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NOTE

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I. Introduction

Robert Fleming is a former associate dean of the Buffalo University Law School and is presently the university's advocate. On May 30, 1970, he was arrested and charged with desecrating the American flag by "flying [it] over his home with a white peace symbol instead of a field of stars in the upper left-hand corner." Mr. Fleming commented: "I think that this was within the constitutional limits of free speech. I've defended people charged this way before and won, so I'm not worried. But I didn't expect this to happen."[1]

Seventeen-year-old Bruce Parker of Charlotte, North Carolina, may not have expected it to happen either when he was ordered to pay court costs of fifteen dollars after a conviction on a similar charge: "wearing on his jacket an American flag with the written words, 'Give peace a chance' and a peace symbol."[2]

In April, 1969, John Bryant, a fifty-four-year-old World War II Army Air Force veteran from Indianapolis, was fined $500 and sentenced to 180 days in jail "for desecrating an American flag by using it as a laundry bag, pillow and suit case."[3]

A flag was burned on the front steps of a United States courthouse on November 14, 1968. FBI agents arrested Norma Ferguson and John Kangas and charged them with violating the federal flag desecration statute. In convicting the defendants, the court ruled that it could not "accept the view that the actions charged can be labeled 'speech' merely because [the] defendant intends thereby to express an idea."[4]

One student and a former student at the University of Hawaii were charged with flag desecration for having represented the flag on a poster with dollar signs in place of stars. The student, Noel Kent, appealed from his conviction and the Hawaii Circuit Court reversed, holding that no dishonor had been shown toward the flag by this act.[5]

Fortunately for sixteen-year-old Rod Taylor of Colorado Springs, District Court Judge John Gallagher ordered him reinstated in his high school after he was expelled "because he destroyed an American Flag during speech class."[6]

From New York to Hawaii, the headlines are clear: the flag of the United

1 New York Times, May 31, 1970, at 47, col. 4.
2 *Id.*, May 10, 1970, at 59, col. 1.
3 *Id.*, Apr. 9, 1969, at 4, col. 8.
4 United States v. Ferguson, 302 F. Supp. 1111, 1113 (N.D. Cal. 1969).
5 State v. Kent, Hawaii 1st Cir. Ct., No. 36, 423, Dec. 9, 1966; reprinted in *Hearings Before Subcomm. No. 4 of the House Comm. on the Judiciary on H.R. 271 and Similar Proposals to Prohibit Desecration of the Flag*, 90th Cong., 1st Sess., Ser. 4, at 175-77 (1967).
6 New York Times, Apr. 11, 1970, at 32, col. 3.

States has become the symbol of legal controversy. As if to challenge the laws of the states and the federal government, Americans, in one form or another, "publicly mutilate, deface, defile, defy, trample upon or cast contempt either by word or act, upon [the United States flag]"[7] and are thereby prosecuted in such numbers that the trend has been called by at least one professor of law "the phenomenon of flag desecration."[8]

If the abundance of prosecutions for abusing the flag is phenomenal, the variety of forms in which the flag is depicted is unmatched in our national history. Americans have, in fact, confused themselves as to exactly what the flag symbolizes and as to the meaning that the emblem is intended to convey.[9] The confusion originates, not unexpectedly, in the heart of the legal process throughout the country. Vague laws, inconsistent prosecutions and extreme disparities in penalties among the various states have created a legal morass from statutory standards which have remained, until recently, largely unchallenged.[10]

Of the questions which arise from these cases and statutes, the most compelling is whether the use of the flag as a means of conveying a message symbolically is protected under the first amendment guarantee of free speech, and in particular, whether any such use of the flag may be considered "symbolic speech."[11] The United States Supreme Court has acknowledged this issue more than once, but has left it unanswered.[12] This Note will examine the general background of the problem, as well as some of the arguments and related cases in terms of a foreseeable settlement of this unsettled issue.

II. General Background

Although the American flag was officially created on June 14, 1777,[13] it was not until 140 years later that any legislative protection for the flag was approved. The initial guardian against desecration came in the form of the Uniform Flag Act which was adopted by the states of Arizona, Louisiana,

7 The wording is that of the typical state statute. *See* notes 23-27 *infra.*

8 Prosser, *Desecration of the American Flag,* 3 IND. L.F. 159, 160 (1969).

9 TIME, June 6, 1970, at 8-15. *See id.* at 9-12 for color photographs.

10 Some examples illustrate these inconsistencies. Police in Bridgeport, Connecticut, are authorized to wear an American flag patch on their uniform if they so desire. New York Times, Jan. 12, 1970, at 34, col. 7. New York Patrolman Patrick Dolan received a congratulatory letter from President Nixon for having succeeded in amending police uniform regulations to allow the wearing of a flag pin no larger than a square inch. *Id.,* Jan. 28, 1970, at 44, col. 4. The flag pin is now a voluntary part of the uniform of Boston police. *Id.,* Feb. 2, 1970, at 70, col. 2.

On the other hand, Allan Smith of Hinsdale, New York, was charged with "contemptuous display of the American flag," for driving a car which had red and white stripes painted on the sides and a star-spangled hood. *Id.,* Jan. 31, 1970, at 13, col. 5. A Rutgers University student was arrested during a protest demonstration "on charges of having desecrated the American flag by wearing it over his shoulders." *Id.,* Apr. 16, 1970, at 48, col. 4. Eighteen-year-old William Chambers was fined $100 and sentenced to thirty days in jail for admittedly appearing in public at Waterloo, New York, wearing trousers fashioned from a flag; he was also ordered to raise and lower the flag each day of his jail term. *Id.,* May 20, 1970, at 63, col. 2. There was neither public criticism nor arrest of celebrities, Roy Rogers and Dale Evans, after they appeared on a January 24, 1970, television production of "Hollywood Palace," wearing "costumes making use of the stars and stripes associated with the flag," with the intended effect of using the flag "as a symbol to suggest patriotism." *Id.,* Mar. 3, 1970, at 65, col. 1.

11 Note, *Symbolic Conduct,* 68 COLUM. L. REV. 1091 (1968).

12 *See* notes 81 and 89 *infra.*

13 Prosser, *supra* note 8, at 194.

Maine, Maryland, Michigan, Mississippi, New York, Pennsylvania, Rhode Island, South Dakota, Tennessee, Vermont, Virginia, Washington and Wisconsin.[14] Politicians during the election of 1896 had seized upon the flag as a means of identifying their party with some higher symbol in the voter's mind. The idea, however, fell into the hands of both major parties and the flag suddenly became the ubiquitous prop of political exploitation. According to the Commissioners on Uniform State Laws, flag desecration accompanied the emotionalism of the times, when

> . . . the flag so used was torn down and torn in pieces and trampled in the dust. These outrages occurred in all sections of the country. This demonstrated that there was lurking among the people a spirit in political excitement in which was lacking a decent respect and reverence for our National emblem.[15]

Indeed, many of the incidents occurring at that time make the dishonor brought to the flag today seem mild by comparison.[16] Exploitation of the flag, however, was not limited to politics alone. At the beginning of the century, a wide variety of commercial products was being promoted through advertisements depicting the American flag — another form of desecration.[17]

The efforts of the American Flag Association, combined with public demand, produced flag legislation in more than half of the states by the year 1907.[18] In 1907, the Supreme Court addressed itself to the problem of commercial exploitation of the flag in *Halter v. Nebraska*.[19] The Court upheld a state's conviction of two men who sold beer depicting the American flag on the label. The first test of the constitutionality of flag legislation was thus met, and the decision became primary authority regarding a state's interest in fostering respect for the flag.[20] The *Halter* case has, however, been discredited to some extent concerning the issue of freedom of expression and the use of the flag by

14 9B UNIFORM LAWS ANNOTATED 48 (1966).
15 *Id.*
16 As Professor Prosser notes:
> During the campaign, paper flags bearing pictures of the political candidates were posted in courtrooms in Anderson, Indiana. They were torn down and trampled. In Council Bluffs, Iowa, a large American flag with a partisan banner was fired upon with a shotgun. A soldier returned the fire, killing the assailant's horse. At Sedalia, Missouri, a child with a flag in her hand was singing campaign songs on the platform of a special train. A man seized the girl's flag and burned it, to the applause of some members of the crowd. Prosser, *supra* note 8, at 196.

