1972

Flag Profanation and the Law

Emmet V. Mittlebeeler
Flag Profanation and the Law

By EMMET V. MITTLEBEELER

I. INTRODUCTION

Recent years have seen numerous deliberate acts of mutilation or destruction of one of the most cherished of all American emblems—the flag of the United States of America. These have been performed in public, often before a sympathetic crowd, and nearly always for the purpose of protesting a current policy or action of the government or a social practice or custom. Use of the flag or flag design in unconventional ways, as in clothing, decorations, and advertising, even where no political protest is intended, has also become prevalent.

Both types of flag abuse—"desecration"—have presented vexatious constitutional questions, especially in regard to freedom of expression. Questions about such freedom of course are not new but now they involve an especially unique and respected object—the flag. A widespread body of citizens venerates the flag with an almost religious fervor. Extreme adherents of this body in times past have sought to enforce outward respect, as by compelling the saluting1 or pledging of allegiance2 to the flag, in public schools. Incidents have been recorded in which private individuals, acting without color of law, have forced unpopular persons to manifest outward obeisance to the flag.3 To persons

---

1 The place of flag salute cases in American constitutional history is well known. The two principal Supreme Court decisions in this area are West Virginia State Board of Education v. Barnett, 319 U.S. 624 (1943), and the case which it overruled, Minersville School District v. Gobitis, 310 U.S. 586 (1940). See also D. MANWARING, RENDER UNTO CAESAR: THE FLAG SALUTE CONTROVERSY (1962).


3 See e.g., Ex parte Starr, 263 F. 145 (D. Mont. 1920) and Johnson v. State, 163 S.W.2d 153 (Ark. 1942). The tribulations of Jehovah's Witnesses in this respect have been widely publicized. See e.g., McKee v. State, 87 N.E.2d 940 (Ind. 1941).
who would exalt the flag into a kind of mystical reification of the nation, this writer—without pejorative implication—gives the name of the cult of vexillatry. Public defilement of the flag is anathema to the cult.

This article will examine in their most recent context, constitutional and legal issues arising from profanation of the flag of the United States. The principal question can be briefly stated thus: Can profanation of national flags be prohibited? This embraces two subordinate questions: Is profanation of a flag as a means of political protest protected as symbolic speech—a freedom covered by the First and Fourteenth Amendments? Can the non-destructive or non-mutilative use of flags and objects having some resemblance to flags, in unconventional ways, be regulated or prohibited in the absence of any overt attempt at political expression?

Physically, a flag is a piece of cloth, usually rectangular, and often attached to a pole or a staff. It is its symbolic nature, however, which gives rise to legal problems. A national flag is a unique chattel, which can be bought and sold in the open market, but for which special treatment is expected. In the United States the design of the flag is set forth by statute and executive order; a Flag Code prescribes the proper manner in which it is to be used; and statutes of fifty states, the District of Columbia, and the federal government prohibit acts of disrespect or profanation.

4 Vexillatry, meaning worship or veneration of the flag, has been coined for this article. It is derived from vexillum, Latin for banner or standard, and atraria, Latin suffix for worship, as found in idolatraria, Latin for idolatry. The second syllable should be accented.

5 "Profanation" is employed to mean disrespectful use, such as destruction, mutilation, defilement, commercial exploitation, improper display, or defacement. "Desecration" will not be used, except when necessary for legal precision or identification, or with quotation marks. Webster distinguishes profanation from desecration in that the former implies "irreverence or contempt as shown in vulgar intrusion or vandalism," the latter "a loss of sacred character, as though pollution, defilement, or reduction to secular usage." New International Dictionary of the English Language (2d ed.). Strictly speaking, the flag cannot be desecrated, because it has no sacred character. It can, however, be profaned. At this point, the writer gives his own reaction to flag profanation: as an act of personal conduct and morality, he condemns it.


Flag profanation has been prohibited in other countries; see a compilation of relevant German legislation in the appendix to State v. Turner, 478 P.2d 747 (Wash. 1970). Legislation of several countries forbidding the use of flags as trade-
The flag of the United States was adopted by a resolution of the Continental Congress of June 14, 1777;\(^7\) that resolution fixed the design which, in general form, has remained in effect. Establishment of the new governments under the Articles of Confederation in 1781 and the present Constitution had no effect on the flag, and statutory enactments on design have been surprisingly few. An act of 1794\(^8\) provided that upon the admission of a new state (Vermont and Kentucky had been admitted by that time) a star and a stripe should be added, but when it was realized that the unrestricted addition of stripes would produce a blurring and unsymmetrical effect, Congress provided in 1818\(^9\) that while the number of stars should equal the number of states, the number of stripes should remain at thirteen. Except for a codification in 1947\(^10\) there have been no other congressional enactments on design. Details on the number of stars, dimensions, color and miscellany are controlled by executive orders. The design of the flag now in use was fixed by President Eisenhower upon the admission of Hawaii, the fiftieth state.\(^11\)

II. FLAG PROFANATION LEGISLATION

A. Common Law

At common law flags enjoyed no special protection; no early cases of profanation for political purposes have been uncovered, but there is judicial authority that no one might claim a proprietary right in a representation of the flag as a trade mark, for it was open to use by anyone.\(^12\) A treatise on trademarks toward the close of the 19th Century recognized the use of the flag in advertising as legitimate:

---

(Continued on next page)

\(^7\) Jour. of the American Congress, Vol. II, at 165 (1823).
\(^8\) Act of January 13, 1794, ch. 1, 1 Stat. 341.
\(^12\) Johnson v. Hitchcock, 3 N.Y.S. 680 (1888), where the Supreme Court of New York County granted an injunction against the use by a competitor of a flag (Continued on next page)
Color may be of the essence of a mark of manufacture or commerce, known as a "trade-mark." National flags are sometimes blended with other objects to catch the eye. They are admirably adapted to all purposes of heraldic display, and their rich, glowing colors appeal to feelings of patriotism, and even purchases of the merchandise to which they are affixed... One flag printed in green may catch the eye of a son of the Emerald Isle... Another flag, with stars on a blue field and stripes of alternate red and white, may secure a preference for the commodity upon which it is stamped.\textsuperscript{33}

B. \textit{National Legislation}

Earliest agitation for national legislation against flag profanation seems to have been inspired by popular outcries against use of the flag for advertising, though flag mutilations and destructions as protests had occurred since early times. Beginning in the last quarter of the 19th Century bills appeared in Congress to forbid the use of flags for advertising and their being marked or lettered in the interest of candidates for political office.

Examination of congressional debates and committee reports from introduction of the first flag "desecration" bill shows that the use of the flag in protest gestures was not a major motivation for anti-profanation legislation. For example, when the American Flag Association endorsed S-229, then pending in the 57th Congress, it listed thirteen common acts of profanation, but all except one—"The flag has been stripped from the staff and torn to shreds and stamped upon by anarchists and others in excitement and anger"—related to political and commercial advertisements, use in clothing and costumes, and functional uses like employment as sacks.\textsuperscript{44} A leading abuse long before the Civil War was placing the names of candidates on flags, with the result that in melees

\textsuperscript{33} W. Browne, \textit{supra} note 6, at 275. But a Massachusetts statute (Stat. of 1903, ch. 195, Sec. 1) prohibiting the use of the arms or great seal of the state, and any representation of it, for any advertising or commercial purpose was upheld because of the state's proprietary right. Commonwealth v. R.I. Sherman Mfg. Co., 189 Mass. 76, 4 Ann. Cas. 268 (1905).

\textsuperscript{44} Hearings on S. 226, S. 596, S. 1220, and S. 3504 Before the Senate Comm. on Military Affairs, 57th Cong. 1st Sess. at 4 (1920).
involving hostile demonstrators, the flag often received rough treatment.\(^\text{15}\)

Use of the flag for clothing was also rampant; a speaker in 1898 deplored the fact that flags had been used as coats for black face minstrels, skirts for ballet dancers, trunks by prize fighters, and garb of circus clowns and professional bicycle riders, and had been made into hammocks, dog blankets, equine fly nets, sofa pillows and bed quilts.\(^\text{16}\)

Agitation against profanation reached its height in the early 1900’s, but sentiment in support of penal legislation was by no means unanimous. Voices were raised against prohibiting commercial use of the flag, and even the Chairman of the Senate Committee on the Judiciary declared in 1896 that while he had voted for a profanation bill on the floor, “the more I think of it the more there seems to be in the way of objection to any legislation on the subject. . . . It is a very difficult thing to deal with, and whether it would not be better to leave it to the good taste and good sense of private citizens I very much question.”\(^\text{17}\)

During World War I verbal flag abuse was prohibited. By a 1918 act it was forbidden, while the United States was at war:

> to willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about . . . the flag of the United States . . . or any language intended to bring the . . . flag of the United States . . . into contempt, scorn, contumely, or disrepute. . . .

Advocating, teaching, defending, or suggesting the doing of any of these acts was also forbidden, and any employee or official of the United States government “who in an abusive and violent manner” criticized “the Army or Navy or the flag of the United States” should “at once be dismissed from the service.”\(^\text{18}\)

There was no law against profanation, except by words, and after repeal

\(^{15}\) See Desecration of the American Flag and Prohibitive Legislation, address by Charles Kingsbury Miller before Illinois Sons of the American Revolution, November 2, 1898; 98 Uniform Laws Annotated 48 (1966).

\(^{16}\) Miller, supra note 15.


of this act in 1921, no national law prohibited any kind of profanation until 1968.

Presumably in the 1920's there was some promotion of a national flag profanation law, since an Attorney General's Opinion of May 15, 1925, pointed out the absence of such legislation, and stated that under Halter v. Nebraska Congress might enact such a statute for the entire country. "But until Congress actually exercises its power, the States are free to act, and the silence of Congress, in this case at least, is not to be taken as a declaration that the States must refrain from acting. Should Congress wish to assume control, it has power, under the Constitution, to do so."

Although commercial and political misuse was considered the major evil at the turn of the century, there is not yet a federal statute penalizing general use of the national colors for political or commercial advertising. Only in 1905 was use of the flag of the United States as a trade mark prohibited; an enactment deprived the Commissioner of Patents of the authority to register insignia of the United States as trade marks, though for several years before the act was passed, the Commissioner had been refusing the registration of the coat of arms of the United States or of a state on the ground of public policy. The court thought that even if the 1905 act had not been passed, the International Convention for the Protection of Industrial Property of March 20, 1883, to which the United States was a party, "would have suggested the acquiescence of Congress to the refusal to register coats of arms of a state. . . ." The 1905 act remains on the books in amended form.

