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Flag Desecration: Illegal Conduct or Protected Expression?

[The American flag] signifies government resting on the consent of the governed; liberty regulated by law; the protection of the weak against the strong; security against the exercise of arbitrary power; and absolute safety for free institutions against foreign aggression.¹

The extent to which the government may control nonverbal expression is a difficult problem, especially when our flag is part of such expression. The flag, as the symbol of our nation, has become integrally associated with patriotism and freedom.² Because of its strong psychological impact,³ the flag is an excellent method of conveying economic, social, and political ideas.⁴ Consequently, it has been used in a wide variety of ways to express ideas. This widespread use of the flag has resulted in the enactment of flag desecration statutes designed to punish certain conduct with respect to the flag. Today, every state and the federal government have enacted flag desecration statutes.⁵ Approximately 30 of the state laws contain the following language: "[N]o person shall publicly mutilate, deface, defile, defy, trample upon, or by word or act cast contempt upon such flag . . . ."⁶

Because flag statutes contain such broad language, their enforcement and interpretation has been far from uniform. Some courts, reading the statutes very expansively, have found that they prohibit a wide variety of conduct involving the flag.⁷ Other courts have taken

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¹ Halter v. Nebraska, 205 U.S. 34, 43 (1907).
² Id.
³ See United States v. Ferguson, 302 F. Supp. 1111 (N.D. Cal. 1969): "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." Id. at 1114.
⁶ For a complete list of the state flag desecration statutes, see Hearings on H.R. 271 Before the Subcomm. on Desecration of the Flag of the House Comm. on the Judiciary, 90th Cong., 1st Sess., ser. 4, at 324-46 (1967). See also Note, Flag Burning, Flag Waving and the Law, 4 VALPARAISO L. REV. 345, 362-67 (1970), where the author has listed most of the current data on these statutes. The language quoted in the text is part of section 3 of the Uniform Flag Act. The Act is set out in 9B UNIFORM LAWS ANN. 51-54 (1966). See note 16 infra.
a narrower view, and several courts have recently found flag desecration statutes unconstitutionally overbroad. This Note will examine the development of flag desecration statutes and the constitutional problems they entail.

I. History

Flag legislation was originally enacted to curtail disrespect for and commercial use of the flag. At the turn of the century, the


A comparison of People v. Keough, 61 Misc. 2d 762, 305 N.Y.S.2d 961 (Monroe County Ct. 1969) with People v. Von Rosen, supra, clearly demonstrates the lack of uniformity in the application of the flag statutes. Both cases involved the publication of a picture of a nude woman partially covered with a flag, yet the courts, interpreting similar statutes, reached opposite conclusions on whether this act constituted flag desecration. For a more detailed comparison of these two cases, see note 25 supra.

Courts are becoming aware of the nonuniform application of the flag statutes. Time magazine recently reported the following case:

Does it desecrate the American flag to sit on it? Not, presumably, when the sitter is Raquel Welch. Hauled into a Philadelphia Court for having a picnic on a flag, five young men defended themselves with a photo of Raquel's noteworthy anatomy cradled in the stars and snuggled in the stripes. Municipal Judge Robert A. Latrone was impressed. "Do we condone that and prosecute these defendants?" he asked. "When she cloaks herself in the flag, is she glamorizing the flag or desecrating it?" Case dismissed. TIME, Nov. 2, 1970, at 34.


10 See Commissioners' Prefatory Note to Uniform Flag Act, in 9B UNIFORM LAWS ANN. 48-50 (1966). It appears that the initial impetus for flag desecration statutes occurred during the presidential campaign of 1896, when overzealous political followers destroyed party emblems which had been attached to the flag. Id. at 48.
Supreme Court of Illinois, in *Ruhstrat v. People*, 1 examined the Illinois flag statute, which prohibited commercial use of the flag, and stated that unless it promoted the public health, safety, or welfare, it could not constitutionally be used to interfere with the personal liberty of individuals. The court in *Ruhstrat* concluded:

> It is difficult to see how the flag law . . . tends in any way to promote the safety, welfare, or comfort of society . . . [Commercial use of the flag] may violate the ideas which some people have of sentiment and taste, but the propriety of an act, considered merely from the standpoint of sentiment and taste, may be a matter about which men of equal honesty and patriotism may differ.2

But in 1907, in *Halter v. Nebraska*, 3 the United States Supreme Court took an opposite view, holding that commercial use of the flag could be constitutionally prohibited.4 The Court reasoned that the state has the power to "provide not only for the health, morals and safety of its people, but also for the common good, as involved in the well-being, peace, happiness and prosperity of its people."5

Thus, the *Halter* Court found that a state may enact legislation to encourage patriotism by preventing the degradation and cheapening of the flag through commercial use. Ten years later the Uniform Flag Act 6 was drafted by the National Conference of Commission-

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185 Ill. 133, 57 N.E. 41 (1900). The defendant in *Ruhstrat* used the flag to help advertise cigars.

12 *Id.* at 143, 57 N.E. at 44.

13 205 U.S. 34 (1907).