17 Some of the examples cited by the American Flag Association include:
> . . . bicycles, bock beer, whiskey, fine cambric, Bone Knoll sour mash, tar soap, American pepsin chewing gum, theatres, tobacco, Japan tea, awnings, breweries, cigars, charity balls, cuff buttons, dime museums, door mats, fireworks, furriers, living pictures, picnic grounds, patent medicines, pool rooms, prize fights, restaurants, roof gardens, realestate [*sic*] agencies, sample rooms, shoe stores, soap makers, saloons, shooting galleries, tentmakers, variety shows, venders [*sic*] of lemon acid, and for awnings and a host of others. S. REP. No. 506, 58th Cong., 2d Sess. 53 (1904).

18 Halter v. Nebraska, 205 U.S. 34, 39 n.1 (1907).
19 205 U.S. 34 (1907).
20 Justice John Marshall Harlan spoke for the majority:
> 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. *Id.* at 43.

a New York district court which pointed out that *Halter* was decided before the first amendment was applicable to the states under the due process clause of the fourteenth amendment.[21]

All fifty states currently have statutes aimed at proscribing certain conduct in association with the American flag. The most notable distinctions between the various statutes are (1) the maximum penalty and (2) the particular language of some statutes.[22]

A comparison of the statutes reveals that the penalty varies from a mere $20-$100 fine in Oregon, to a $3000 fine and a maximum of three years imprisonment in Oklahoma. Nine states recommend no specific penalty, and describe the violation upon conviction as only some form of misdemeanor.[23] Nine states have amended the maximum penalty to higher fines and longer sentences.[24] The statutes of seven states are entitled and patterned after the Uniform Flag Act.[25] While nearly all states regard the violation of their flag desecration statutes a misdemeanor, three states consider burning or other mutilation of the flag to be a felony.[26] Furthermore, there are serious discrepancies in the various statutes regarding the elements of knowledge or intent. Only eleven states require that the conduct of the defendant be wilful, deliberate or knowing.[27]

Ironically, Congress was not attempting to alleviate this lack of uniformity in the state laws when it passed the federal flag desecration law in 1967.[28] That law specifically states:

> Nothing in this section shall be construed as indicating an intent on the part of Congress to deprive any State, territory, possession, or the Commonwealth of Puerto Rico of jurisdiction over any offense over which it would have jurisdiction in the absence of this section.[29]

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21 Duncombe v. New York, 267 F. Supp. 103, 106 (S.D. N.Y. 1967). The pertinent portion of the opinion reads:

> I adhere to the view . . . that the substantive constitutional issues are not insubstantial. This view can scarcely be altered by *Halter* which was decided several years before the protections of the First Amendment were held to be firmly applicable to the states through the Fourteenth Amendment. Moreover, the argument that the statute is unconstitutional for vagueness — which is one of Duncombe's major contentions — was notably absent in the *Halter* case.

22 *See Appendix.*

23 California, Florida, Georgia, Michigan, Nevada, New Mexico, New York, Virginia and Washington. *See Appendix.*

24 Alabama: from 30 days and/or $100, to 1 year and/or $1000. Illinois: from 30 days and/or $10-$100, to 1-5 years and/or $1000-$5000. Minnesota: from 90 days and/or $100, to 90 days and/or $300. New Hampshire: from 30 days and/or $50, to 6 months and/or $1000. Ohio: from 30 days and/or $100, to 30 days-1 year and/or $100-$1000. Oklahoma: from 30 days and/or $100, to 3 years and/or $3000. Pennsylvania: from 6 months and/or $200, to 1 year and/or $1000. Tennessee: from 60 days and/or $200, to 1-3 years and/or $500-$1000. Wisconsin: from 3 months and/or $100, to 1 year and/or $500. *See Appendix.*

25 Delaware, Florida, Maine, Maryland, Vermont, Virginia and Washington. *See Appendix.*

26 Alabama, Oklahoma and Tennessee. *See Appendix.*

27 Alaska, Georgia, Louisiana, Minnesota, Nebraska, Nevada, South Dakota, Tennessee, Washington, Wisconsin and Wyoming are the only states which include "wilful," "deliberate," "intentional," or "knowing" desecration in the wording of their respective statutes. *See Appendix.* This point was debated at some length in the House of Representatives upon consideration of the federal flag desecration law. 113 CONG. REC. 16,453, 16,464 (daily ed. June 20, 1967).

28 18 U.S.C. § 700 (1968).

29 *Id.* § 700(c). The other subsections are as follows:

> (a) Whoever knowingly casts contempt upon any flag of the United States by

Rather than attempting to bring the public consciousness toward a common understanding of specific conduct proscribed, Congress passed the bill on June 20, 1967, with debate and emotional oratory filling over fifty pages in the Congressional Record.[30] The remarks of Representative Ryan of New York reveal provocative insights into the possible ramifications of the law:

> How ironic it is to undermine the symbol of our individual liberty in the zeal to enforce reverence for that symbol.
>
> . . . .
>
> Mr. Chairman, no nation has ever saved itself by imposing ever harsher penalties upon its dissenters, and no democracy should ever wish to do so.
>
> Mr. Chairman, there is a serious constitutional issue involved in this legislation — the question of whether or not symbolic action may be protected under the first amendment guarantee of free speech.[31]

III. Some Arguments and Related Cases

The burden necessarily shifted to the courts to interpret and rule on legislation aimed at protecting the flag. One of the first applications of the new federal law came on October 3, 1968, when Abbie Hoffman appeared in Washington, D.C., to testify before the House of Representatives' Committee on Un-American Activities wearing a "shirt that resembled the American flag."[32] In affirming Hoffman's subsequent conviction, the Court of Appeals for the District of Columbia upheld the constitutionality of the new law.

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publicly mutilating, defacing, defiling, burning, or trampling upon it shall be fined not more than $1000 or imprisoned for not more than one year, or both.

(b) The term "flag of the United States" as used in this section, shall include any flag, standard, colors, ensign, or any picture or representation of either, or of any part or parts of either, made of any substance or represented on any substance, of any size evidently purporting to be either of said flag, standard, colors, or ensign of the United States of America, or a picture or a representation of either, upon which shall be shown the colors, the stars and the stripes, in any number of either thereof, or of any part or parts of either, by which the average person seeing the same without deliberation may believe the same to represent the flag, standards, colors, or ensign of the Unites States of America.

