backdrop of artistic expression.

In *Korn v. Elkins*,[120] students at the University of Maryland distributed a student publication which pictured the burning flag on the front cover. The university officials refused to permit publication of the issue, and an action was brought by the students challenging this refusal and requesting declaratory and injunctive relief. The court declared the statute unconstitutional as applied, on the ground that there were no acts other than the creation of the cover illustration and its attempted publication. The court noted that it was not faced with any intertwining of conduct and expression, but that the case presented expression only, in the form of art.

The Supreme Court of Illinois was confronted with a similar issue[121] following the arrest of the distributors of a magazine which depicted a young woman who was nude, except for a large hat, sunglasses, and a piece of cloth, that looked exactly like the United States flag, covering the pubic area of her body. The court examined the statute, a standard enactment, and concluded that its chief purpose was to prevent breaches of the peace. The conviction was reversed upon their holding that the record was devoid of any evidence tending to show that the publication of this picture was of the sort likely to bring about the substantive evils the legislature sought to prevent. Art was not discussed, but inferentially, the case may be construed as authority for the protection afforded to published material, which, as "pure" speech is to be distinguished from conduct.

Neither *Korn* nor *Von Rosen* involved obscenity. But the concept of restricting material said to be pornographic, in the face of reliance

118. Brown v. Paramount Corp., 240 App. Div. 520, 270 N.Y.S. 544 (1934); Monson v. Tussands, 1 Q.B. 671 (1894).

119. C. GATLEY, LIBEL AND SLANDER IN A CIVIL ACTION 34 (1953). This concept was recognized in New York in Schuyler v. Curtis, 40 N.Y. St. Rep. 289 (Sup. Ct. 1891).

120. 317 F. Supp. 138 (D. Md. 1970).

121. People v. Von Rosen, 13 Ill. 2d 68, 147 N.E.2d 327 (1958).

upon artistic expression, is one that parallels the standards for the enforcement of flag desecration statutes as against claims involving the furtherance of art. In either case, whether it be "flag art", or matter thought to be obscene, restrictions on expression will occur if the interest of the state or government in attempting to avoid the evil to which the statute is addressed outweighs the particular expression or act involved. Thus, as in the case of obscenity, a balance of competing interests occurs, and the courts must decide whether the particular commodity is subordinate to the state or governmental interest.

The United States Supreme Court recognized that the "portrayal of sex, *e.g.*, in art . . . is in itself insufficient reason to deny material the constitutional protection of freedom of speech and press."[122] In so holding, the Court confirmed the view that artistic exposition is embraced within the freedom of speech guarantees under the first amendment.

Radich, upon a prosecution for constructing a flag in the form of a male sexual organ, contended that this was a work of art, worthy of free speech guarantees.[123] Indeed, his construction was displayed in a Madison Avenue gallery. The court of appeals would not, however, convert what it felt to be a wilful act of flag desecration into protected art. The case presented special interest because there was more than "art" involved. Radich asserted that his production was not only an artistic work, but that it was entitled to further protection on the ground that it evinced his repudiation of the Vietnamese war. New York's Court of Appeals has previously rejected an analagous argument by upholding an "aesthetic" ordinance prohibiting the display of soiled laundry on a clothesline in the defendant's front yard, despite the fact that the display was said to be an expression of social protest.[124]

Radich's fate was thus pre-ordained. Having denied social protest and art *automatic* entry into the fortresses of the first amendment, the court allowed Radich to fare no better, notwithstanding his reliance on both.

We can look forward to cases in which conduct related to the flag will be discussed under artistic freedoms within the first amendment.

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122. Jacobellis v. Ohio, 378 U.S. 184, 191 (1964).

123. 26 N.Y.2d at 117, 257 N.E.2d at 31, 308 N.Y.S.2d at 848.

124. People v. Stover. 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734, *appeal dismissed*, 375 U.S. 42 (1963).

To the extent that these cases parallel the standards used in adjudicating between obscenity and art, expert opinion would be available on a flag desecration trial as an offer of proof to establish an overriding artistic content.[125] In assessing artistic merit, upon an obscenity prosecution, it is error to refuse expert testimony on the subject.[126] Thus, if plays,[127] dance,[128] poetry,[129] and other art forms are deserving of first amendment protection, one can expect expanded reliance upon the concept of artistry in cases involving representations of the flag. While art work is entitled to no less protection merely because it may be primarily intended as a social utterance,[130] a defendant's classification of something as "art" is not necessarily entitled to recognition.

Should these issues arise, it is predictable that a defendant would have an easier time of it were he to photograph or verbally depict flag desecration than if he were to erect and display a creation of the sort described in *Radich*. This would be consonant with the recognized doctrine that greater freedom is afforded to pure speech, than to people who act out the expression of a message, as in the case of picketers.[131]

Radich, by mingling that which he termed art with social protest, was less successful than the purveyor of a publication portraying a judge sitting on a swastika while masturbating.[132] In resisting an obscenity prosecution, he urged that he was engaging in protected social criticism. His contention was upheld. Had it been an American flag, rather than a swastika, the result might well have been different.