14 "[W]e cannot hold that any privilege of American citizenship or that any right of personal liberty is violated by a state enactment forbidding the flag to be used as an advertisement on a bottle of beer." *Id.* at 42.

15 *Id.* at 41.

16 The Act is set out in 9B UNIFORM LAWS ANN. 51-54 (1966). It provides in part:

§ 1. Definition. — The words flag, standard, color, ensign or shield, as used in this act, shall include any flag, standard, color, ensign or shield, or copy, 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
ers on Uniform State Laws. This Act has been adopted by approximately 30 states and has served as a model for the remaining state flag desecration statutes.\textsuperscript{17}

The courts have advanced two primary rationales for sustaining the validity of flag desecration statutes. The first rationale includes upholding the dignity of the flag,\textsuperscript{18} maintaining love for the country,\textsuperscript{19} and instilling loyalty and patriotism.\textsuperscript{20} The second rationale is that flag desecration might or will lead to breaches of the peace.\textsuperscript{21}

The far-reaching application of these two policy rationales can be seen in the wide variety of situations in which flag desecration statutes have been enforced.\textsuperscript{22} Although some courts have emphasized that flag statutes were designed to preserve respect for the flag, and thus have upheld flag desecration convictions where there was little likelihood of a breach of the peace, these courts generally agree that the public order rationale must also be considered when the justifications for flag statutes are examined.\textsuperscript{23} The public order rationale

\textsuperscript{17} Note, supra note 6, at 362-67.

\textsuperscript{18} See People v. Picking, 23 N.Y.S.2d 148 (Magis. Ct. 1940).


\textsuperscript{22} See cases cited notes 7-8 supra. Recently people have been charged with flag desecration because they burned the flag. See People v. Street, 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 (1969); United States v. Ferguson, 302 F. Supp. 1111 (N.D. Cal. 1969); People v. Burton, 27 N.Y.2d 198, 265 N.E.2d 66, 316 N.Y.S.2d 217 (1970). But cf. State v. Turner, ___ Wash. 2d ___, 474 P.2d 91 (1970), where the court, sitting en banc, held that the state must show the defendant intended to cast contempt upon the flag when he burned it; merely showing that he performed the physical act, with no proof of intent, was not enough to sustain a conviction.

is certainly applicable in cases where the defendant has engaged in acts which would create a likelihood of violence, such as publicly burning or ripping the flag. It is more difficult, however, to conceive of violence resulting from conduct such as wearing flags or publishing photographs of a person wearing a flag. Yet some courts have upheld convictions where the defendants have engaged in only these latter activities. As long as flag desecration statutes are used to control one's attitude along with his conduct, they will continue to be applied very broadly.

II. CONSTITUTIONAL PROBLEMS RAISED BY FLAG DESECRATION STATUTES

A. Is "Flag Desecration" Protected Speech?

The initial inquiry in this area is whether symbolic conduct involving the flag can be considered protected speech under the first amendment. Currently the case law is divided, but many courts have...
held that "flag desecration" cannot be considered protected speech.\textsuperscript{27} In recent years, the Supreme Court has had at least four opportunities to resolve this issue, but has failed to do so.

In \textit{Hinton v. State},\textsuperscript{28} a group of civil rights marchers lowered the United States and Georgia flags to half-mast to symbolize a state of mourning. The marchers then lowered the flags to the ground, tore them apart, and shook the pieces in the faces of the police. The defendants were found guilty of flag desecration and appealed their conviction to the United States Supreme Court. In a per curiam decision, \textit{Anderson v. Georgia},\textsuperscript{29} the Supreme Court did not reach the issue of flag desecration, finding that the defendants' convictions must be reversed because of improper jury selection.

In the second case, \textit{Street v. New York},\textsuperscript{30} the defendant, upon hearing that James Meredith had been shot, went to an intersection and burned his flag, saying that we no longer need the United States flag. The Supreme Court reversed Street's conviction because of the possibility that it was at least partially based on constitutionally protected verbal speech. The Court stated that Street's \textit{words which had cast contempt upon the flag could not be punished}. The Court then added: "[W]e resist the pulls to decide the constitutional issues involved in this case on a broader basis than the record before us imperatively requires."\textsuperscript{31} Thus, the \textit{Street} Court expressly refused to consider whether Street could have been convicted solely on the basis of his \textit{act} of flag burning.

In \textit{Cowgill v. California},\textsuperscript{32} the Supreme Court again avoided the issue of whether flag desecration is symbolic expression protected by the first amendment, this time by dismissing the appeal. Mr. Justice Harlan, joined by Mr. Justice Brennan, explained in a concurring opinion that although he considered the question whether flag desecration is symbolic expression a substantial one, the lower court record in \textit{Cowgill} was inadequate to decide the issue.