30 113 CONG. REC. 16,441-99 (daily ed. June 20, 1967).

31 *Id.* at 16,472. The bill passed the House by a vote of 387-16. *Id.* at 16,498.

The Attorney General of the United States, Ramsey Clark, addressed a letter to Chairman James O. Eastland of the Senate Judiciary Committee, when that body was considering the bill, in which he stated:

> Particular care should be exercised to avoid infringement of free speech. To make it a crime if one "defies" or "casts contempt . . . either by word or act" upon the national flag is to risk invalidation. Such language reaches toward conduct which may be protected by First Amendment guarantees. The courts have been insistent on guarding against sanctions which reach the protected expression of ideas and also have struck down on grounds of vagueness provisions which are so broad that they might include protected speech along with conduct that could constitutionally be penalized. U.S. CODE CONG. AND ADMIN. NEWS 2507, 2511 (1968).

32 Hoffman v. United States, 256 A.2d 567 (D.C. Cir. 1969). The opinion of the Court of Appeals is worth noting:

> Appellant's contention that the Statute [18 U.S.C. § 700] as applied abridges his freedom of speech guaranteed by the First Amendment appears to be his chief contention on this appeal. He argues that his conduct was "symbolic speech" and that no distinction should be made between symbolic and nonsymbolic communication of ideas. We disagree. The First Amendment protects freedom of speech and not freedom of conduct. *Id.* at 568.

The Court apparently rejected the concepts established by the United States Supreme Court regarding freedom of expression as exercised through "symbolic speech." *See* notes 42, 44-50 *infra.*

> Surely the Government has a substantial, genuine and important interest in protecting the flag from public desecration by contemptuous conduct. We find the Statute to be a reasonable regulation limited to prohibiting certain defined acts of conduct, and it does not necessarily impinge on a citizen's right to protest.[33]

The argument that the government (federal or state) has an interest in protecting the flag from abuse is undisputed.[34] Indeed, a recent federal case in Delaware,[35] which held that state's flag desecration statute to be unconstitutionally vague, declared: "That the state has an interest in the preservation of the national symbol is not disputed. Nor is it questionable that the interest permits some types of regulation, to the detriment of asserted freedoms."[36] In that case, the defendant had been arrested and charged under the Delaware law[37] for expressing his dissatisfaction with United States war policy in Vietnam by displaying the United Nations flag in the position of honor on the right side of his house front and the United States' flag at half mast in the subordinate position on the left side. The court reasoned that "[I]f there are limitations on the protection afforded conduct by the First Amendment, they are defined by exigencies other than the prevention of public expression of attitudes — even those of defiance or contempt."[38]

The court in *United States v. Ferguson*[39] would seem to set the limitation at the point of "contemptuous destruction" of the flag, regardless of the protection given to "symbolic speech, due to the availability of other means of communication."[40] The line which separates "contemptuous destruction" from protected symbolic speech, however, is surely tenuous in the courts today.[41] The fundamental questions that must be considered are: (1) what is meant by

33 *Id.* at 569. While the *Hoffman* case is pending further appeal, the controversy over the appellant's flag shirt has accelerated under different circumstances. In March, 1970, Hoffman appeared as a guest on an entertainment program broadcast over the Columbia Broadcasting System wearing a flag shirt beneath a heavier outer coat. Public outrage with CBS reached great proportions after the network "blacked out" the screen, preventing viewers from seeing the shirt. CBS explained that it feared legal complications would have resulted from allowing Hoffman to exhibit the flag shirt. New York Times, Mar. 28, 1970, at 29, col. 8.

34 Halter v. Nebraska, *supra* note 18.

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

36 *Id.* at 534.

37 11 DEL. CODE ANN. § 532 (1968). This statute is patterned after the Uniform Flag Law and imposes a maximum penalty of $100 or 30 days imprisonment or both.

38 310 F. Supp. at 534.

39 United States v. Ferguson, *supra* note 4.

40 *Id.* at 1114. The relevant statements of the court include the following:

> The power to select a flag carries with it the power to do whatever is necessary and proper for carrying into effect this selection. Certainly this would include the power to protect it from contemptuous destruction. . . .
>
> [E]ven if the burning of the flag was accepted as speech, prohibition of this act would deprive the speaker of no audience or of no other means of reaching her audience.

41 The facts in Joyce v. United States, 259 A.2d 363 (D.C. Cir. 1969) present a dubious picture of an appellant who ". . . knowingly cast contempt upon the flag by publicly mutilating it." On Inauguration Day, 1969, in Washington, D.C., the appellant Joyce

> was holding a small American flag approximately 4 inches wide, 6 inches long and attached to a 7-inch wooden post.
>
> He took the flag off the post, tore it, then folded it lengthwise and, with the assistance of one of his friends, tied it to his right index finger and raised his hand with the index and middle finger in a V position and waved it back and forth above his head until the flag became loose, whereupon he tightened it with his teeth and continued to display the V sign.

"symbolic speech" and (2) to what extent has the common law afforded constitutional protection for this form of speech.

The first case in which the Supreme Court extended the First Amendment to protect symbolic expression was *Stromberg v. California*.[42] This case not only held the ceremonious display of a red flag to be constitutionally protected speech, but it also declared the extent to which such protection is provided:

> The right [of free speech] is not an absolute one, and the State in the exercise of its police power may punish the abuse of this freedom. There is no question but that the State may thus provide for the punishment of those who indulge in utterances which incite to violence and crime and threaten the overthrow of organized government by unlawful means.[43]

In other cases, the Court has ruled that the same protection extended to a sit-in demonstration.[44] The refusal to leave a public library became another form of protected symbolic expression,[45] as did a peaceful and orderly procession of protesters through the city of Chicago,[46] picketing,[47] motion pictures,[48] the refusal to salute the United States flag,[49] and the wearing of black armbands.[50]

The latter two cases are particularly significant. *Board of Education v. Barnette* held that the state cannot constitutionally compel anyone to salute the flag.[51] The salute is the accepted manifestation of respect for that which is symbolized by the flag. *Barnette* stresses the notion that efforts to legislate respect for any symbol are an exercise in futility and wholly inconsistent with constitutional liberties. The question is therefore presented: if the state cannot dictate that its citizens perform any outward show of respect for the flag, can the state through the application of flag desecration laws constitutionally prohibit acts of disrespect toward the flag? If *Barnette* provides an answer to this query, it is that any act which expresses an opinion and which does not threaten a "clear

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42 283 U.S. 359 (1931). The statute involved in this case was declared unconstitutional based upon a clause which prohibited the display of any "flag, badge, banner . . . or any color . . . as a sign, symbol or emblem of opposition to organized government. . . ." *Id.* at 361.

43 *Id.* at 368-69.

44 Garner v. Louisiana, 368 U.S. 157 (1961). In reversing the conviction of defendants who participated in a peaceful sit-in demonstration to protest segregation, the Court stated:

> Such a demonstration . . . is as much a part of the "free trade in ideas" as is verbal expression, more commonly thought of as "speech." It, like speech, appeals to good sense and to "the power of reason as applied through public discussion" just as much as, if not more than, a public oration delivered from a soapbox at a street corner. *Id.* at 201.