In some ways these troublesome issues remind us of the earlier obscenity cases. But just as the United States Supreme Court in *Roth* departed from the *Hicklin*[133] test by examining an allegedly obscene work "as a whole" rather than by isolating certain of its components,[134] the courts will no doubt gradually stabilize standards in separating explosive acts of flag desecration from behavior that chiefly affects our sense

125. United States v. West Coast News Co., 357 F.2d 855, 859 (6th Cir. 1966).
126. Yudkin v. State, 229 Md. 223, 182 A.2d 798 (1962).
127. Dixon v. Municipal Court, 73 Cal. Rptr. 587 (Ct. App. 1968).
128. *In re* Giannini, 69 Cal. 2d 563, 446 P.2d 535, 72 Cal. Rptr. 655 (1968).
129. Ginsberg v. City of Miami, 307 F. Supp. 675 (S.D. Fla. 1969).
130. United States v. Head, 317 F. Supp. 1138 (E.D. La. 1970).
131. Walker v. City of Birmingham, 388 U.S. 307 (1967).
132. Dillingham v. State, 9 Md. App. 669, 267 A.2d 777 (1970).
133. Regina v. Hicklin, [1868] 3 Q.B. 360.
134. *See* United States v. One Book Entitled Ulysses, 72 F.2d 705 (2d Cir. 1934), in which the court anticipated this standard by evaluating James Joyce's *Ulysses*, "as a whole" and in so doing confirmed its artistic merit.

of decorum and patriotism. At one time in the not too distant past, the courts actually found it necessary to write opinions declaring that Bocciaccio, Arabian Nights, Rabelais, and Ovid were shielded by the first amendment,[135] just as convictions for verbal affronts to the flag would now be reversed. To be sure, in exuberant excess, some courts will go beyond customary limits by seeking, for example, to punish a person for displaying as an ecology gesture, an American flag manufactured with green rather than red stripes,[136] much in the same way as earlier courts held books like Dreiser's *An American Tragedy* to be outside the ambit of the first amendment, obscene, and corruptive of youth.[137]

But in sum, the standard, in assessing whether a work is "art" or "desecration", may be adopted from the language of the United States Supreme Court in *Jacobellis v. Ohio*:

> Use of an opprobrious label can neither obscure nor impugn the Court's performance of its obligation to test challenged judgments against the guarantee of the First and Fourteenth Amendments and, in doing so, to delineate the scope of constitutionally protected speech.[138]

CRIMINAL INTENT OR POLITICAL INTENT?

Once having declared the flag to be a very special symbol, it is not surprising that it has been adopted as an attention gaining device. By taking a flag and doing something with it publically, an actor may subjectively intend any one of a number of things. Whether or not he intends contempt can, at best, be inferred by his explanation, if any is given, by the predictable response of onlookers, and by a combination of surrounding circumstances from which a jury may draw conclusions as to the operation of his mind. While a person is deemed to intend the natural and probable consequences of his act,[139] a split of authority has arisen: must an individual intend to cast contempt or is the mere performance of the act, thought by the jury to be contemptuous, a sufficient foundation for criminal responsibility.

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135. *In re* Worthington Co., 30 N.Y.S. 361 (Sup. Ct. 1894).

136. New York Daily News, July 24, 1970, at 5.

137. Commonwealth v. Friede, 271 Mass. 318, 171 N.E. 472 (1930).

138. 378 U.S. 184, 190 (1964).

139. Generally, a person is presumed to intend the natural and probable consequences of a voluntary act. 1 W. BURDICK, LAW OF CRIME 136 (1964); People v. Agron, 10 N.Y.2d 130, 139, 176 N.E.2d 556, 560, 218 N.Y.S.2d 625, 631 (1961). As to presumptions and inferences relating to intent, see 1 F. WHARTON, WHARTON'S CRIMINAL EVIDENCE § 131 (12th ed. 1955).

When explanations are offered, few defendants concede any intent to disgrace the flag. In *Commonwealth v. Sgorbati*,[140] the offender appeared at his draft board wearing only an American flag over a pair of boxer shorts. He professed a love for the country, but opposition to its war. In another case the Court of Appeals for the District of Columbia reversed a conviction for wearing the flag as a shirt.[141] The defendant testified that he wore the shirt as a gesture of adherence to the concepts of the founding fathers.[142] In overturning the conviction the court acknowledged the defendant's purpose by stating:

> Considering appellant's testimony as to his political views and ideology, we may well assume that the episode had a distinct flavor of sarcasm or mockery, with an added element of childishness in his playing with the Yo-Yo, but appellant's performance to his audience did not include the physical injury to the material of the shirt essential to be proved beyond a reasonable doubt to support a conviction of the crime defined in the statute.[143]

In another case[144] the defendant exhorted viewers to "make love not war" by printing it on the flag. This corresponds with dicta in *Crosson v. Silver* where the court observed: ". . . nor in this day and time is anyone likely to mistake the nature of the ideas expressed by a young person who desecrates his country's flag at an anti-war gathering."[145] Hinton pulled the flag down in a melee following his effort to lower the flag to symbolize a state of mourning, during a freedom march;[146] Hodsdon[147] and Radich[148] were claiming the displeasure with the war, while Burton[149] was proclaiming displeasure with

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140. 49 Pa. D. & C.2d 173 (Ct. Comm. Pl. 1970).