In the most recent flag desecration case, \textit{Radich v. New York},\textsuperscript{33} the Supreme Court upheld the defendant's conviction by a four to four vote with Mr. Justice Douglas abstaining. Because the Supreme

\textsuperscript{27} See, e.g., cases cited note 7 supra.
\textsuperscript{29} 390 U.S. 206 (1968).
\textsuperscript{31} Id. at 581.
Court was equally divided and wrote no opinion, the Court's dispo-

sition of the Radich case has no precedential value. As a result, the status of flag desecration as constitutionally protected symbolic speech remains uncertain. The Radich case presented the Court with the clear opportunity to resolve the issue of flag desecration as sym-
bolic speech. Radich, an art dealer, was convicted of exhibiting art pieces which "desecrated" the flag. These art pieces prominently incorporated the United States flag in several settings, including the flag in the shape of a phallic symbol and in the shape of a human body hanging from a yellow noose. Though no verbal speech was involved, both the artist and the dealer contended that the purpose of the exhibit was to protest against the Vietnam war. In affirming Radich's conviction, the New York Court of Appeals rejected his argument that his conduct was protected under the first amendment, finding that the purpose of the flag statute was not to suppress ideas, but rather was to preserve the public order.

In a dissenting opinion, Chief Judge Fuld rejected the majority's contention that any danger to the public order resulted from Radich's display of antiwar art. He emphasized that in the quiet at-

mosphere of Radich's upstairs Madison Avenue art gallery, there was no danger to the public order. Judge Fuld further stated: "It is evident that the only reason why these works ... were singled out for prosecution was not because the flag was used in the sculptures but solely because of the particular political message which those sculptures were intended to convey."

The Supreme Court has long recognized that nonverbal expres-
sion such as picketing, sit-ins, and symbolic protests communicates ideas and should be considered symbolic speech protected by the first amendment. But in addition to the limitations which may

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34 See Ohio ex rel. Eaton v. Price, 364 U.S. 263 (1960) (per curiam), where Mr. Justice Brennan stated:
The judgment ... is being affirmed ex necessitate, by an equally divided Court. Four of the Justices participating are of opinion that the judgment should be affirmed, while we four think it should be reversed. Accordingly, the judgment is without force as precedent. The Antelope, 10 Wheat. 66, 126; Etting v. Bank of the United States, 11 Wheat. 59, 78. In such circum-
stances, as those leading cases indicate, the usual practice is not to express any opinion, for such an expression is unnecessary where nothing is settled. Id. at 263-64.


36 Id. at 128, 257 N.E.2d at 39, 308 N.Y.S.2d at 857.

be placed on verbal speech,\textsuperscript{38} there are further limitations placed on symbolic speech.\textsuperscript{39} The Court does not feel that whenever conduct communicates an idea, it should be afforded the same first amendment protection as pure speech.\textsuperscript{40}

In \textit{United States v. O'Brien},\textsuperscript{41} the Supreme Court upheld the defendant's conviction for burning his draft card.\textsuperscript{42} The defendant argued that his act was constitutionally protected symbolic speech because it demonstrated his opposition to the war and the draft. Assuming that the draft card burning was symbolic speech, the \textit{O'Brien} court established a test to determine when governmental restriction of symbolic speech is justified. The Court stated that the government can constitutionally regulate conduct where speech and nonspeech elements are combined if

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the government regulation is within the constitutional power of the Government; if it furthers an important or substantial governmental
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it clear that picketing and parading may nonetheless constitute methods of expression entitled to First Amendment protection." 394 U.S. at 152. In Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 313-14 (1968), and Thornhill v. Alabama, 310 U.S. 88, 104 (1940), the Court found that picketing contained speech elements. \textit{See also} Drivers Union Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941), where Mr. Justice Frankfurter stated that "peaceful picketing is the workingman's means of communication." \textit{Id.} at 293. In Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969), the Supreme Court held that the wearing of black armbands by high school students was constitutionally protected. Specifically, the Court stated that the wearing of black armbands "was closely akin to 'pure speech' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment." \textit{Id.} at 505-06. In Brown v. Louisiana, 383 U.S. 131, 141-42 (1966) (sit-in at library), Garner v. Louisiana, 368 U.S. 157, 201-02 (1961) (sit-in at lunch counter), and Stromberg v. California, 283 U.S. 359, 369 (1931) (raising a red flag), the Court found that the challenged conduct had speech overtones and thus was protected under the Constitution.

\textsuperscript{38}See \textit{Feiner v. New York}, 340 U.S. 315 (1951) (speech limited when it caused imminent danger of violence among the listeners); Kovacs v. Cooper, 336 U.S. 77 (1949) (speech limited to protect homes or businesses from sound trucks); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (speech limited when it contained fighting words).

\textsuperscript{39}See, \textit{e.g.}, \textit{Adderley v. Florida}, 385 U.S. 39 (1966) (civil rights demonstrators could not interfere with state activities by protesting on the jail grounds); United States v. Eberhardt, 417 F.2d 1009 (4th Cir. 1969), \textit{cert. denied}, 397 U.S. 909 (1970) (individuals protesting against the draft did not have the right to pour blood on Selective Service files). The \textit{Eberhardt} court noted that "[i]f one elects to engage in conduct as symbolic speech he must limit himself to lawful conduct; he is not entitled to commit criminal acts with impunity, even in order to communicate ideas." \textit{Id.} at 1014.

\textsuperscript{40}See \textit{Cox v. Louisiana}, 379 U.S. 536 (1965), where the Court stated: "We emphatically reject the notion \ldots that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech." \textit{Id.} at 555.