This same form of symbolic expression was reaffirmed as being protected in Bell v. Maryland, 378 U.S. 226 (1964).

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

46 Gregory v. Chicago, 394 U.S. 111 (1969).

47 Thornhill v. Alabama, 310 U.S. 88 (1940). *See also,* Carlson v. California, 310 U.S. 106 (1940).

48 Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

49 Board of Education v. Barnette, 319 U.S. 624 (1943).

50 Tinker v. Independent Community School District, 393 U.S. 503 (1969).

51 The Court in *Barnette* observed:

> There is no doubt that . . . the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. . . . A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn. 319 U.S. at 632-33.

and present danger" to the community peace and welfare cannot be legally suppressed.[52] On this point, the Court emphasizes that the scope of such protected expression is necessarily substantial.

> . . . freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.[53]

Twenty-six years after *Barnette*, the Court decided *Tinker v. Independent Community School District.*

> In order for the State . . . to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.[54]

The conduct of the appellants in this case — wearing of black armbands — was intended as a symbolic expression of protest against United States policy in Vietnam, and was held to be neither actually nor potentially disruptive. The Court held this conduct to be " . . . closely akin to 'pure speech' which . . . is entitled to comprehensive protection under the First Amendment."[55]

The limitations placed on "pure speech" provide some insight and guidance as to the meaning of "symbolic speech" and its restrictions. Such expressions as include

> . . . the lewd and obscene, the profane, the libelous, and the insulting or 'fighting words' — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace . . . are no essential part of any exposition of ideas, and are of such slight social value as a step

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52 The Court in *Barnette* further stated:

> It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish. *Id.* at 633.

This rule was asserted originally in Schenck v. United States, 249 U.S. 47 (1919). It was modified in Dennis v. United States, 341 U.S. 494 (1951), wherein the Court adopted the judicial balancing test established by Judge Learned Hand: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *Id.* at 510.

53 319 U.S. at 642. The concurring opinion of Justices Douglas and Black corroborated the majority's statement:

> Love of country must spring from willing hearts and free minds, inspired by a fair administration of wise laws enacted by the people's elected representatives within the bounds of express constitutional prohibitions. These laws must, to be consistent with the First Amendment, permit the widest toleration of conflicting viewpoints consistent with a society of free men. *Id.* at 644.

54 393 U.S. at 509.

55 *Id.* at 505, 506. The concurring opinion of Justice Fortas in Barker v. Hardway, 394 U.S. 905 (1969), a case in which college students had participated in a violent protest against their college administration, distinguished the conduct protected in *Tinker* from that conduct which the state can prevent and punish:

> The petitioners contend that their conduct was protected by the First Amendment, but the findings of the District Court, which were accepted by the Court of Appeals, establish that the petitioners here engaged in an aggressive and violent demonstration, and not in peaceful, nondisruptive expression, such as was involved in [*Tinker*]. The petitioners' conduct was therefore clearly not protected by the First and Fourteenth Amendments.

> to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[56]

These expressions comprise some of the restrictions on pure speech recognized by the Court and are not protected.

This process of weighing the interests of society is perhaps the unacknowledged cause for the present unsettled state of flag desecration law. Such a test is consistently applied in cases wherein the sensitive balancing of private and public rights is susceptible to a number of relative factors.[57] In *Terminiello v. Chicago*,[58] for example, the defendant had been charged with disorderly conduct for having incited resentment against a crowd gathered outside the auditorium in which the defendant, speaking to a meeting of the Christian Veterans of America, denounced certain political and racial groups. The Supreme Court found that the defendant's conviction may have rested upon a jury instruction permitting the jury to find guilt if the speech stirred people to anger, invited public dispute, or brought about a condition of unrest. The conviction was reversed by the Court, which held that such effect may be validly brought about through the constitutional exercise of free speech.[59]

In a similar case, *Feiner v. New York*,[60] the Court affirmed a conviction, holding that the arrest and conviction of the petitioner was not for the utterance or the content of his speech, but for "the reaction which it actually engendered."[61]

One conclusion that may validly be asserted from these two cases is that noticeably absent from the Court's reasoning is any attempt to establish some guideline by which conduct might be regulated.

> General guidelines must be laid down to determine when non-verbal expression or 'symbolic speech' is in fact the essence of the activity sought to be regulated before any meaningful balancing of public and private interests under the first amendment is possible.[62]

Without attempting to determine exactly what guidelines are derived from the cases, it might be asserted that two of the most important considerations in

56 Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). *See also,* Cox v. Louisiana, 379 U.S. 536 (1965).

57 *See generally,* Beauharnais v. Illinois, 343 U.S. 250 (1952); American Communications Association v. Douds, 339 U.S. 382, 399 (1950); Note, *Desecration of National Symbols as Protected Political Expression,* 66 MICH. L. REV. 1040, 1043 n.16 (1968).

58 337 U.S. 1 (1949).

59 With unusual emphasis, the Court stated:

> . . . a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute [citing Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942)] is nevertheless protected against censorship or punishment. . . . There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups. *Id.* at 4-5.

60 340 U.S. 315 (1951). The defendant was charged with disorderly conduct, inciting to riot and making derogatory remarks about public officials. He was allegedly attempting to incite Negroes to violence against the white race and, when requested to stop speaking, he refused.

61 *Id.* at 320.

62 Note, *Symbolic Conduct,* 68 COLUM. L. REV. 1091, 1105 (1968).

cases focusing on restricting free speech are the nature of the actor's conduct contrasted with the potential for violence. Taking these two factors together is helpful in understanding the distinction between *Adderley v. Florida*,[63] and *Brown v. Louisiana*.[64]

In *Adderley*, the Court affirmed the conviction of demonstrators at a county jail who were protesting segregation and the previous arrests of other participants in the demonstration, during which the passage of vehicles into the jail driveway was blocked. In *Brown*, some students refused a request to leave a public library as a symbolic protest against segregation policies; their conviction was reversed. Though the conduct in either case might be questioned, the Court found the potential for violence significantly greater in *Adderley*.

If the message conveyed through the actor's conduct is determined to have some "redeeming social importance," then the interest in preserving free expression is less likely to be subordinated to any other interest.[65] This is true although the symbolic message conveyed might be unpopular, especially with respect to political protest.[66] The principal concern in the area of flag desecration is the effect of the two relevant factors — the nature of the conduct and the potential for violence—upon the balancing of interests, which are preservation of freedom of expression and protection of the flag from abuse or desecration. Two New York cases, *People v. Street*,[67] and *People v. Radich*,[68] provide excellent illustrations of the main issue.

As a means of protesting the shooting of civil rights leader James Meredith in Mississippi, Sidney Street burned an American flag on a Brooklyn street corner and declared, "We don't need no damn flag," and "If they let that happen to Meredith, we don't need an American flag." He was charged with publicly mutilating the United States flag.[69] In unanimously affirming the conviction, the New York Court of Appeals held that the conduct of the defendant in burning the flag, was "an act of incitement, literally and figuratively 'incendiary' and as fraught with danger to the public peace as if he had stood on the street corner shouting epithets at passing pedestrians."[70] Speaking for the court, Chief Judge Fuld stated that the statute was designed to prevent a breach

63 385 U.S. 39 (1966).
64 383 U.S. 131 (1966).
65 The language is taken from the opinion of Justice Brennan in ruling on an obscenity case:

> All ideas having even the slightest redeeming social importance — unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion — have the full protection of the guaranties [of free speech and press], unless excludable because they encroach upon the limited area of more important interests. Roth v. United States, 354 U.S. 476, 484 (1957). (Footnote omitted.)