141. Hoffman v. United States, 445 F.2d 226 (D.C. Cir. 1971), *rev'g* 256 A.2d 567 (1969).

142. * * * I had a shirt that resembled the American Flag. I wore the shirt because I was going before the Un-American Activities Committee of the House of Representatives, and I don't particularly consider that committee American in the tradition as I understand it, and I don't consider that House of Representatives in the tradition that I understand it, and I wore the shirt to show that we were in the tradition of the founding fathers of this country, and that that committee wasn't. That's why I wore it. *Id.* at 227.

143. *Id.* at 229.

144. Commonwealth v. Janoff, 439 Pa. 212, 266 A.2d 657 (1970).

145. 319 F. Supp. 1085, 1086 (D. Ariz. 1970).

146. Hinton v. State, 223 Ga. 174, 154 S.E.2d 246 (1967).

147. Hodsdon v. Buckson, 310 F. Supp. 528 (D. Del. 1970).

148. People v. Radich, 26 N.Y.2d 114, 257 N.E.2d 30, 308 N.Y.S.2d 846 (1970).

149. People v. Burton, 27 N.Y.2d 198, 265 N.E.2d 66, 316 N.Y.S.2d 217 (1970).

Johnson, Humphrey, and Wallace. The flagged peace symbols in *Long Island Vietnam Moratorium Committee*,[150] *Nicola*[151] and *Liska*[152] were essentially political, as was Street's[153] reaction to the killing of James Merideth, Ferguson's[154] flag burning during a rally in front of the court house, and Deeds's assertion that "government policies had soiled the flag."[155]

These defendants, unlike others who had "no purpose whatever,"[156] regard their intent as political as opposed to criminal. The importance of criminal intent as an element of the crime is thus readily seen. If the standard were subjective as opposed to treating the statute as one *malum prohibitum*, responsibility would be measured from the actor's viewpoint.[157] Critical as this issue is, only three courts discussed it, and they were not unanimous.

The majority in *Radich* viewed the statute as *malum prohibitum*, holding that:

> . . . a person with the purest of intentions may freely proceed to disseminate the ideas in which he profoundly believes, but he may not break a law to do it . . . . Whether defendant thinks so or not, a reasonable man would consider the wrapping of a phallic symbol with the flag as an act of dishonor . . .[158]

The Supreme Court of Washington held differently in *State v. Turner*[159] and reversed a conviction because of the failure of the trial court to instruct the jury that a verdict of guilty must be predicated upon a finding that the defendant, notwithstanding his having burned the flag, intended to violate law, and to defile the flag.

Such a holding, while not declaring the statute unconstitutional, effectively destroys it. The requirement of scienter must be read into the statute, the court said, because the offense does not require conduct

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150. 437 F.2d 344, 348 (2d Cir. 1970).
151. State v. Nicola, 182 N.W.2d 870 (N.D. 1971).
152. State v. Liska, 26 Ohio Misc. 19, 268 N.E.2d 824 (1970).
153. Street v. New York, 394 U.S. 576 (1969).
154. United States v. Ferguson, 302 F. Supp. 1111, 1112 (N.D. Cal. 1969).
155. Deeds v. State, 474 S.W.2d 718 (Tex. Crim. App. 1971).
156. *E.g.*, State v. Waterman, — Iowa —, 190 N.W.2d 809 (1971).
157. On the distinction between *malum prohibitum* and *mala in se* see F. WHARTON, WHARTON'S CRIMINAL LAW AND PROCEDURE 56 (12th ed. 1957).
158. 26 N.Y.2d at 123, 257 N.E.2d at 35, 308 N.Y.S.2d at 852 (1970). *See also* State v. Waterman, — Iowa —, 190 N.W.2d 809 (1971).
159. 78 Wash. 276, 474 P.2d 91 (1970). *See also* Hodsdon v. Buckson, 310 F. Supp. 528, 531 n.2 (D. Del. 1970) (in which the court appears to have held a similar view).

that would cause disruption or riot.[160] This writer questions the logic by which scienter was judicially engrafted. The court did so on the theory that it must have been contemplated, because it was omitted.

If *Turner* is good law, then all "communicative" acts of public flag burning under existing statutes, would perforce be protected. It thus seems hardly necessary to reverse on such technical grounds when the court was actually negating the statute as being incompatible with the first amendment. If the statute is constitutional—that is, if the government may legitimately proscribe such acts as public flag burning—an actor's behavior must be assessed by an objective test, with a defendant's personal avowals relevant, but not controlling; otherwise the statute would be hollow and inoperable.