\textsuperscript{41}391 U.S. 367 (1968).

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.43

The O'Brien Court found first that Congress could legislate in the selective service area through its power to raise and support armies; second, that the federal statute prohibiting the mutilation or destruction of draft cards was necessary if the Selective Service System was to function smoothly and efficiently; and third, that the statute was not designed to suppress free expression, but only to prevent harm to the efficient functioning of the Selective Service System. But the Court did not discuss the fourth part of its test. Mr. Justice Douglas stated in his dissent that although the draft statute may be necessary in a wartime draft, it was questionable whether it was essential in a peacetime draft situation. Thus, in light of the fourth element of the Court's test, it is arguable that O'Brien's conviction should not have been sustained.

In examining whether flag desecration should be granted first amendment protection as symbolic speech, it is, of course, first necessary to determine when conduct attains the status of symbolic speech. Several writers have suggested that the following criteria be considered to determine whether conduct should be considered symbolic speech: "First, the actor must be motivated only by the desire to communicate. Second, the conduct must be capable of being understood by others as communication."44 Under this kind of test, as long as a person intended to communicate an idea through conduct which could be understood as communication, his conduct would receive first amendment protection as symbolic speech.45

Symbolic speech involving "desecration" of the flag presents special problems created by the esteemed position the flag occupies in American society. But respect for the flag should not preclude first amendment protection for the "flag desecration" type of symbolic

43 391 U.S. at 377.
44 Note, Symbolic Conduct, 68 COLUM. L. REV. 1091, 1109 (1968); see Henkin, On Drawing Lines, 82 HARV. L. REV. 63 (1968), where the author states: "If [the conduct] is intended as expression, if in fact it communicates, especially if it becomes a common comprehensible form of expression, it is 'speech.'" Id. at 80.
45 See also People v. Radich, 26 N.Y.2d 114, 257 N.E.2d 30, 308 N.Y.S.2d 846 (1970), aff'd by an equally divided court, 39 U.S.L.W. 3422 (U.S. Mar. 24, 1971): "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 has been expressed, instead, through the medium of sculpture." Id. at 127-28, 257 N.E.2d at 38, 308 N.Y.S.2d at 856 (dissenting opinion).
speech. In *West Virginia State Board of Education v. Barnette*, the Supreme Court declared unconstitutional a law that required school children to salute the flag and repeat the pledge of allegiance. The Court said: "The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own." Even so, the *Barnette* Court realized that the "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." Thus, when conduct involving the flag is intended to communicate an idea and can be understood by others as communication, this conduct should receive the same first amendment protection as other forms of symbolic speech.

Whether symbolic speech involving the flag is protected by the first amendment depends on an application of the *O'Brien* test. Recently, in *Crosson v. Silver*, a three-judge district court applied the *O'Brien* test to determine whether Sharon Crosson's act of publicly burning the United States flag during a University of Arizona anti-war demonstration was protected by the first amendment. The court in *Crosson* began by deciding "something *O'Brien* assumed, namely, whether the conduct drawn into question by the subject statute is conduct 'so intertwined with expression' as to bring the First Amendment into play. . . . Plaintiff asserts, and we agree, that her act of publicly burning the flag was symbolic speech." The court then stated: "[W]e think it is self-evident that most, if not all, conduct associated with the United States flag is symbolic conduct." After finding that Crosson's act of flag burning was symbolic speech, the court looked to the *O'Brien* test to determine whether

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46 *319 U.S. 624 (1943).*


48 *319 U.S. at 641; cf. *Parker v. Morgan, 322 F. Supp. 585 (W.D.N.C. 1971),* where the court observed: "Enacted in 1917 during a period of national chauvinistic fervor, it [the North Carolina flag statute] 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." *Id.* at 586-87.

49 *319 U.S. at 642.


51 *Id.* 1086 (citation omitted).

52 *Id.* See also *Hodsdon v. Buckson, 310 F. Supp. 528, 533 (D. Del. 1970)* (judicial notice taken of the symbolic significance of the United States flag).
this conduct was constitutionally protected. The *Crosson* court found that the first element of the *O'Brien* test (whether the regulation is within the constitutional power of the government) was satisfied under the state's police power. With respect to the second element (whether the regulation furthers an important governmental interest), the court only considered what governmental interest there was in regulating the nonspeech element of the act — the physical act of flag desecration. This nonspeech element has a dual impact. The first impact is that the flag is mutilated or destroyed; the second impact is that the emotions of the viewers, either of approval, disapproval, or indifference, are affected. The *Crosson* court stated that in order to meet the second requirement of the *O'Brien* test, there must be a finding that the state has a substantial interest in preventing one or both of these impacts. The court examined these dual impacts, and found first that the state has "no property interest in the flag sufficient to support a prohibition against . . . physical desecration of the flag." With respect to the second impact, the court stated:

> We find nothing inherent in the act [of flag desecration] which stimulates those viewers who sympathize with the aims of the desecrator to engage in unlawful acts, such as rioting. Nor is the protection of the "sensibilities of passersby" the proper concern of the state.