66 Bacheller v. Maryland, 3 Md. App. 626, 240 A.2d 623 (1968). *See also* Henry v. Rock Hill, 376 U.S. 776 (1964); Edwards v. South Carolina, 372 U.S. 229 (1963); NAACP v. Button, 371 U.S. 415 (1963); Beauharnais v. Illinois, 343 U.S. 250 (1952); Taylor v. Mississippi, 319 U.S. 583 (1943).
67 20 N.Y.2d 231, 229 N.E.2d 187, 282 N.Y.S.2d 491 (1967), *rev'd on other grounds*, 394 U.S. 576, 579 (1969).
68 26 N.Y.2d 114, 257 N.E.2d 30, 308 N.Y.S.2d 846 (1970).
69 NEW YORK PENAL LAW, § 1425(16)(d) (McKinney 1944); now changed to NEW YORK GEN. BUS. LAW § 136 (McKinney 1968).
70 20 N.Y.2d 231, 237, 229 N.E.2d 187, 191, 282 N.Y.S.2d 491, 496 (1967).

of the peace, and that the state could "legitimately curb such activities in the interest of preventing violence and maintaining public order."[71]

Steven Radich, the owner of an art gallery in Manhattan in which several "artistic constructions" depicting the American flag in various forms[72] were displayed, was convicted under the New York statute for making contemptuous use of the flag. The New York Court of Appeals affirmed in a 5-2 decision. Speaking for the majority, Judge Gibson held that the requirement of *United States v. O'Brien*,[73] that a government regulation to be justified must be unrelated to the suppression of free expression, was satisfied in the conviction of Radich. Judge Gibson relied on the opinion of Chief Judge Fuld in the *Street* case.[74]

It is significant irony that the Chief Judge emphatically dissented in *Radich*. Noting that the constructions were established as works of "protest art," the Chief Judge stated that nothing in the *Street* opinion suggested that "the mere fact that a person chooses to express himself by other than verbal means removes him entirely from the protections of the First Amendment."[75] The dissent made clear its judgment that

> [i]n the absence of a showing that the public health, safety or the well being of the community is threatened, the State may not act to suppress symbolic speech or conduct having a clear communicative aspect, no matter how obnoxious it may be to the prevailing views of the majority.[76]

According to Chief Judge Fuld, the fundamental difference between *Street* and *Radich* was that the burning of the flag in the former posed a significant threat to the community peace, whereas the display of the flag through the medium of sculpture "in the quiet surroundings" of the art gallery posed no such threat.[77] The interplay of conduct (burning the flag as against displaying it

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71 *Id.*

72 Seven forms were represented, two of which included a stuffed flag resembling a phallic symbol protruding from the upright member of a cross, and a stuffed flag resembling a human figure hanging from a yellow noose. The purpose behind the display was to symbolically protest the "church-condoned American aggressive warfare in Vietnam," 53 Misc.2d 717, 719, 279 N.Y.S.2d 680, 683 (N.Y. City Crim. Ct. 1967). *See* LIFE, Mar. 31, 1967, at 18; New York Times, Dec. 30, 1966, at 2, col. 2.

73 391 U.S. 367 (1968).

74 Judge Gibson went so far as to synopsize Chief Judge Fuld's opinion in *Street* as follows:

> While nonverbal expression may be a form of speech within the protection of the First and Fourteenth Amendments, the same kind of freedom is not afforded to those who communicate ideas by conduct as to those who communicate ideas by pure speech; that the State may legitimately proscribe many forms of conduct and no exception is made for activities to which some would ascribe symbolic significance; that, in sum, the cases show that the constitutional guarantee of free speech covers the substance rather than the form of communication, but that if the substance is being conveyed by a form violative of the public health, safety or well being, then the First Amendment protection is subordinated to the general public interest. 26 N.Y.2d 114, 116, 257 N.E.2d 30, 32 , 308 N.Y.S.2d 846, 848-49 (1970).

75 26 N.Y.2d 114, 123, 257 N.E.2d 30, 37; 308 N.Y.S.2d 846, 855 (1970).

76 *Id.* at 124, 257 N.E.2d at 37, 308 N.Y.S.2d at 856.

77 Chief Judge Fuld added:

> In our modern age, the medium is very often the message, and the State may not legitimately punish that which would be constitutionally protected if spoken or drawn, simply because the idea had been expressed, instead, through the medium of sculpture. *Id.* at 124, 257 N.E.2d at 38, 308 N.Y.S.2d at 856.

in distasteful forms) and the potential for violence (unlimited numbers at a street corner as against voluntary observers in an art gallery) distinguished these two cases.

The fact that the flag was "desecrated" in each case did not categorize the convictions as deserving of the same disposition, because, as the dissent observed, the restriction of free speech required something more than the showing of obvious disrespect for the flag. It was necessary to establish that the private right of the defendant to express himself without fear of suppression had been subordinated to the public interest in preserving peace and order.[78] Since this could not be shown convincingly, the Chief Judge could only conclude: "This prosecution . . . is nothing more than political censorship falling far outside our holding in *People v. Street*."[79]

The United States Supreme Court reversed Street's conviction on the ground that the statute, in proscribing the contemptuous use of the flag, "by word or act," was unconstitutionally applied against Street since he might have been convicted for the *words* he uttered rather than the *act* of burning the flag.[80] To the consternation of the dissenting judges,[81] the Court refused to address the question of whether or not a statute proscribing the *act alone* could be constitutionally upheld.[82] Hopefully this issue will soon be resolved since the *Radich* case is currently on appeal to the United States Supreme Court.[83]

IV. Necessity for an Answer

As the recent cases indicate, the dockets of courts across the country are being filled with cases which challenge the judiciary for a clear answer to the question set aside in *Street* — proving the accuracy of the Chief Justice's admonition. "The Court's explicit reservation of the constitutionality of flag-burning probitions encourages others to test in the streets the power of our States and National Government to impose criminal sanctions upon those who

78 Judge Gibson did attempt to argue that a significant potential for violence could be shown:

> Here, the expression, if less dramatic, was given far wider public circulation [than *Street*] and, in consequence, perhaps, a measurable enhancement of the likelihood of incitement to disorder, by the placement of one of the constructions in a street display window of defendant's gallery on Madison Avenue in the City of New York, and the exhibition and exposure for sale of the companion pieces in the public gallery and mercantile establishment within. Implicit in the invitation to view was the opportunity thereby afforded to join in the protest, or in counterprotest, with the consequent potential of public disorder; or so the trier of the facts could properly find. *Id.* at 116, 257 N.E.2d at 32-33, 308 N.Y.S.2d at 849.

79 *Id.* at 124, 257 N.E.2d at 39, 308 N.Y.S.2d at 857.