The 1883 Convention, which prohibited use of national emblems as trade marks, has since been revised by numerous

21 205 U.S. 34 (1907), affg 105 N.W. 298 (Neb. 1905).
24 Id. at 180. For other applications of the 1905 statute see In re American Glue Co., 277 App. D.C. 391 (1906), respecting a simulation of the Great Seal, and In re William Connors Paint Manufacturing Co., 27 App. D.C. 389 (1906), where a design resembling the seal of the Department of Justice, bearing exposed ends of several American flags, was denied registration.
international agreements, the most recent of which was entered into in Lisbon in 1958 and set up a union for the protection of industrial property.\textsuperscript{27} There is also a Pan American Trade Convention of February 20, 1929.\textsuperscript{28} Such international agreements are broad enough to embrace prohibition by a state of use of its own flag as a trade mark.\textsuperscript{29}

Use of the flag for advertising is also disapproved by a 1942 Joint Resolution of Congress designed as a "codification of existing rules and customs."\textsuperscript{30} Section 176 declared, "No disrespect should be shown to the flag of the United States," while subsections covered profanations:

\begin{quote}
(g) The flag should never have placed upon it, nor on any part of it, nor attached to it any mark, insignia, letter, word, figure, design, picture, or drawing of any nature.

\ldots

(i) The flag should never be used for advertising purposes in any manner whatsoever. It should not be embroidered on such articles as cushions or handkerchiefs and the like, printed or otherwise impressed on paper napkins or boxes or anything that is designed for temporary use and discard; or used as any portion of a costume or athletic uniform. Advertising signs should not be fastened to a staff of halyard from which the flag is flown.\textsuperscript{31}
\end{quote}

But the Joint Resolution prescribed no penalty so could entail no

\textsuperscript{27} 13 U.S.T. 1, T.I.A.S. No. 4931 (Oct. 31, 1958).
\textsuperscript{28} 45 Stat. 2907, T.S. No. 833, 124 L.N.T.S. 357, 2 Bevans 751 (1927).
\textsuperscript{29} See also Wilson, Respect for National Flag, 12 Am. J. Int’l L. 662 (1935).
\textsuperscript{30} Though the constitutionality of prohibitions of the commercial use of foreign flags has never been ruled upon it was decided in a 1912 federal case that a plaintiff who had used the flag of Italy as a trade-mark had no standing in equity to have restrained another cigar manufacturer from using a trade-mark similar to his own. "The policy of the law, as indicated by the statutes . . . recognizes the impropriety of using the flags of nations upon advertising matter. . . ." De Nobili v. Sanda, 198 F. 341, 346 (D. Pa. 1912). Federal statute expressly prohibits commercial use of the coat of arms of Switzerland, which, because of its design of a white cross on red, is peculiarly subject to such practice. 18 U.S.C. § 708 (1970). The multiplication of national states and of subordinate units of government, with consequent proliferation of flags, makes it increasingly likely that no matter what kind of flag—even one with a design originating in the mind of the American advertiser—is depicted, it will turn out to be the flag of some nation, state, or municipality. Even use of a simple all red flag might inadvertently be offensive to Zanzibar, which for a number of years had such a flag. An all white flag was once used in France.
prosecutions. Further, through use of "should" rather than "shall" it was merely hortatory, not mandatory or even normative.\(^3\)

Though distaste for advertising and not mutilation of the flag as a political protest seems to have originally inspired the unsuccessful agitation for a national flag statute, Congress did not pass a profanation statute until after a series of dramatic acts related to the Vietnam war. A rash of public flag burnings in protest against that conflict turned congressional attention to this type of misbehavior, and to the realization that in fact no federal flag profanation statute existed.

The present flag profanation law\(^3\) resembles rather closely the Uniform Flag Act, discussed infra, which fifteen states have enacted. Pertinent portions of the federal act bear quotation:

\begin{quote}
(a) Whoever knowingly casts contempt upon any flag of the United States by 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 and 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 in 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 United States of America.
\end{quote}

In one respect it differs: the federal statute prohibits burning, whereas the Uniform Law assumes this is included in other prohibited acts. One can suppose that "burning" was inserted be-

\(^3\) For a judicial pronouncement on the effect of that code section, see State of Delaware ex rel Trader v. Hudson, 265 F.Supp. 308 (D. Del. 1967), where it was also held that the state had no interest in compelling compliance with existing rules and customs respecting flag use. A portion of the code (36 U.S.C. § 176(a), (d), and (h) was nevertheless used as a standard by the Municipal Court of Cincinnati to determine if actions were contemptuous under the Ohio profanation law, Ohio Rev. Code Ann. § 2921.05 (Page 1954). State v. Bunch, 268 N.E.2d 831 (Ohio 1970).

cause that spectacle was so vividly before Congress in 1967 and 1968. The Senate Committee on the Judiciary\textsuperscript{34} also had before it the recent Second Circuit Court of Appeals case of \textit{United States v. Miller},\textsuperscript{35} on draft card burning.