But this finding does not mean that the state "could not validly find that certain types of public flag desecration are so inherently inflammatory that in and of themselves they are likely to provoke the average person to retaliation and thereby cause a breach of the peace." Thus, the court found that the statute satisfied the second element of the *O'Brien* test because of the state's substantial interest in preventing breaches of the peace. And because it is one of the impacts of the nonspeech element that causes the breach, the conduct is not related to the suppression of free expression. Therefore the statute satisfies the third part of the *O'Brien* test (whether the governmental interest is unrelated to the suppression of free expression).

Under the first three elements of the *O'Brien* test, it is clear that the state may restrict certain conduct involving the flag. To deter-

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53 319 F. Supp. at 1087-88. The court further explained: "[W]e read *Street* as holding that the State cannot justify such a prohibition in order to insure that the potential desecrator shows proper respect for the flag." *Id.* at 1088.

54 *Id.* at 1088.

55 *Id.*
mine whether the fourth part of the O'Brien test (whether the incidental restriction on alleged first amendment freedoms is greater than is essential to further the governmental interest) is satisfied, one must look to the specific flag statute involved. The flag desecration statute in Crosson,56 and the majority of such statutes,57 would penalize one who publicly mutilates, defaces, defiles, tramples upon, or by word or act casts contempt upon the United States flag. The Crosson court found that the word "contempt" was all-encompassing and as such could prohibit "acts, which are clearly symbolic speech, [and] do not affect the only legitimate state interest underlying such a prohibition."58 The court thus held that the Arizona flag desecration statute was unconstitutionally overbroad.59

B. Lack of Intent

Most flag desecration statutes do not require the element of intent.60 This absence of intent has not caused the courts much difficulty, however; most of them have either failed to consider the issue or have summarily dismissed it.61 In Radich v. New York,62 the defendant testified that neither he nor the artist intended to defile or cast contempt upon the flag, but were merely pointing out that in their opinion others were contemning the flag through the commis-

56 ARIZ. REV. STAT. ANN. § 41-793 (1956).
57 See notes 16-17 supra & accompanying text.
58 319 F. Supp. at 1089.
59 Three other states have had either all or part of their flag statutes struck down as unconstitutionally overbroad. See cases cited note 9 supra.
60 Only 11 states and the federal government include the element of intent in their flag desecration statutes. See Note, Flag Burning, Flag Waving and the Law, 4 VALPARAISO L. REV. 345, 362-67 (1970).
61 See State v. Schlueter, 127 N.J. 496, 23 A.2d 294 (1951). In Schlueter a young woman was convicted of flag desecration because she took a small United States flag from the front of her motorcycle, crumbled it, and threw it to the ground. In upholding her conviction, the court noted that the statute did not require that the act be done willfully or with evil intent, but that the forbidden act was completed when done. This reasoning was cited with approval in Hoffman v. United States, 256 A.2d 567, 570 (D.C. Ct. App. 1969). But see State v. Turner, ___ Wash. 2d ___, 474 P.2d 91 (1970), where the court held that the defendant must be allowed to defend a charge of burning the flag by showing that "his purpose in committing the acts was neither to deface, nor to defile, nor to desecrate, nor to cast contempt upon the flag ...." 474 P.2d at 96. See also Street v. New York, 394 U.S. 576 (1969), where Chief Justice Warren said that intent is a necessary element of the state's case when the prosecution is for flag desecration. Id. at 599 (dissenting opinion).
sion of aggressive acts in its name.\textsuperscript{63} The \textit{Radich} majority disposed of the contention that intent was a necessary element of the crime of flag desecration with the following statement: "Another argument is addressed to the factor of intent; but even if we assume that defendant has an honest political intent in exhibiting these constructions, or that he had no intent at all, that element is not essential to a conviction of violating a statute which is \textit{malum prohibitum}."\textsuperscript{64} To support this statement the \textit{Radich} majority cited two New York strict liability cases, one dealing with selling liquor to minors\textsuperscript{65} and the other with selling adulterated milk.\textsuperscript{66}

The \textit{Radich} majority incorrectly analogized flag desecration statutes to strict liability public welfare offenses. The rationale underlying public welfare statutes is that in order to protect the public, the highest standard of care must be required from those who sell such potentially dangerous items as food, drugs, and liquor and who are the only ones in a position to take necessary precautions.\textsuperscript{67} This rationale is not applicable to flag desecration statutes. Thus, even assuming that flag desecration statutes are \textit{malum prohibitum}, this alone does not justify removing the element of intent. And at least one court has said that flag desecration statutes are \textit{malum in se} because the prohibited conduct involves moral turpitude.\textsuperscript{68} In this context, one commentator has pointed out:

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[C]ourts following the false analogy of the public welfare offenses may now and again similarly relax the \textit{mens rea} requirement, particularly in the case of unpopular crimes, as the easiest way to secure desired convictions. . . .

It is no answer that judges convinced of the actual moral inno-
\end{quote}

\textsuperscript{63} Id. at 126, 257 N.E.2d at 37, 308 N.Y.S.2d at 855.


\textsuperscript{65} People v. Werner, 174 N.Y. 132, 134, 66 N.E. 667, 668 (1903).