In discussing standards for criminal intent, one cannot ignore the standards of enforcement, and the selection of defendants. This is quite another thing from the doctrine of "unconstitutional as applied." The latter presupposes a valid statute which, by its terms, may work unfairly against some people or groups rather than others.[161] The selection of defendants, however, is a more subtle phenomenon, in which the law is applied unevenly not through any statutory infirmity but by targeting it at a chosen few. An example would be a case of a "hippie" arrested for wearing the flag upside down, while a "law and order" candidate, who sports the flag on a campaign poster would be let alone. The latter case is a clearer violation of the statute which forbids flag advertising, but the hippie, it is inferred, intends contempt while the candidate does not. It is a doctrine that activates the equal protection clause of the Constitution, but not as plainly as in cases like *Halter,* where the defendant, a beer distributor, argued that the statute

160. 474 P.2d at 95.

161. New York, may, for example, constitutionally prohibit the use of the flag on all commercial labels. On its face such a statute seems even handed enough, but would be unconstitutional as applied to a businessman who stands to lose money after having purchased such stock in trade, when it was lawful for him to do so. *See* People *ex rel.* McPike v. Van De Carr, 91 App. Div. 20, 86 N.Y.S. 644 (1904); Ruhrstat v. People, 185 Ill. 133, 57 N.E. 41 (1900).

The most recent example of the unconstitutional application of the statute was in *Street,* where the conviction was reversed because of the possibility that the statute permitted Street to be punished "merely for speaking defiant or contemptuous words about the American Flag." 394 U.S. at 581.

For another instance where the Court held that the flag statute could not be constitutionally applied by University officials to refuse publication of a paper that pictured a burning flag, *see* Korn v. Elkins, 317 F. Supp. 138, 142 (D. Md. 1970). Precisely the same result was reached, with regard to the publication in *Von Rosen.*

was "class legislation"[162] unfair to businessmen who could no longer use the flag on products.

The Court, in *Parker v. Morgan*,[163] made a sardonic reference to the kind of inconsistencies that these practices connote. Parker wore a jacket, on which he had sewn the flag with the words "Give peace a chance" superimposed. He was arrested. The court noted that the statute was so broad as to amount to the expropriation of color and design, but that "On the day this case was heard the Charlotte Observer carried a Belk store advertisement in red, white, and blue with stars. Needless to say, there has been no arrest and no prosecution."[164]

Similarly, flag creations that are manufactured and worn are less likely to induce arrests than home-sewn articles, presumably, one fears, because manufacturers are thought to be more respectable than Bohemian handcrafters.

The Second Circuit Court of Appeals touched on this point in the *Long Island* case, declaring that the statute prohibiting markings on the flag was too vague to provide officials with standards, thus promoting selective enforcement.

The court said:

> Because of its overbreadth, the statute vests local law enforcement officers with too much arbitrary discretion in determining whether or not a certain emblem is grounds for prosecution. It permits only that expression which local officials will tolerate; for example, it permits local officials to prosecute peace demonstrators but to allow "patriotic" organizations and political candidates to go unprosecuted. This opportunity for discriminatory selective enforcement, which § 136(a) provides, renders the statute unconstitutional.[165]

THE VAGUENESS DOCTRINE

No statute that seeks to punish conduct will survive unless it can be understood and obeyed.[166] If a law lacks criteria sufficient to afford

162. 205 U.S. at 37. *See* text accompanying notes 23-40 *supra*. The same arguments, made by the defendants in *McPike* and *Picking* were rejected.

163. 322 F. Supp. 585 (W.D.N.C. 1971).

164. *Id.* at 588 n.3.

165. 437 F.2d at 350.

166. *See* Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

comprehension and compliance, it will be invalidated, as impermissibly vague.[167] A great many defendants in flag cases have attacked the statute on these grounds. In *Crosson, Hodsdon, Long Island,* and *Parker* the argument carried the day. The Supreme Court expressly declined to pass on the issue;[168] two other courts, in declining to pass directly on the statute's constitutionality, confessed grave doubts about it.[169]

The chief ailment of the statute, according to these courts, is its ready application to seemingly innocuous or even patriotic items such as windshield decals, posters, buttons, symbols, slogans, and their fear that it would encompass "all those reproductions of the face of President John F. Kennedy superimposed upon a picture of the American flag which hang on the walls of shops, homes, and offices all over this country."[170]

The court in *Hodsdon,* said that the casting of the contempt provision could be read to prohibit gestures or salutes that identify unpopular or controversial groups,[171] and therefore voided the statute.

Perhaps the most devastating attack on the statute's overbreadth was made by Judge Craven, who, speaking for the Federal District Court in North Carolina, said:

> The definition of a flag in the North Carolina statute is simply unbelievable. It would doubtless embrace display of the Star of David against a red, white and blue background. The statute makes plain that it matters not how many stripes or how many stars. One of each is enough. This is expropriation of color and design—not flag protection. Size is of no consequence and substance of no importance. It is even possible that the stars could be omitted entirely and the colors alone infringe the statute, for there is a disjunctive clause leaving it to the subjective determination of any person to believe, without deliberation, that a substance or design may represent the flag of the United States. Read literally, it may be dangerous in North Carolina to possess anything red, white and blue. Such a definition is a manifest absurdity. Since it is not suggested that the state has the slightest

167. Lanzetta v. New Jersey, 306 U.S. 451 (1939); Thornhill v. Alabama, 310 U.S. 88 (1940).

168. 394 U.S. at 580-81.