Passage of a federal law was undertaken against the previously proffered advice of the Uniform Law Commissioners on the proposed Uniform Flag Act: “This is purely state legislation, although some think that it ought to take the form of congressional legislation. However, it is considered that this subject properly belongs to the states and that federal legislation would not be nearly as effective as the state legislation.”\textsuperscript{36}

\textbf{C. State Legislation}

South Dakota was the first state to enact a flag protection law.\textsuperscript{37} The target of such laws was commercial and political advertising although they were often broad enough to include all kinds of deliberate mutilation. They varied widely; some suffered from poor draftsmanship, some were flagrantly unconstitutional, and others covered the most innocent use of the flag.\textsuperscript{38} To clear up

---

\textsuperscript{34} S. REP. No. 1287, to accompany H.R. 10,480, 90th Cong., 2d Sess. (1968), 2 U.S. CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS 2507 (1968).

\textsuperscript{35} 367 F.2d 72 (1966), \textit{cert. denied}, 386 U.S. 911 (1967). To protest against military action in Vietnam and the draft law, a young man publicly burned his Notice of Classification card, and in a prosecution under 50 U.S.C. APP. § 462(b) (3) (1970) for destroying the card tried to justify his action on the ground that it was protected symbolic speech. Declining to recognize the identity of pure and symbolic speech, the Court of Appeals in affirming conviction reasoned that forbidding the destruction of the certificates served a legitimate purpose in administering the system, and weighed this interest against that of freedom of expression. Quoting from \textit{Cox v. Louisiana}, 379 U.S. 536 (1965): “... it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.” See \textit{infra} for discussion of symbolic speech. A more recent and authoritative pronouncement of the Supreme Court on the draft card situation is \textit{O'Brien v. United States}, discussed \textit{infra}.

\textsuperscript{36} 9 B UNIFORM LAWS ANNOTATED 48 (1966).

\textsuperscript{37} S.D. Laws 1897, ch. 119, approved February 26, 1897.

\textsuperscript{38} A New York statute prohibiting marking on the flag was held invalid as to articles manufactured and in existence at a time when it was lawful to manufacture or possess them. People \textit{ex rel} McPike v. Van De Carr, 178 N.Y. 425, 70 N.E. 965, 66 L.R.A. 189, 102 Am.St. Rep. 516 (1904). For its application to the likeness of a flag that had been painted upon an automobile as an advertisement, see People v. Pickering, 228 N.Y. 644, N.E.2d 741 (1942), \textit{cert. denied}, 317 U.S. 632, in which constitutionality of the then New York profanation law was upheld. Alone among the states, Pennsylvania exempts “any patriotic or political demonstration or decoration” from the prohibition of placing words on a flag. Act of June 24, 1939, P.L. 872, \textit{as amended}, PA. STAT. tit. 18, § 4211 (1936). See Commonwealth v. (Continued on next page)
obvious defects and regularize such statutes, the National Conference of Commissioners of Uniform State Laws in 1917 presented to the states a Uniform Flag Act,\(^3^9\) though to date its aim has not been realized.

As will be shown later, the Uniform Flag Act has been vulnerable to constitutional attack. Crosson \(v.\) Silver,\(^4^0\) infra, assumes that the Supreme Court in Street \(v.\) New York\(^4^1\) had eliminated from it the words, "by word", and after the Street decision the Washington legislature amended its version of the Uniform Act by like excision, adding public burning to the list of proscribed acts, and inserting the adverb "knowingly."

In the excitement of World War I, states passed laws similar to that of the United States, prohibiting verbal abuse. A Montana

---

(footnote continued from preceding page)

Janoff and Haugh, 256 A.2d 874 (Pa. 1969), which held the exemption applicable where the words "Make Love Not War" and "The New American Revolutionaries" had been placed on a flag.

\(^3^9\) The Uniform Flag Act reads as follows:

Sec. 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 as 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.

Sec. 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 law of the United States or of this state; or (b) expose to public view any such flag, standard, color, ensign or shield upon which shall have been printed, painted or otherwise produced, or to which shall have been attached, appended, affixed or annexed any such word, figure, mark, picture, design, drawing or advertisement; or (c) expose to public view for sale, manufacture, or otherwise, or to sell, give or have in possession for sale, for gift or for use for any purpose, any substance being an article of merchandise, or receptacle, or thing for holding or carrying merchandise, upon or to which shall have been produced or attached any such flag, standard, color, ensign or shield, in order to advertise, call attention to, decorate, mark or distinguish such article or substance.

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

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


statute\textsuperscript{43} making it an offense to utter contemptuous and slurring language about the flag was upheld\textsuperscript{44} on the ground that since \textit{Halter v. Nebraska}\textsuperscript{45} a state might legislate to protect the flag.

D. \textit{Halter v. Nebraska}

A Nebraska act\textsuperscript{46} gave rise to a Supreme Court decision that if a state chooses to protect the national flag from commercial defilement, the federal constitution does not stand in the way. Because that decision has been so frequently (and erroneously) used to support flag legislation, and has employed such sweeping language, it deserves analysis.