\textsuperscript{66} People v. Kibler, 106 N.Y. 321, 322-23, 12 N.E. 795, 796 (1887).


\textsuperscript{68} State v. Turner, 320 Wash. 2d 82, 474 P.2d 91 (1970). The court stated: [A]s we read the flag desecration statute [the Washington statute was identical to the New York statute in \textit{Radich}] applied either to a principal or to one who aids and abets in its violation, it does not define crimes \textit{mala prohibita} but rather offenses \textit{mala in se}. In essence, to defile or hold up to contempt is conduct involving moral turpitude. Therefore, to sustain a conviction of desecrating the flag . . . the acts must have been done knowingly and intentionally with the intent or purpose of . . . desecrating it or holding it publicly up to contempt. 474 P.2d at 94-95.
cence of the defendant may impose only a nominal punishment. The harm is wrought through the conviction itself and through the subjection of innocent men to the possibility of having imposed upon them by some ignorant or prejudiced judge the substantial punishment which the crime allows. For true crimes it is imperative that courts should not relax the classic requirement of the mens rea of guilty intent.\(^6\)

There is an even stronger reason, however, why intent should be an element of the crime of flag desecration. When a "flag desecrator's" actions acquire the status of symbolic speech,\(^7\) they are protected by the first amendment.\(^7\) And if intent is not an element of an offense involving first amendment rights, freedom of expression may be unduly restricted. The Supreme Court recognized the possibility of such a limitation on first amendment rights in Smith v. California,\(^7\) where it reversed the conviction of a bookseller charged with selling obscene material. The ordinance under which the bookseller was convicted did not contain the element of intent. The Court found that if the ordinance fulfilled its purpose, a bookseller, because of the danger of criminal liability, would restrict his sales to books he had inspected. Thus, it found the ordinance unconstitutional on the ground that it tended to severely limit the public's access to constitutionally protected reading material. In reference to the analogy to public welfare offenses, the Court stated:

> The usual rationale for such [strict liability] statutes is that the public interest in the purity of its food is so great as to warrant the imposition of the highest standard of care on distributors . . . . There is no specific constitutional inhibition against making distributors of food the strictest censors of their merchandise, but the constitutional guarantees of the freedom of speech . . . stand in the way of imposing a similar requirement on the bookseller.\(^7\)

Thus, it seems clear that when the first amendment is involved, a statute may not remove the element of intent. This is just as true in a prosecution for selling "flag desecrating" war protest art as in one for selling obscene books. In fact, in the former situation the statute directly inhibits freedom of speech by imposing penalties on the symbolic speaker, whereas in the Smith case, the public's first amend-

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69 Sayre, Public Welfare Offenses, 33 Colum. L. Rev. 55, 79-80 (1933) (footnotes omitted).
70 See notes 44-45 supra & accompanying text.
71 See note 37 supra & accompanying text.
72 361 U.S. 147 (1959).
73 Id. at 152-53.
C. Overbroadness

A second constitutional obstacle facing flag desecration statutes is overbroadness. A three-judge district court in Hodsdon v. Buckson\textsuperscript{74} has recently examined the problem of overbroadness in the context of flag desecration statutes. The Hodsdon court defined overbroadness as "the statutory result when the legislature, having the power to regulate certain conduct, strikes so bluntly as to prescribe constitutionally protected conduct as well."\textsuperscript{75}

In Hodsdon, the defendant was indicted under Delaware's flag desecration statute\textsuperscript{76} for casting contempt upon the United States flag by displaying it improperly. Hodsdon had flown the United States flag at half-mast on the left side of his house while flying the United Nations flag at full-mast, in the position of honor, on the right side of his house. His purpose in displaying the flag in this manner was to express his displeasure with the United States involvement in Vietnam and with various civil injustices existing in this country. After Hodsdon was indicted, he instituted an action for declaratory and injunctive relief in a federal district court, claiming that the Delaware statute abridged his right of free speech and was unconstitutionally vague.

In granting Hodsdon declaratory relief, the three-judge court stated that "[t]he failure of the legislature to regulate with particularity and specificity in this not too clearly charted area of First Amendment rights poses a danger of chilling vigorous and important debate and compels the Court to hold the statute unconstitutional."\textsuperscript{77}

\textsuperscript{74} 310 F. Supp. 528 (D. Del. 1970).

\textsuperscript{75} Id. at 532; see Note, The First Amendment Overbreadth Doctrine, 83 HARV. L. REV. 844 (1970). See also Giaccio v. Pennsylvania, 382 U.S. 399 (1966), where the Supreme Court discussed the closely related problem of vagueness:

\begin{quote}
It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case. Id. at 402-03.
\end{quote}

As Mr. Justice Harlan pointed out in his concurring opinion in Zwickler v. Koota, 389 U.S. 241, 257 (1967), the Supreme Court has yet to precisely define the substantive difference between "overbreadth" and "vagueness." In Hodsdon, the court used the term overbreadth, but at times was speaking of both overbreadth and vagueness.

\textsuperscript{76} DEL. CODE ANN. tit. 11, § 532 (Supp. 1968); see text accompanying note 84 infra.