80 Street v. New York, 394 U.S. 576 (1969).

81 Chief Justice Warren, and Justices Black, Fortas and White dissented. In his opinion, the Chief Justice noted emphatically:

> In a time when the American flag has increasingly become an integral part of public protests, the constitutionality of flag-desecration statutes enacted by all of the States and Congress is a matter of the most widespread concern. Both those who seek constitutional shelter for acts of flag desecration perpetrated in the course of political protest and those who must enforce the law are entitled to know the scope of constitutional protection. *Id.* at 604-5. (Footnotes omitted.)

82 *Id.* at 581, 594.

83 Radich v. New York, *appeal docketed,* 39 U.S.L.W. 3007 (U.S. May 18, 1970) (No. 169).

would desecrate the flag."[84] The four dissenters in *Street* agreed that the defendant's conduct could be constitutionally punished. However, the broader question formulated herein — whether an individual's disrespectful use of the flag as symbolic expression is protected by the first amendment when neither the nature of his conduct nor the potential for violence would permit the state to punish such conduct in order to preserve peace and order — is an issue which the dissent itself left unanswered. In other words, the Court might ultimately rule that publicly burning an American flag is conduct which may constitutionally be punished based on the inflammatory nature of the conduct which lends itself to a greater potential for inciting observers to violence.[85] Such a rationale, however, might not be as easily applicable to lowering the flag to half-mast to symbolize mourning,[86] publicly wearing the flag as a vest,[87] or displaying the flag in disrespectful forms of artistic construction.[88] Each of these instances is central to a case which has come before the Court or is in the appeal docket.[89]

One of the four questions presented to the Supreme Court in the *Radich* appeal deserves particular attention: "Does the statute under which [the] appellant was convicted further any governmental interest other than fostering respect for the flag, and is the interest which is furthered by the statute unrelated to suppression of free speech?"[90] This question is derived from the holding in *United States v. O'Brien*,[91] wherein the defendant's conviction for burning his draft card was affirmed.

> . . . we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers

84 Street v. New York, 394 U.S. 576, 605 (1969).

85 That the state may punish an individual for uttering words which incite others to commit unlawful acts, and that the state may prevent an individual "from uttering words so inflammatory that they would provoke others to retaliate physically against him, thereby causing a breach of the peace . . ." are governmental interests recognized by Justice Harlan which could conceivably — but not constitutionally in the circumstances of *Street* — be furthered by punishing Street. *Id.* at 591.

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

87 People v. Cowgill, 274 Cal. App. 174, 78 Cal. Rptr. 853 (1969).

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

89 *See, e.g.*, Radich v. New York, *appeal docketed*, 39 U.S.L.W. 3007 (U.S. May 18, 1970) (No. 169); Cowgill v. California, 274 Cal. App. 174, 78 Cal. Rptr. 853 (1969), *appeal dismissed*, 396 U.S. 371 (1970); Hinton v. State, 223 Ga. 174, 154 S.E.2d 246 (1967), *rev'd per curiam* Anderson v. Georgia, 390 U.S. 206 (1968) (the reversal was based on Whitus v. Georgia, 385 U.S. 545 (1967), holding Georgia's system of jury discrimination unconstitutional).

90 Jurisdictional Statement for Defendant (filed with the United States Supreme Court) at 3, Radich v. New York, *appeal docketed*, 39 U.S.L.W. 3007 (U.S. May 18, 1970) (No. 169). The other three questions are as follows:

1) Does the First Amendment to the U.S. Constitution permit punishment of artistic expression on the ground that it has been found to be contemptuous of our national symbol?
2) Is the prohibition against casting contempt upon the flag in the statute under which appellant was convicted sufficiently clear, certain and limited to meet the requirement of the Fourteenth Amendment that criminal activity be specifically defined?
3) Does the equal protection clause of the Fourteenth Amendment bar the conviction of appellant for displaying sculpture in an art gallery under a statute which permits magazine and newspaper publishers to show photographs of that sculpture in their publications and permits exhibition of paintings on the same theme?

91 391 U.S. 367 (1968).

> an important or substantial governmental interest; *if the government 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.[92] [Emphasis added.]

The governmental interest in *O'Brien* was clearly identified as "limited to preventing harm to the smooth and efficient functioning of the Selective Service System."[93] The governmental interest involved in *Radich* was established as preventing "acts dishonoring the flag."[94] Whether this interest is unrelated to the suppression of free expression can only be determined after it has been shown that some form of expression was in fact exercised within the proper limitations set by other governmental interests — specifically, the interest in preserving peace and order in the community. Whether the governmental interest in protecting the flag outweighs the interest in preventing restriction of the freedom of expression appears to be answered by a careful consideration of the language by which the Supreme Court has consistently and jealously guarded the latter interest. In *Abrams v. United States*,[95] Mr. Justice Holmes said:

> I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.[96]

The Court in *DeJonge v. Oregon*[97] reached a similar conclusion:

> The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press, and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.[98]

The language of *Cantwell v. Connecticut*[99] is likewise impressive:

> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor . . . . But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.
>
> The essential characteristic of these liberties is, that under their shield

92 *Id.* at 377.
93 *Id.* at 382.
94 26 N.Y.2d 114, 120, 257 N.E.2d 30, 35, 308 N.Y.S.2d 846, 853 (1970).
95 250 U.S. 616 (1919).
96 *Id.* at 630 (Holmes, J., dissenting).
97 299 U.S. 353 (1937).
98 *Id.* at 365.
99 310 U.S. 296 (1940).

> many types of life, character, opinion and belief can develop unmolested and unobstructed.[100]

That the theme symbolically conveyed by disrespectful uses of the flag has been political protest, is an understatement of the current wave of cases. In *Hodsdon v. Buckson*,[101] the United States District Court for the District of Delaware carried the rationale of *Barnette*[102] and *Stromberg*[103] to the conclusion that "the punishment of peaceful symbolic acts rejecting the political ideas bespoken by the flag is as alien to the mandate of the First Amendment as is compulsion to signify adherence."[104] The dissenting judge in the *Radich* case when it came before the New York City Criminal Court, Judge Basel, cited the inequity of convicting the defendant.

> There are many Americans in opposition to the war, who . . . protest that the image of the American flag as a symbol of freedom to lovers of liberty and a shining object to the oppressed is cast in contempt. . . . This is the message the artist seeks to convey in the work the defendant exhibited. We may quarrel with his theme, disagree with his method, condemn his goal. We cannot dispute his right to express dissent even though the means be loathsome to us.[105]

The flag desecration statute in Pennsylvania contains a clause which exempts the application of the statute to any "patriotic or political demonstration or decoration."[106] Stephen Haugh, a twenty-three-year-old Pennsylvania State University student participated in a campus antiwar demonstration on July 4, 1967, during which he "brandished an American flag emblazoned with the slogans 'Make Love Not War' and 'The New American Revolutionaries.' "[107] The conviction of Haugh for desecrating the flag was reversed by the Pennsylvania Supreme Court which strictly construed the clause and held that the state legislature could not define "political" to exclude protest groups.[108]

Many such cases receiving publicity today involve the wearing of a flag patch,[109] or of the flag itself.[110] The Court of Appeals for Lucas County, Ohio, has construed the "otherwise cast contempt" portion of the Ohio statute which states "No person shall . . . publicly mutilate, burn, destroy, defile, deface, trample upon or otherwise cast contempt upon [the United States flag],"[111] to mean "acts of physical destruction or abuse similar in nature to acts of