The statute had made it a misdemeanor for anyone to sell, expose for sale, or have in his possession for sale, any article of merchandise upon which had been printed or placed, for the purpose of advertisement, a representation of the flag of the United States.\textsuperscript{47} It expressly excepted any act allowed by United States or army or navy regulations, or any “newspaper, periodical, book, pamphlet, circular, certificate, diploma, warrant, or commission of appointment to office, ornamental picture, article of jewelry, or stationery for use in correspondence”, in which the flag should be printed, painted or placed “disconnected from any advertisement.”\textsuperscript{48} The defendant had placed a representation of the flag on bottles of beer he had been selling, and he argued infringement of personal liberty guaranteed by the Fourteenth Amendment and discrimination in favor of a class through exception of newspapers and books.

In what is probably its only federal adjudication on the validity of such a statute, the Court, through the first Mr. Justice John Marshall Harlan, upheld the enactment. It noted that Congress had established no regulation for the use of the flag, except the act of 1905, but also observed that more than half of the states had enacted statutes similar to that of Nebraska. Therefore the Court must “pause before reaching the conclusion that a majority of the states have, in their legislation, violated the Constitution

\textsuperscript{43} Laws Mont. Ex. Sess. 1918, ch. 11.
\textsuperscript{44} \textit{Ex parte Starr}, 263 F. 145 (D. Mont. 1920).
\textsuperscript{45} 205 U.S. 34 (1907), aff'g 105 N.W. 298 (Neb. 1905).
\textsuperscript{46} 1 Cobbey's Ann. St. Neb. 1903, ch. 139.
\textsuperscript{47} \textit{Id.} § 2375g.
\textsuperscript{48} \textit{Id.} § 2375i.
of the United States." It concluded that no constitutionally protected rights had been infringed, and that the statute had no relation to a subject exclusively committed to the national government. In a passage more notable for rhetoric than pure law, but reflective of a sentiment that cannot be dissociated from legislation, the Court declared:

From the earliest periods in the history of the human race, banners, standards and ensigns have been adopted as symbols of the power and history of the peoples who bore them. It is not then remarkable that the American people, acting through the legislative branch of the Government, early in their history, prescribed a flag as symbolic of the existence and sovereignty of the Nation. Indeed, it would have been extraordinary if the Government had started this country upon its marvelous career without giving to it a flag to be recognized as the emblem of the American Republic. For that flag every true American has not simply an appreciation but a deep affection. No American, nor any foreign born person who enjoys the privileges of American citizenship, ever looks upon it without taking pride in the fact that he lives under this free Government. Hence, it has often occurred that insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot.

Finding a connection between the love of nation and state, and their symbols, the Court thought that such love would diminish in proportion as respect for the flag was weakened. That would occur if the flag were used for commercial purposes, for defilement would degrade and cheapen the flag in the estimation of the people. This statute had its origin in a purpose to cultivate a feeling of patriotism among the people of Nebraska, so the Court could not say that the state infringed the constitutional rights of anyone.

The argument that the statute was an improper classification was met by the statement that no one had a constitutional right to use the flag merely for the purposes of advertising merchandise while a representation of a flag, wholly disconnected from an

40 205 U.S. 34, 40 (1907).
50 Id. at 41.
advertisement, might be used upon a newspaper, periodical, or book, in such a way as not to offend. The decision also associated flag misuse with breaches of the peace. One may question whether commercial flag abuse excites so much resentment as Mr. Justice Harlan feared, though, a relationship between breach of the peace and flag defilement can exist. The effect of the decision is that a state may constitutionally protect the national flag from commercial defilement. Discussion of the use of the flag in association with freedom of expression is absent, though courts have often confused the issues.

III. SYMBOLISM AS PROTECTED EXPRESSION

A. Symbolic Speech Generally

Misuse of flags as a protest must be considered within the context of protection of non-verbal expression of opinion. Courts have not yet struck a universally acceptable balance between the right to express one's self, guaranteed by the First and Fourteenth Amendments, on the one hand, and the duty of society to maintain order, on the other. At various points in the spectrum, pure speech shades off into symbolic speech, which in turn becomes acts of varying degrees of unlawful violence. It is possible even to classify assassination as symbolic speech; when John Wilkes Booth shot President Lincoln he was protesting Union government policy. As the growing literature in this field indicates

---

51 See Halter v. State, 105 N.W. 298, 300 (Neb. 1905), where the Supreme Court of Nebraska discusses this point at length.
courts more and more are being called upon to square the two concepts, and the importance of flag profanation legislation lies in this particular area.

One of the earliest symbolic conduct cases concerned flags, though the Supreme Court decision did not emphasize flags, and contained only hints of the problem that was to come upon the nation in full force thirty-five years later. A California statute had prohibited the display of a:

red flag, banner or badge or any flag, badge, banner or device of any color or form whatever in any public place or in any meeting place or public assembly, or from or on any house, building or window as a sign, symbol, or opposition to organize government or as an invitation or stimulus to anarchistic action or as an aid to propaganda that is of a seditious character. . . .

The Court noted that the statute contained three purposes, and it was impossible to say under which of the clauses expressing the purposes conviction was obtained, so that if any of the clauses was invalid, conviction could not be sustained. The first clause, relating to a display "as a sign, symbol or emblem of opposition to organize government," was invalid and that vitiated the whole. The statute was void on its face because it was so indefinite as to permit punishment of use of an opportunity to oppose the government.