169. Commonwealth v. Sgorbati, 49 Pa. D. & C.2d 173 (Ct. Comm. Pl. 1970); Commonwealth v. Janoff, 439 Pa. 212, 266 A.2d 657 (1970).

170. Long Island Moratorium Comm. v. Cahn, 322 F. Supp. 559 (E.D.N.Y. 1970).

171. 310 F. Supp. at 535.

interest in singling out from the spectrum certain colors for unique protection, this definition alone is sufficient to void the statute.[172]

As long as the statute is open to these interpretations it will be vulnerable to the claim that citizens are compelled to guess at its limits, and that it goes beyond the allowable area of governmental control, sweeping within its ambit assorted innocent acts. It then becomes the unenviable task of its enforcers to make the necessary distinctions, recognizing that a statute challenged under the overbreadth doctrine may be held invalid "whether or not the record discloses that the petitioner has engaged in privileged conduct."[173]

The vagueness doctrine was raised in the minority report of the House of Representatives[174] in 1967, prior to the enactment of the federal flag desecration law, 18 U.S.C. 700. The federal measure is patterned after the standard state enactments, but studiously omits contempt by "words." The definition of a flag, which the *Parker* court termed "simply unbelievable" is virtually the same in the federal statute, and indeed, in New York's law, and in most other states as well. The Senate report rejected any argument as to vagueness, saying that:

> The language of the bill prohibits intentional, willful, not accidental or inadvertent public physical acts of desecration of the flag. Utterances are not proscribed. Specific examples of prohibited conduct under the bill would include casting contempt upon the flag by burning or tearing it and by spitting upon or otherwise dirtying it. There is nothing vague or uncertain about the terms used in the bill.
>
> Of course, nothing in the bill will prohibit any person from complying with section 176(j) title 36, United States Code, which provides that when the flag "is in such condition that it is no longer a fitting emblem for display [it] should be destroyed in a dignified way, preferably by burning." Compliance with this provision obviously does not cast contempt on the flag.
>
> Public burning, destruction, and dishonor of the national emblem inflicts an injury on the entire Nation. Its prohibition imposes no substantial burden on anyone. Enactment of this legislation is wholly salutary.[175]

As for another congressional concern, namely, the danger of un-

172. Parker v. Morgan, 322 F. Supp. 585, 588 (W.D.N.C. 1971).
173. N.A.A.C.P. v. Button, 371 U.S. 415, 432 (1963).
174. H.R. REP. No. 350, 90th Cong., 1st Sess. 18 (1967).
175. S. REP. No. 1287, 90th Cong., 2d Sess. 2509 (1968).

wittingly pre-empting the states, *Halter* was viewed by the Attorney General as authorizing concurrent legislation by federal and state bodies.[176]

The Congress believed that state enforcement was adequate but felt that the matter was of national dimension. The House report, on this point, reads as follows:

> The bill as amended, will assure Federal investigative and prosecutive jurisdiction over those who would cast contempt by publicly mutilating, defacing, defiling, burning, or trampling upon the flag of the United States. It is intended that State jurisdiction in this matter should not be displaced. Often, the only immediate method of detection and apprehension of those who desecrate the law may be State and local police. In other areas, the exercise of Federal jurisdiction may be critical in the enforcement of the law. The committee is persuaded that it is in the national interest that concurrent jurisdiction be exercised by Federal and State law enforcement agencies over this subject.[177]

SPEECH, NON-SPEECH, AND SYMBOLIC SPEECH

It has been seen that speech, within the meaning of the first amendment freedoms, includes more than mere verbal or written utterances, and may include "communicative" acts. Whether the burning of a flag constitutes symbolic "speech" meriting the security of the first amendment is a question that the Supreme Court expressly declined to answer during two most recent opportunities.[178]

Federal and state courts have, however, labored over this issue and it usually lies at the heart of their holdings. The courts, notwithstanding any direct expression from the high court, have been guided by several leading cases in analagous situations. Three of these cases are *United States v. O'Brien*[179] (draft card burning), *Stromberg v. California*[180] (displaying a red flag), and *Tinker v. Des Moines Indep. Comm. School Dist.*[181] (students wearing armbands). In each of these cases, the Supreme Court was dealing with the boundaries of political dissent through expression that was neither verbal nor written.

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176. *Id.* at 2510.

177. H.R. REP. No. 350, 90th Cong., 1st Sess. 2 (1967).

178. Street v. New York, 394 U.S. 576, 580-81 (1969). The Court in Radich's appeal had another opportunity, but no decision was written when it affirmed by an equally divided court. 401 U.S. at 531.