\textsuperscript{77} 310 F. Supp. at 536.
The court reasoned that the statute was capable of sweeping and improper application and must fall because it inhibited the flow of constitutionally protected expression. This sweeping power enabled the flag statute to regulate the expression of attitudes toward the government and as such was unconstitutionally overbroad. The Hodsdon court pointed out that "[u]nlike the [draft card burning] statute sustained in O'Brien, narrowly drawn and clearly directed to the preservation of a national administrative scheme, this law encompasses acts which bear no relation to any interest within the legislative competence and which are intended and understood as symbolic speech." 

The court then combined the holding of West Virginia State Board of Education v. Barnette, that the government cannot require a gesture of adherence towards the United States flag, with the holding of Stromberg v. California, that states cannot prohibit the display of a red flag used to symbolize opposition to organized government, and concluded:

[T]he punishment of peaceful symbolic acts rejecting the political ideals bespoken by the flag is as alien to the mandate of the First Amendment as is compulsion to signify adherence. That this statute proceeds, heedless of the guarantee of that amendment, to proscribe such acts determines its invalidity.

The Hodsdon court's conclusion that Delaware's flag statute was overbroad was not unwarranted. The unlimited scope of flag desecration statutes is readily apparent when one examines the wide diversity of situations in which such statutes have been applied. The Hodsdon case demonstrates the need for legislatures to narrowly define what is meant by flag desecration, avoiding such broad language as "whoever publicly mutilates, defaces, defiles, defies, tramples upon or casts contempt either by word or act, upon [the United States flag] shall be fined . . . ." 

Hodsdon was the first case in over 65 years to declare a flag desecration statute overbroad.

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78 The Court emphasized that the first amendment "guarantees the right to express . . . attitudes [even of defiance and contempt] toward the government, and it is the strength of our democracy that they are tolerated in almost all their public manifestations." Id. at 534.

79 Id.

80 319 U.S. 624 (1943).

81 283 U.S. 359 (1931).

82 310 F. Supp. at 535.

83 See cases cited notes 7-8, 22 supra.

84 DEL. CODE ANN. tit. 11, § 532 (Supp. 1968). Section 532 is practically identical to section 3 of the Uniform Flag Act, which is set out in note 16 supra.
Flag desecration statute unconstitutional. Three other courts have recently struck down state flag desecration statutes because the flag statutes were unconstitutionally overbroad. But until the Supreme Court finally resolves this issue, the broad, nonuniform application of these statutes will continue.

III. Conclusion

In Radich, the Supreme Court had an opportunity to lend some much needed clarity to the flag desecration area. But because Radich was decided by an equally divided court without an opinion and thus has no precedential value, the confusion surrounding the flag statutes remains. If the Supreme Court hears another flag desecration statute unconstitutional. Three other courts have recently struck down state flag desecration statutes because the flag statutes were unconstitutionally overbroad. But until the Supreme Court finally resolves this issue, the broad, nonuniform application of these statutes will continue.

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cation case, it could choose to narrow the application of these statutes by holding that one must intend to desecrate the flag to be guilty of flag desecration. But although requiring intent would result in the toleration of more kinds of expression involving the flag, in some cases it would not go far enough to afford complete first amendment protection. Neither reading in the element of intention nor restrictively interpreting the all-inclusive language contained in flag statutes would cure the defect of overbroadness present in these statutes. The four courts that have held flag desecration statutes unconstitutional have done so because these statutes can and have been used to restrict constitutionally protected symbolic expression. As the Court stated in Thornhill v. Alabama:

The existence of [an overbroad] statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting offi-

80 As long as Mr. Justice Douglas continues to abstain in flag desecration cases, however, it is unlikely that the present Court will agree to hear another flag case. But because the Court did not write an opinion in Radich, the Justices' positions on the flag desecration issue remain flexible. As Mr. Justice Brennan noted in Ohio ex rel. Eaton v. Price, 364 U.S. 263 (1960): "The usual practice of not expressing opinion upon an equal division [of the Court] has the salutary force of preventing the identification of the Justices holding the differing views as to the issue, and this may well enable the next case presenting it to be approached with less commitment." Id. at 264.


91 See Hodsdon v. Buckson, 310 F. Supp. 528 (D. Del. 1970), where the court stated that no conceivable construction, not even reading in intent, could make the Delaware flag statute constitutional. Id. at 531.