Historically, the issue seems to have been brought to the fore for the first time in labor disputes. *Thornhill v. Alabama,* struck down a statute prohibiting loitering or picketing about a place of business for the purpose of influencing or inducing others not to trade there or work for that business.

Symbolic expression became quite prevalent in civil rights activity in the 1950's and 1960's. When demonstrators taking seats at a lunch counter reserved for whites were subsequently prosecuted under a statute prohibiting breach of peace but de-
fining it as the doing of specified violent, boisterous, or disruptive acts, their act was recognized as symbolic speech. In a concurring opinion to a decision overturning the conviction on the ground that the statute was of too broad application, Mr. Justice Harlan declared the court would have to be blind not to know that the defendants had sat at the counters knowing full well they would not be served. Their demonstration, was as much a part of the free trade in ideas as a speech.

In Shuttlesworth v. City of Birmingham the Supreme Court reaffirmed that the First and Fourteenth Amendment protected those who would communicate ideas by patrolling, marching, and picketing on streets and highways. An example of balancing the state's interest in preventing trespasses against the rights of demonstrators was the earlier case of Adderley v. Florida, whereby a divided Supreme Court upheld the trespass statute of a state as against demonstrators who were singing, clapping, and dancing on a nonpublic county jail driveway.

Frequent burnings of draft cards by young men protesting military action in Vietnam as well as the draft system itself have raised anew the controversy over protection of symbolic speech. The leading case is O'Brien v. United States, which has been used on occasion to sustain flag burning convictions. Because of outward similarities in the draft card and flag situations, an analysis of the decision is pertinent. A young man publicly burned his Selective Service registration certificate on the steps of the South Boston court house, and was charged with having violated 50 U.S.C. App., § 462(b)(3), which penalized one "who forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes such certificate." Defendant asserted that prohibition of destruction was unconstitutional because it had been enacted to abridge free speech and because it served no legislative purpose.

The Supreme Court upheld conviction, denying that draft

---

58 Reference was made here to Whitney v. California, 274 U.S. 357, 375 (1927).
card burning was protected symbolic speech. The view that an apparently limitless variety of conduct could be called "speech" for constitutional purposes, whenever someone intended to express an idea, was rejected. Verbal speech was thus not identical with non-verbal "speech." A standard designed to harmonize expression with government regulation was thereupon devised: A government regulation is sufficiently justified if (1) it is within the constitutional power of government; (2) it furthers an important or substantial governmental interest; (3) that interest is unrelated to the suppression of free expression; and (4) the incidental restrictions on First Amendment freedoms is no greater than essential to the furtherance of that interest.

In examining the nature of the object destroyed, the Court reasoned that Selective Service certificates served a useful purpose in draft law administration, thereby following United States v. Miller. 63 The nation had a vital interest in an efficient army-raising system, and therefore in assuring the continuing availability of draft certificates. The draft card burner was arrested for the non-communicative aspect of his conduct but no view was expressed on the constitutionality of penalizing the communicative aspect, i.e., public expression of his opposition to the war and the draft. He had thwarted the public interest of having a smoothly running draft system. It would follow, in this writer's opinion, that he could have been convicted even had he burned his card in private. The motive of Congress—said by the card burner to be the stifling of opposition to the Vietnam war—in passing the statute was declared irrelevant. The court did not discuss the relationship of draft card burning as a public spectacle to possible breach of the peace.

Pupils in public schools who wore black arm bands in protest against Vietnam hostilities received the protection of the two Amendments in Tinker v. Des Moines School District. 64 The court divided not over whether wearing of black armbands was symbolic speech, or whether symbolic speech was protected, but whether that protection extended into public schools. The majority opinion, containing these words, was written by Mr.

64 393 U.S. 503 (1969).
Justice Fortas, one of the dissenters in *Street v. New York*, discussed later:

... in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, *Terminiello v. Chicago*, 337 U.S. 1 (1949); and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.\(^6\)

No judicial pronouncement on flag profanation on property of a school below the college level has been discovered.\(^6\)

One aspect of the symbolic speech problem, already apparent in some of the cases discussed, is that of overbreadth—that in the pursuit of a legitimate end the state runs the risk of expanding its sanctions so far as to restrict freedom of expression.\(^6\) In *Gainer v. Louisiana*,\(^6\) reversing the conviction of some blacks who deliberately sat at a lunch counter reserved for whites, Mr. Justice Harlan in a concurring opinion conceded that the state had an interest in the preservation of peace and harmony, but when it:

... seeks to subject to criminal sanctions conduct which, except for a demonstrated paramount state interest, would be within the range of freedom of expression as assured by the Fourteenth Amendment, it cannot do so by means of a general and all inclusive breach of the peace prohibition. It must bring the activity sought to be proscribed within the ambit of

---

\(^{65}\) Id. at 508, 509.

\(^{66}\) In Texarkana Independent School District v. Lewis, 470 S.W.2d 727 (Tex. Civ. App. 1971), a Texas Court of Civil Appeals referred to the action of the Board of Trustees of a local high school declaring "Desecration of the American flag" to be "major disruptive behavior," i.e. "activity or action by any student that interferes with the normal routine operation of the school program...".