100 *Id.* at 310.
101 310 F. Supp. 528 (D. Del. 1970).
102 Board of Education v. Barnette, 319 U.S. 624 (1943).
103 Stromberg v. California, 283 U.S. 359 (1931).
104 310 F. Supp. at 535.
105 53 Misc.2d 217, 223, 279 N.Y.S.2d 680, 686 (N.Y. City Crim. Ct. 1967).
106 PA. STAT. ANN. tit. 18, § 4211 (1963).
107 —— A.2d —— (1970). *See* TIME, July 20, 1970, at 43.
108 *Id.*
109 Hoffman v. United States, 256 A.2d 567 (D.C. Cir. 1969); New York Times, May 22, 1970, at 63, col. 2; *id.* May 10, 1970, at 59, col. 1; *id.*, Apr. 15, 1970, at 74, col. 8 (flag sewed to seat of trousers); *id.*, Feb. 24, 1970, at 8, col. 3 (flag sewed to seat of trousers); Wall Street Journal, June 12, 1970, at 1, col. 4.
110 Duncombe v. New York, 267 F. Supp. 103 (S.D. N.Y. 1967); New York Times, Apr. 16, 1970, at 48, col. 4; COMMONWEAL, Mar. 27, 1970, at 61 (carrying flag across shoulder).
111 OHIO REV. CODE ANN. § 2921.05 (Anderson 1953).

mutilating, burning, destroying, defiling, defacing, or trampling upon."[112] The conviction of a defendant who was charged with having "unlawfully, publicly and contemptuously cast contempt upon a flag of the United States of America by publicly wearing [the] same as a cape" was therefore reversed.[113]

The Long Island Vietnam Moratorium Committee and others sought injunctive protection against possible prosecution by the Naussau County, New York, District Attorney for distributing emblems, buttons and decals designed as a black circle within three quadrants of which were red and white stripes, with seven white stars on a blue field in the upper left quadrant, and upon which was superimposed a black "peace" symbol.[114] The District Court granted the injunction holding that the New York statute[115] could not be constitutionally invoked to prosecute the wearing of the symbols since the statute was intended to protect the flag itself from physical alteration. The statute, however, was not held unconstitutional.[116]

With the accumulation of cases today wherein individuals are finding an infinite variety of ways to act upon, reproduce or represent the flag to convey an essentially subjective meaning, the American public looks to the Supreme Court for an answer. The most recent statement from the Court was issued by Justice Harlan on January 17, 1970. In dismissing the appeal of a defendant's conviction for "defiling" the flag by cutting and sewing the flag into a vest and wearing it in public, Justice Harlan stated that the issue — "whether symbolic expression by displaying a 'mutilated' American flag [was] protected by the Fourteenth Amendment — [was] one that [he could not] regard as insubstantial."[117] The Court refused to address the issue on the grounds that the trial court had not established as a factual matter whether there was any "recognizable communicative aspect to [the] appellant's conduct."[118]

V. Conclusion

The necessity for an answer to the unsettled issue is obvious; it is genuinely compelling for the civil libertarian. The cries for consistency and certainty in the interpretation and application of the law in each state are becoming louder and more frequent throughout the nation.

Underlying all of this is the feeling that, in an age of increasing polarization of views, few have ever paused to reflect upon the latent but unassailable thought that political viewpoint is not synonymous with patriotism or love of country. Where a controversial issue divides the nation into majority and minority views, it does not follow in a country professing freedom of expression that the minority should be punished for making known its opinion through flag symbolism (as in wearing a flag patch on the seat of trousers) any more

112 State v. Saionz, 23 Ohio App.2d 79, 82-83 (1970).
113 *Id.* at 79.
114 Vietnam Moratorium Comm. v. Cahn, 39 U.S.L.W. 2015 (E.D. N.Y. June 22, 1970).
115 NEW YORK GEN. BUS. LAW § 136(a) (McKinney 1968).
116 Vietnam Moratorium Comm. v. Cahn, 39 U.S.L.W. 2015, 2016 (E.D. N.Y. June 22, 1970).
117 Cowgill v. California, 396 U.S. 371 (1970).
118 *Id.*

than the majority should be rewarded for making known its opposition through a different form of flag symbolism (as in wearing a flag patch on police uniforms). The point is that the American flag waves above and beyond the jealous reach of either group. It symbolizes both the minority and the majority because they are Americans, despite the outrage either group feels toward the other from the opinion each identifies with the flag.

Certainly our Constitution can never permit the conclusion that the expression of opinion by the peaceful "desecration" of the flag is an "overt act against peace and good order" based on the assumption that such an act is aimed at weakening "the patriotic unity which is our strength."[119] Students and "hardhats," "doves" and "hawks," liberals and conservatives — all those who enjoy the exercise of free expression — know the consequences which would befall them should the fear of "political censorship" felt by Chief Judge Fuld ever become reality in this country.[120] Representative Mink eloquently stated this point in her remarks to the House upon consideration of the federal flag desecration law:

> America is not a country which needs to punish its dissenters to preserve its honor . . . . America is not a country which needs to demand conformity of its people, for its strength lies in all our diversities converging in one common belief, that of the importance of freedom as the essence of our country and the real honor and heritage of our Nation, which no trampled flag can ever symbolically desecrate.[121]

In view of the decisions of the Supreme Court which uphold the protection of symbolic speech and which emphasize the importance of free expression to the operation of democratic government, the Court has impliedly chosen the course it will follow. To permit physical abuse of the flag with impunity may stir the sensibilities of many Americans. However, to limit the first amendment by proscribing peaceful symbolism which uses the flag as its medium would unconstitutionally restrict the exercise of the most cherished of American rights — the freedom of expression.

Consequently, in a case such as *Radich*, which involves the balancing of two interests, the Supreme Court must recognize that only one of these interests — the preservation of free expression — carries the substantial weight of historical precedent and the authority of the United States Constitution. The *Radich* conviction cannot stand in light of these considerations, for such a conviction would inevitably represent the desecration of the ideals which are universally symbolized by the flag.

Dennis M. Tushla

119 Prosser, *Desecration of the American Flag*, 3 IND. L.F. 159, 237 (1969).
120 People v. Radich, 26 N.Y.2d 114, 123, 257 N.E.2d 30, 39, 308 N.Y.S.2d 846, 857 (1970).
121 113 CONG. REC. 16492 (1967) (remarks of Congresswoman Mink).

APPENDIX

This chart sets out the distinctions among the fifty state laws on flag desecration. The focus of this comparison is only upon that section of the statute(s) describing public acts of desecration. Most states use essentially the same language for this legislation as, for example, in Arizona:

> A person who publicly mutilates, defaces, defiles, tramples upon, or by word or act casts contempt upon [the flag of the United States] is guilty of . . . Ariz. Rev. Stat. Ann. § 41-793(c).

This wording is regarded as standard.

The distinctions in "maximum penalty" are obvious. Some states are designated as having amended this provision, which in all such states has been an increase in either the amount of the fine, or in the length of the sentence, or both. A few have changed this law from a misdemeanor to a felony.