179. 391 U.S. 367 (1968).

180. 283 U.S. 359 (1931).

181. 393 U.S. 503 (1969).

Stromberg was arrested in 1930, pursuant to a California statute that outlawed the display of a red flag as a "symbol or emblem of opposition to organized government or as an invitation or stimulus to anarchistic action or as an aid to propaganda that is of a seditious character." Her "intent" was supplied by the introduction into evidence of her books, which included communist revolutionary dogma. The Supreme Court reversed her conviction because the statutory phrase could be construed to stifle peaceful opposition to government. Thus, this was one of the first cases in which the Court expanded the phrase "free speech" to embrace communicative *acts*. The California court was equally cognizant of the statute's infirmities, but endeavored to redeem it, on the ground that it was aimed at conduct designed to promote revolution with which the red flag was synonymous.

In *Tinker*, Des Moines School authorities promulgated a regulation prohibiting, under pain of suspension, any elementary, junior high, or high school student from wearing an armband to school. This action was defended on the ground that school authorities feared these "demonstrations" would be disruptive and inimical to the operation of the school. Three Tinker children, aged eight, eleven, and thirteen, violated the rule, and the case was carried to the Supreme Court. The enforcement of the regulation was enjoined by the Court as being obnoxious to the first amendment in the absence of any showing by school administrators that the forbidden conduct would materially interfere with school discipline. Thus, the Court again safeguarded, as "protected speech", forms of communicative conduct.

But in *O'Brien*, the majority, rejecting the view that all communicative conduct is protected, held 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."[182]

Thus, in seeking to restrict flag mutilation, what governmental interest would qualify as sufficiently compelling?

O'Brien held that the interest of the government in preserving an orderly system for selective service is sufficient to justify such an intrusion. The decision was not posited on grounds of patriotism or decorum. The *O'Brien* governmental interest test is the most commonly employed yardstick in measuring the constitutionality of flag statutes. *O'Brien* tells us that

182. 391 U.S. at 376.

> 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. . . .[183]

The court in *Cowgill* opted for the second interest as being necessary to prevent public disorder.[184]

In Crosson, the court found that the control of the non-speech element is not justified by (1) patriotic concerns (2) emotional disapproval of the viewers of flag desecrations (3) governmental "property" interests in the flag.

There is, the court said, a sufficient interest in avoiding public disorders,[185] but because of the statute's overbreadth, the method of prohibiting conduct places a greater burden on protected expression than is necessary to further the state's interest in averting breaches of the peace.

Whether *Crosson* is right or wrong, it is clear that the governmental interest in punishing "words" is inadequate. The Court in *Street,* identified four governmental interests that might be furthered by punishing Street for his words: (1) an interest in preventing him from vocally inciting others to commit unlawful acts; (2) an interest in preventing him from uttering words so inflammatory that they would provoke others to retaliate physically against him, causing a breach of the peace; (3) an interest in protecting the sensibilities of passersby who might be shocked by Street's words about the American flag; (4) an interest in assuring that Street, regardless of the impact of his words on others, showed proper respect for the national symbol. None of those interests, the Court concluded, could constitutionally justify a conviction under the statute.[186]

The *Hodsdon* court, under the *O'Brien* test, held that while speech and non-speech elements are intertwined, the statute strikes where no interest is served other than expression and is therefore void.[187]

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183. 391 U.S. at 377.

184. People v. Cowgill, 274 Cal. App. 2d 923, 78 Cal. Rptr. 853 (1969).

185. *See* Loewy, *Punishing Flag Desecrators: The Ultimate in Flag Desecration,* 48 N.C.L. REV. 48, 78 (1970).

186. *See* Note, *Freedom of Speech and Symbolic Conduct: The Crime of Flag Desecration,* 12 ARIZ. L. REV. 72, 77 (1970).

187. *See also* Hodsdon v. Buckson, 310 F. Supp. 528, 531 (D. Del. 1970) in which the court hypothesized that a valid statute could be drawn.

Although the court was unable to determine in *Deeds* just what the defendant was trying to communicate, it assumed that he was, by flag burning, engaging in some form of expression, but held, as did *Ferguson* and *Sutherland,* that *the preservation of the flag as a symbol,* and the interest of public order outweigh his act, however inextricably interwoven it may be with its communicative aspect.

PROCEDURE: APPEAL, INJUNCTION, SEVERENCE, AND THE DOCTRINE ON FEDERAL ABSTENTION

Most flag law has evolved from decisions on appeals from judgments of conviction. A defendant is free, on direct appeal to seek review on constitutional grounds, but the failure to raise the question below may be held to constitute a waiver.[188] The Supreme Court has generally regarded it as immaterial that the record does not show that a constitutional question was raised in the trial court if it appears that the issue was properly raised before, and decided by, the state court of last resort,[189] but at other times the Supreme Court has held appellants to stricter standards. In *On Lee v. United States,*[190] the Court, by way of dictum, noted that it subscribed to the uniform policy requiring constitutional questions to be raised at the earliest possible stage in the litigation, but decided the question nonetheless, apparently in reliance upon earlier writings in which the Court expresed a propensity for deciding newly raised constitutional issues in "exceptional" cases only.[191]

Habeas corpus is suitable, in most jurisdictions, as a vehicle to assail the constitutionality of a statute,[192] as is prohibition,[193] demurrer,[194] or an action for declaratory relief.[195]

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188. *E.g.,* Dodge v. Cornelius, 168 N.Y. 242, 61 N.E. 244 (1901); United States v. Walton, 411 F.2d 283, 286 (9th Cir. 1969).