\(^{68}\) 368 U.S. 157 (1961).
a statute or clause "narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State." Cantwell v. Connecticut69 . . . ; Thornhill v. Alabama, 310 U.S. 88, 105.70

B. Flag Profanation as Protest

Flag profanation as political expression has occasionally occurred in American history. Captain John Endicott, commander of a military company in Salem, Massachusetts Bay Colony, in 1634 cut out, or had cut out, one part of the red cross of the King's colors, because of the alleged connection of the cross with the papacy.71 A British flag was torn to pieces after British troops left New York in 1783.72 After news of the secession of Virginia in 1861 had been received in Liberty, Mississippi, a United States flag was burned in the public square before cheering spectators.73 A burial of a United States flag was publicly celebrated in Memphis in 1861,74 and in 1870 a student at Kentucky State University, influenced by post-Civil War emotionalism, destroyed a flag.75

More recently, flags have been profaned in demonstrations against United States military action in Vietnam, and our racial friction, and such symbolic speech cases are now reaching the courts. Federal district courts have held state profanation statutes invalid in three cases76 and have upheld them in two.77 Another

69 310 U.S. 296 (1940).
72 P. Harrison, Stars and Stripes and Other American Flags 134 (1906).
73 Id. at 189.
74 Id. The New York Express of April 29, 1861, is given as a source.
75 Taylor, Bases for Conflict in the Kentucky Constitutional Convention 1890-91, 46 THE FILSON CLUB HISTORY QUARTERLY 24, 31 (1972).
district court has ruled that a state statute was unconstitutionally applied, and a Court of Appeals has struck down a portion of another. A different Court of Appeals has restricted the application of the federal statute, withholding a ruling on constitutionality.

The United States Supreme Court, therefore, will supposedly be giving a ruling on the subject sooner or later, and clear up the confusion into which this branch of law has fallen. The closest it has come to it was Street v. New York, and its thorough discussion of the problem there deserves analysis. That case, however, did not reach the fundamental question of whether public destruction of a flag in conscious protest could constitutionally be prohibited.

Sidney Street, an Afro-American, while listening to a radio in his Brooklyn apartment, heard that James Meredith, the civil rights leader, had been shot by a sniper. Muttering to himself “They didn’t protect him,” he took from a drawer his 48-star American flag, which he had previously displayed on national holidays, and carried it to an intersection near his residence. There he unfolded the flag, applied a lighted match to it, and dropped it to the pavement when it started to burn. A crowd gathered, and a police officer a few moments later stopped his car and found the burning flag. He testified he came upon Street shouting to a group, “We don’t need no damn flag,” and in response to the officer’s question whether he had burned the flag, Street replied, “Yes; that is my flag; I burned it. If they let that happen to Meredith we don’t need an American flag.” There was no evidence of violence or other disorder.

Street was charged with disorderly conduct and malicious

(Footnote continued from preceding page)
action to invalidate the Colorado statute was dismissed on procedural grounds in Fremd v. Johnson, 311 F. Supp. 1116 (D. Colo. 1970).


mischief in that in violation of the New York flag "desecration" law\textsuperscript{82} he willfully and unlawfully defiled, cast contempt on, and burned an American flag, while uttering the words quoted above. The New York Court of Appeals upheld conviction for malicious mischief.\textsuperscript{83} Ruling that the deliberate act of burning an American flag in public as a protest might constitutionally be punished as a crime, it recognized that non-verbal expression might be a form of speech within constitutional protection but stopped short of saying that the same kind of freedom should be accorded those whose expression took the form of acts, as those who used pure speech. By implication, pure speech enjoys more protection, and if the state can show that the prohibition of certain conduct is designed to promote the public health, safety, or well-being, the incidental circumstance that the prohibition has an impact on speech or expression does not invalidate the legislation. In this discussion the New York court was simply stating what had come to be recognized generally, and which the Supreme Court still maintains.

The New York statute had been designed to prevent the outbreak of violence, by discouraging contemptuous and insulting treatment of the flag in public, the court noted, and Street's act was unquestionably one 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."\textsuperscript{84} In the interest of the public peace and prevention of violence, then, the state could constitutionally prohibit profanation, regardless of freedom of expression. No violence had been touched off, but that could not be taken as a condonation. Like the fact that he had been excited by radio news, the absence of violence should be considered only as a mitigating circumstance.

The Supreme Court on appeal did not come to grips with the central constitutional problem. Splitting five to four, it did

\textsuperscript{82} N.Y. Penal § 1425 subd. 16 (McKinney 1909), made it a misdemeanor "publicly to mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by words or by act any flag of the United States." In 1967, this was superseded by Sec. 136 of the General Business Law, which in par. (d) defines the offense in identical language. See N.Y. Laws § 52 (McKinney 1965),

\textsuperscript{83} 229 N.E.2d 187, 282 N.Y.S.2d 491 (1967).

\textsuperscript{84} 229 N.E.2d at 191.
not consider Street's contention that the New York statute did not clearly define the forbidden conduct or that a state might not constitutionally punish one who publicly damaged or destroyed a flag in protest. Mr. Justice Harlan wrote that the statute had been unconstitutionally applied because it may have permitted Street to be punished for speaking words about the flag.

The New York court, in the opinion of the Supreme Court, did not mention the constitutionality of the verbal element of the offense, though it impliedly decided it. Street had adequately met the burden of showing that the issue of the "words" part of the statute had been properly raised. The Supreme Court thus had before it a mixed word-act situation: The act of physical destruction and Street's comments as he burned the flag.