92 Several courts have narrowly interpreted flag desecration statutes in order to uphold their constitutionality. In deciding whether a decal with a peace sign superimposed on a flag came within the prohibitions of the New York flag statute (N.Y. GEN. BUS. LAW § 136 (McKinney 1968)), a federal district court said: "If the words of this definition are to be taken literally, they could describe an object which is not an American flag." Long Island Vietnam Moratorium Committee v. Cahn, 322 F. Supp. 559, 563 (E.D.N.Y.), aff'd on other grounds, 437 F.2d 344 (2d Cir.), cert. denied, 400 U.S. 956 (1970). Only by reading the statute in a restrictive manner was the court able to hold it constitutional. On appeal, however, the section of the statute at issue was declared unconstitutional on its face. Long Island Vietnam Moratorium Committee v. Cahn, 437 F.2d 344 (1970), cert. denied, 400 U.S. 956 (1970). In another case, an Ohio court used an ejusdem generis argument to find that the defendant did not desecrate the flag within the meaning of the Ohio flag statute (OHIO REV. CODE ANN. § 2921.05 (Page Supp. 1970)) by wearing a flag as a cape to protest American policy in Vietnam. State v. Saionz, 23 Ohio App. 2d 79, 216 N.E.2d 135 (1965). And in Commonwealth v. Janoff, 439 Pa. 212, 266 A.2d 657 (1970), the court found that printing the words "Make Love Not War" and "The New American Revolutionaries" on a United States flag used in an anti-Vietnam War rally did not desecrate the flag within the meaning of the Pennsylvania flag desecration statute. PA. STAT. ANN. tit. 18, § 4211 (1963). It found the defendant's conduct was exempted from the statute because patriotic demonstrations were not covered by the Pennsylvania flag desecration statute.

93 See cases cited note 9 supra.

94 310 U.S. 88 (1940).
cials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview. It is not any the less effective or, if the restraint is not permissible, less pernicious than the restraint on freedom of discussion imposed by the threat of censorship.\textsuperscript{95}

Thus, the only truly satisfactory solution to this problem would be for the Supreme Court to strike down flag desecration statutes as being unconstitutionally overbroad.

If the Supreme Court, in the future, declares the present flag desecration statutes unconstitutional, many states will want to enact new flag legislation. In order for this legislation to be constitutional, it should meet the following criteria: First, the new statute must be drafted to protect only an actual flag; in defining a flag, the statute should exclude such items as "flag" decals and "flag" clothing.\textsuperscript{96} Second, the statute must specifically require the element of intent. Third, and most important, the statute must narrowly define what conduct is prohibited. As the court in \textit{Hodsdon} emphasized, the legislature must "regulate with particularity and specificity in this not too clearly charted area of First Amendment rights . . . .\textsuperscript{97} In addition, when the legislatures are designating the kinds of conduct that flag desecration statutes prohibit, they must remember that the state's interest in preventing breaches of the public peace is the only constitutionally permissible rationale upon which these statutes can be based.\textsuperscript{98} The following is a suggested example of the type of statute which should survive a constitutional attack:

\begin{quote}
No person shall willfully and in public burn, trample upon, tear, or otherwise physically destroy the United States flag or the flag
\end{quote}

\textsuperscript{95} Id. at 97-98.

\textsuperscript{96} See Parker v. Morgan, 322 F. Supp. 585 (W.D.N.C. 1971), where the court stated:

\begin{quote}
Thus we think for a flag control statute to be constitutional it must precisely define a flag and carefully avoid expropriation of color and form other than the defined emblem itself, e.g. it seems to us that red, white and blue trousers with or without stars are trousers and not a flag and that it is beyond the state's competence to dictate color and design of clothing, even bad taste clothing. The trouble with the North Carolina statute is that it attempts too much and goes much too far and infringes upon the reserved liberties of the people. We think it is void both for vagueness and overbreadth . . . .

We think the line must be drawn at the point of contemptuous physical contact with the clearly defined flag and that physical protection of the flag itself is the outermost limit of the state's legitimate interest. \textit{Id.} at 590.
\end{quote}

\textsuperscript{97} 310 F. Supp. at 536.

of this State where such act causes a breach of the public peace or where there is an immediate danger of such act causing a breach of the public peace.

Because a flag statute will have to assume the above form to be constitutionally permissible, it is questionable whether such a statute would be necessary. It can only prohibit acts which breach the public peace, and such acts are already proscribed under existing breach of the peace statutes.99 This fact will undoubtedly have little effect on state legislatures, however, which will still want to specifically “protect” the flag.100

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99 See, e.g., N.Y. PENAL LAW § 240.45 (McKinney 1967).

100 Flag legislation has been initiated or endorsed by many of the patriotic societies of the United States. See Commissioners' Prefactory Note to Uniform Flag Act, in 9B UNIFORM LAWS ANNOTATED 48-49 (1966). These organizations are still actively protecting the flag. See, e.g., Lapolla v. Dullaghan, 63 Misc. 2d 157, 311 N.Y.S.2d 435 (Sup. Ct. 1970), where the Veteran's Council was able to enjoin flying the American flag at half-mast to express sorrow for the four students killed at Kent State University and for the 40,000 Americans killed in Vietnam. See also United States Flag Foundation v. Radich, 53 Misc. 2d 597, 279 N.Y.S.2d 233 (Super. Ct. 1970). This case held that the United States Flag Foundation could sue Radich for damages because Radich had sold art which desecrated the flag. (See text accompanying notes 33-36 supra.) The court said: "[T]he desecration of our flag cannot be utilized as a symbolic act to display or exhibit disagreement with or opposition to the policies of our government. To permit such desecration under the guise of freedom of speech would certainly weaken, if not destroy, one of our most cherished symbols." Id. at 598-99, 279 N.Y.S.2d at 235.