The distinctions in "particular language" are based on several comparative elements: whether any notion of the actor's intent is required by use of the terms "wilful," "deliberate," "intentional," or "knowing"; whether the language is standard (stnd.) or patterned after the Uniform Flag Law (UFL); whether the laws are currently in force or whether any provisions have been held unconstitutional; whether any special provision is made for burning the flag; and lastly, whether any wording sets off one statute as unique from any other.

STATE	STATUTE	MAXIMUM PENALTY	PARTICULAR LANGUAGE
Alabama	ALA. CODE tit. 14, § 190 (Supp. 1967).	1 year and/or $1000. Burning: 1-2 years and/or $10,000.	Burning—felony (amended).
Alaska	ALASKA STAT. § 11.60.220 (1962).	1 year and/or $200.	"wilfully"
Arizona	ARIZ. REV. STAT. ANN. § 41-793 (1956).	1 year and/or $2000.	stnd.
Arkansas	ARK. STAT. ANN. § 41-1701 (1964).	30 days and/or $100.	stnd.
California	CAL. MIL. & VET. CODE § 614 (1955).	"misdemeanor"	stnd.
Colorado	COLO. REV. STAT. ANN. § 40-23-3 (1963).	30 days and/or $100.	stnd.
Connecticut	CONN. GEN. STAT. ANN. § 53-255 (1958).	6 months and/or $100.	stnd. NOTE: § 53-255 rpld—PA 828, § 214, effective 10-1-71.
Delaware	DEL. CODE ANN. tit. 11, § 532 (1968).	30 days and/or $100.	UFL—declared unconstitutionally vague, Hodsdon v. Buckson, 310 F. Supp. 528 (D. Del. 1970).
Florida	FLA. STAT. ANN. § 256.06 (1962).	"misdemeanor"	UFL
Georgia	GA. REV. CODE ANN. § 26-2803 (1968).	"misdemeanor"	"deliberately"
Hawaii	HAWAII REV. LAWS § 733-6 (1968).	30 days and/or $100.	stnd.

STATE	STATUTE	MAXIMUM PENALTY	PARTICULAR LANGUAGE
Idaho	IDAHO CODE ANN. § 18-3401 (1948).	30 days and/or $100.	stnd.
Illinois	ILL. ANN. STAT. ch. 56¼, §§ 6-7, 9 (Smith-Hurd 1969).	1-5 years and/or $1000-$5000 (amended).	stnd.
Indiana	IND. ANN. STAT. § 10-509 (1967).	1 year and $1000.	stnd.
Iowa	IOWA CODE ANN. § 32.1 (1967).	30 days and/or $100.	"satirize, deride, or burlesque . . ."
Kansas	KAN. STAT. ANN. § 21-1301 (1964).	30 days and/or $100.	stnd.
Kentucky	KY. REV. STAT. §§ 2.060, 2.990 (1969).	30 days and/or $100.	stnd.
Louisiana	LA. REV. STAT. ANN. § 14:116 (1960).	90 days and/or $100.	"intentionally"
Maine	ME. REV. STAT. ANN. tit. 1, § 254 (1964).	6 months and/or $500.	UFL
Maryland	MD. ANN. CODE art. 27, §§ 83, 85 (1967).	1 year and/or $1000.	UFL
Massachusetts	MASS. GEN. LAWS ANN. ch. 264, § 5 (1968).	1 year and/or $10-$100.	stnd.
Michigan	MICH. STAT. ANN. § 28.443 (1962).	"misdemeanor"	stnd.
Minnesota	MINN. STAT. ANN. § 609.40 (1969).	90 days and/or $300 (amended).	"intentionally"
Mississippi	MISS. CODE ANN. § 2159 (1957).	30 days and/or $100.	stnd.
Missouri	MO. ANN. STAT. § 563.750 (1953).	30 days and/or $100.	stnd.
Montana	MONT. REV. CODE ANN. § 94-3581 (1969).	1-5 years and/or $1000.	stnd.
Nebraska	NEB. REV. STAT. § 28-1102.01 (1965).	30 days and/or $100.	"willfully and maliciously . . ."
Nevada	NEV. REV. STAT. § 201.290 (1967).	"misdemeanor"	"defames, slanders, or speaks evilly . . ."; "wilfully"
New Hampshire	N.H. REV. STAT. ANN. §§ 573:1, 573:3-:5 (1967).	6 months and/or $1000 (amended).	stnd.
New Jersey	N.J. STAT. ANN. §§ 2A:107-2, 2A:85-7 (1951).	3 years and/or $1000.	stnd.
New Mexico	N.M. STAT. ANN. § 40A-21-4 (1964).	"petty misdemeanor"	"improper use"
New York	N.Y. GEN. BUS. LAW § 136 (McKinney Supp. 1968).	"misdemeanor"	stnd. NOTE: § 136 cannot be constitutionally applied to prosecute one who "casts contempt by word . . ." Street v. New York, 394 U.S. 576 (1969).
North Carolina	N.C. GEN. STAT. § 14-381 (1953).	30 days and/or $50.	stnd.
North Dakota	N.D. CENT. CODE § 12-07-04 (1960).	30 days and/or $5-$25.	stnd.
Ohio	OHIO REV. CODE ANN. § 2921.05 (1967).	30 days-1 year and/or $100-$1000 (amended).	stnd.

STATE	STATUTE	MAXIMUM PENALTY	PARTICULAR LANGUAGE
Oklahoma	OKLA. STAT. tit. 21, §§ 372-73 (1967).	3 years and/or $3000.	felony—amended.
Oregon	ORE. REV. STAT. § 162.720 (1968).	$20-$100.	stnd.
Pennsylvania	PA. STAT. ANN. tit. 18, § 4211 (1967).	1 year and/or $1000 (amended).	No application to patriotic or political demonstration or decoration.
Rhode Island	R.I. GEN. LAWS ANN. § 11-15-2 (1956).	30 days and/or $100.	stnd.
South Carolina	S.C. CODE ANN. § 16-532 (1962).	30 days and/or $100.	stnd.
South Dakota	S.D. CODE §§ 22-9-1, 22-9-5, 22-9-7 (1967).	30 days and/or $100.	"wilfully trail it in the dust with intent to dishonor . . ."
Tennessee	TENN. CODE ANN. § 39-1607 (1967).	1-3 years and/or $500-$1000.	"wilfully and maliciously . . ." Felony—amended.
Texas	TEX. REV. CIV. STAT. art. 6139 (1962).	"forfeit penalty of fifty dollars for each offense . . ."	stnd.
Utah	UTAH CODE ANN. § 76-14-1 (1963).	30 days and/or $100.	stnd.
Vermont	VT. STAT. ANN. tit. 13, §§ 1902-3 (1958).	1 year and/or $1000.	UFL
Virginia	VA. CODE ANN. §§ 18.1-425, 18.1-427 (1968).	"misdemeanor" (amended).	UFL
Washington	WASH. REV. CODE ANN. §§ 9.86.030, 9.86.050 (1969).	"gross misdemeanor"	UFL; "knowingly"
West Virginia	W. VA. CODE ANN. § 61-1-8 (1966).	30 days and/or $5-$100.	stnd.
Wisconsin	WIS. STAT. ANN. §§ 946.05-.06 (1969).	1 year and/or $500 (amended).	"intentionally"
Wyoming	WYO. STAT. ANN. § 6-106 (1957).	1 year and/or $250.	"wilfully"