189. Whitfield v. Ohio, 297 U.S. 431, 436 (1936).

190. 343 U.S. 747, 749-50 n.3 (1952).

191. *See* Lawn v. United States, 355 U.S. 339, 362 n.16, *rehearing denied,* 355 U.S. 967 (1958).

192. *E.g., Ex parte* Starr, 263 F. Supp. 145 (D. Mont. 1920); People *ex rel.* Battista v. Christian, 249 N.Y. 314, 164 N.E. 111 (1928); *In re* Wells, 335 P.2d 358 (Okla. 1959); 39 C.J.S. *Habeas Corpus* § 18 (1944).

193. *Ex parte* Siebold, 100 U.S. 371, 377 (1879).

194. Chicago & N.W. R.R. v. Fachman, 225 Iowa 989, 125 N.W.2d 210 (1963); People v. Collozo, 54 Misc. 2d 687 (Sup. Ct. N.Y. 1967).

195. Bunis v. Conway, 17 App. Div. 2d 207, — N.Y.S.2d —, *appeal denied,* 17 App. Div. 2d 1036, 247 N.Y.S.2d 134, *appeal dismissed,* 12 N.Y.2d 883, 188 N.E.2d 260, 237 N.Y.S.2d 993 (1963).

Under federal procedure, a court may entertain a civil action, pursuant to 42 U.S.C. § 1983, based on a claim of state deprivation of a constitutional right.[196] Declaratory relief may issue under 28 U.S.C. §§ 2201 and 2202.[197] If the requests for relief meet the standards of 28 U.S.C. § 2281 *et seq.*, a three judge court will be convened.

Original jurisdiction is vested in federal district courts, pursuant to 28 U.S.C. § 1343, in any action to redress a deprivation described in 42 U.S.C. § 1983. In any such action, brought to restrain a state prosecution, an application for a preliminary injunction must be addressed to a three judge court; it may not be considered at that stage by a single judge.[198]

These statutes must be read in relation to 28 U.S.C. § 2283, the "anti-injunction statute", which prohibits a United States court from granting any injunction to stay state court proceedings except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

A troublesome question then arises as to whether 42 U.S.C. § 1983, the civil rights deprivation statute, falls within any of the exceptions. Needless to say, the prohibition against enjoining a state prosecution does not apply to threatened or future state court proceedings.[199]

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196. 42 U.S.C. § 1983 (1970) provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

197. 28 U.S.C. §§ 2201-02 (1970):

> § 2201. Creation of remedy
>
> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.
>
> § 2202. Further relief
>
> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reaosnable notice and hearing, against any adverse party whose rights have been determined by such judgment.

198. 28 U.S.C. §§ 2281-82 (1970); Hendricks v. Hogan, 324 F. Supp. 1277, 1279 (S.D.N.Y. 1971).

199. Dombrowski v. Pfister, 380 U.S. 479 (1965). But note that the Third Circuit and the Sixth Circuit have held § 1983 is an express exception to the anti-injunction statute: Honey v. Goodman, 432 F.2d 333 (6th Cir. 1970); Cooper v. Hutchinson, 184 F.2d 119 (3d Cir. 1950). While *Younger* was decided after *Honey*,

The purpose of the anti-injunction statute is to avoid friction between federal and state courts. It was invoked in *Cole v. Graybeal*[200] in dismissing a petition for an injunction against a *pending* state prosecution for flag desecration. Other courts have been less chary. In *Crosson* the court not only entertained the petition but voided the statute, and with it, a pending Arizona prosecution. The courts in *Hodsdon* and *Parker* did the same, in nullifying Delaware and North Carolina pending prosecutions. None of the courts mentioned the anti-injunction statute. In *Long Island*, the court was dealing with a *threatened* prosecution and was incontestably within its jurisdiction. The district courts in *Sutherland* and *Ferguson*, dealing with pending prosecutions in Illinois and California, entertained the petitions, despite (and without mentioning) 28 U.S.C. § 2283, but denied relief on the merits, upholding the constitutionality of the state statute.

While the courts in *Crosson* and *Ferguson* did mention the propriety of assuming jurisdiction, those in *Hodsdon, Parker* and *Sutherland*, while not mentioning the anti-injunction statute, did discuss the "doctrine of abstention" concluding, in each case, that under the authority of *Dombrowski* and *Zwickler v. Koota*,[201] there was ample support for deciding the issues on the merits. In the light of *Younger v. Harris*,[202] *Samuels v. Mackell*,[203] *Boyle v. Landry*,[204] *Bryne v. Karalexis*,[205] and *Dyson v. Stein*,[206] all decided on February 23, 1971, the cases may well have been wrongly decided.

In *Younger* the Supreme Court held that the unconstitutionality of a statute, on its face, is not in itself justification for enjoining a pending state prosecution. The teaching of *Younger* and its companion cases is that abstention, rather than intervention is the rule, in the absence of a combination of extraordinary circumstances amounting to nothing less than bad faith state efforts to prosecute under a palpably unconstitutional statute. It is not enough to show the sort of injury "asso-

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the approach taken by the Sixth Circuit indicates the continued validity of *Honey*. *See* 401 U.S. at 62 (Douglas, J. dissenting); Note, *The Civil Rights Act of 1871 versus the Anti-Injunction Statute: The Need for a Federal Forum*, 1971 WASH. U.L.Q. 625.

200. 313 F. Supp. 48 (W.D. Va. 1970).
201. 389 U.S. 241 (1967).
202. 401 U.S. 37 (1971).
203. 401 U.S. 66 (1971).
204. 401 U.S. 77 (1971).
205. 401 U.S. 216 (1971).
206. 401 U.S. 200 (1971).

ciated with the defense of a single prosecution brought in good faith . . . ."[207] The harm must not only be irreparable, but great, immediate, and exclusive of the cost, anxiety, and inconvenience of defending a state prosecution.[208]

The adjudication of "overbreadth" in *Parker* would not, under *Samuels v. Mackell*, be sufficient for federal injunctive or declaratory relief. In *Dyson v. Stein*, the Court reversed a district court order which voided an obscenity statute. The high court held that the criteria for the injunction (*i.e.*, irreparable injury) were not adequately described.

The courts that voided the statutes did so despite the rule that the judiciary, short of doing violence to the plain language of the statute, should indulge every intendment and resolve any reasonable doubt in favor of the statute's constitutionality.[209] Those courts also rejected the "severence" doctrine, by which they could have separated and invalidate a portion of the statute, while sustaining the rest. This approach was specifically rejected in *Crosson*,[210] and at least impliedly in the other cases.

Younger v. Harris, which mandates a strict application of the doctrine of abstention, and *Street*, in which the United States Supreme Court itself applied the doctrine of severability, make it reasonably certain that the high court has tightened the standards for the nullification, by federal district courts, of proceedings that have not been subject to state constitutional review.

WHAT IS A FLAG?

The Uniform Flag Act contains provisions prohibiting desecration of any flag, standard, color, ensign or shield, of any size, "or any representation thereof." New York's statute contains the additional words "upon which shall be shown the colors, the stars, and the stripes in any number of either thereof." If this means what it says, the statute would cover objects which no one could conceivably regard as the national flag. The courts have, therefore, themselves limited the statute, precluding convictions on the ground that the object in question was simply not a flag.

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207. 401 U.S. 37, 48 (1971).

208. *Id.* at 46.

209. Long Island Moratorium Comm. v. Cahn, 322 F. Supp. 559 (E.D.N.Y. 1970); Welsh v. United States, 398 U.S. 333, 344-45 (1970) (concurring opinion).

210. 319 F. Supp. at 1089.

In *Long Island*, the district court held that New York's statute did not apply to defendant's display, a peace symbol emblem superimposed on a part of a flag. The Second Circuit Court of Appeals rejected this view but affirmed the granting of injunctive relief by voiding the statute itself, precisely because the statute was so overbroad as to include the emblem.

In *Nicola* the North Dakota Supreme Court made the same ruling as the district court in *Long Island*, by holding that defendant's superimposed peace symbol was not a flag. North Dakota's statute contains the same broad definition as New York's.

This point troubled at least one member of the Supreme Court, as seen from the oral argument in *Radich*. The following exchange took place between Mr. Justice Marshall and assistant district attorney Michael Juviler:

> Mr. Justice Marshall: "Suppose it was a 48-star flag."
>
> "Yes, that would violate the statute."
>
> "How about a 13-star flag? * * * And when I get through I'm going to ask you about a 53-star flag."
>
> "I suppose whether this is a contemporary American flag is a question of fact * * * and then there would be no First Amendment question."[211]

Examples even more perplexing arise: Is a national flag, with hammers and sickles in the corner, in place of stars, a defaced American flag, or is the absence of stars a feature that alters its character as an American flag?

Considerations of this kind will, no doubt, continue to arise because of the existence of a statute that was written 70 years ago when the concept of symbolic speech was beneath the horizon.

The even division of the Supreme Court in *Radich* bespeaks the very division of the lower courts in an important constitutional area. It is submitted that the existing flag laws, most of which are of World War I vintage, should be re-examined, accompanied by legislative efforts to draft a uniform flag law compatible with the constitutional considerations described in the case law.

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211. Reported in 8 CRIM. L.J. 4168.