Faced with the intertwining of the two elements, the Court harked back to Stromberg v. California, 85 where the Supreme Court had thought it would be unconstitutional to punish one who displayed the flag for one reason but rejected the state court's reasoning that conviction could be sustained because the other reasons were severable and constitutional. Because the verdict was a general one and did not specify the ground upon which it rested, it was impossible to state under which clause of the statute the convictions were obtained. By analogy, then, Street's conviction would have to be set aside if it could have been based solely on his words, and a conviction on his words alone would be unconstitutional. 86

85 283 U.S. 359 (1931).
86 Some judicial authority had held that the flag could be profaned by words. The Uniform Flag Act and a number of state profanation statutes penalize the casting of contempt, by word or act, upon the flag. Words were held to constitute profanation in Johnson v. State, 163 S.W.2d 153 (Ark. 1942), despite a dissent that the words of the defendant, a member of Jehovah's Witnesses, about the flag had been uttered out of a religious conviction. The legal liability for words was assumed in State v. Shumaker, 175 P. 978 (Kan. 1918) and State v. Peacock, 25 A.2d 491 (Mo. 1942), the decisions turning upon whether the words had been said publicly. The latter case is unique in that one was prosecuted under the Uniform Flag Act for going through the motions of tearing up an imaginary flag; he had said that if he had a real flag he would trample it underfoot. Sensing the constitutional difficulties of penalizing words, the Attorney General in 1967 had advised the Chairman of the Senate Judiciary Committee that a proposed "desecration" statute then under consideration would avoid the words "defiles" and acts like mutilating be made criminal only if performed as a means of casting contempt on the flag. For text of the communication see Penalties for Desecration of the Flag, H.R. Rep. No. 350, to accompany H.R. 10,480, at 5, 90th Cong., 2d Sess. (1968). Street v. New York, 394 U.S. 576 (1969), laid the issue to rest. Mere words no longer constitute "desecration."
Conviction must still be overturned, if it could have been based upon both words and act. Street had been charged with two deeds: the burning, and publicly speaking defiant or contemptuous words about the flag. The verdict was general and there was a single penalty, so Street must have been convicted of both. Unless the record negated "the possibility that the conviction was based on both alleged violations," the judgment had to be affirmed as to both or neither:

... when a single count indictment or information charges the commission of a crime by virtue of the defendant's having done both a constitutionally protected act and one which may be unprotected, and a guilty verdict ensues without elucidation, there is an unacceptable danger that the trier of fact will have regarded the two acts as 'intertwined' and have rested the conviction of both together.\(^{87}\)

The state, tacitly agreeing that there could be no conviction for words alone, argued that Street's words were not an independent cause of the conviction, and in a further attempt to downgrade the effect of Street's words asserted that they had not been spoken publicly, but had been uttered only to the police officer. Yet the trial judge, reasoned the Court, might have concluded from the testimony that Street's remarks had been made within the hearing of a crowd, and observed that the sworn information used the word "shouted," thereby satisfying the statutory requirement of publicity. The trial court might also have found that Street's words defied or cast contempt upon the flag; in short, thought the Supreme Court, the record was insufficient to eliminate the possibility either that Street's words were the sole basis of the conviction or that he had been convicted for both his word and his act.

The conclusion that the state might not constitutionally punish one for publicly defying or casting contempt upon the flag by words was arrived at after measurement against the criteria of just what governmental interest could have been protected by penalizing contemptuous or defiant words:

(1) Did the state have an interest in deterring Street from

inciting others to commit unlawful acts? No. Street had urged no one to do anything unlawful; his words "amounted only to somewhat excited public advocacy of the idea that the United States should abandon, at least temporarily, one of its national symbols." The Fourteenth Amendment protects public advocacy of peaceful change in institutions.

(2) Did the state have an interest in preventing him from uttering words so inflammatory they would provoke others to retaliate physically against him, thereby causing a breach of peace? No, because his words were not so "inherently inflammatory as to come within that small class of ‘fighting words’ which are ‘likely to provoke the average person to retaliation, and thereby cause a breach of the peace.’"9

(3) Did the state have an interest in protecting the sensitivities of passers-by? No. Publicly expressed ideas might not be prohibited just because they are offensive to some hearers.

(4) Did the state have an interest in insuring that Street, regardless of the impact of his word on others, should show respect for the national emblem? The Court’s negative response was based on the words of Mr. Justice Jackson in Board of Education v. Barnette: "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." Then, Mr. Justice Harlan continued:

We have no doubt that the constitutionally guaranteed ‘freedom to be intellectually . . . diverse or even contrary,’ and the ‘right to differ as to things that touch the heart of the existing order,’ encompass the freedom to express publicly one’s opinions about our flag, including those opinions which are defiant or contemptuous.91

The Court carefully avoided an opinion whether Street could have been punished for burning alone; or whether Street’s conviction could have been reversed if evidence had been introduced

88 Id. at 591.
89 Id. at 592.
90 319 U.S. 624, 642 (1943).
that words proved some element of the offense. Nor was there
an opinion that conviction was not permissible because an element
of the crime was proved by Street’s words rather than in some
other way. It concluded by remarking that “disrespect for our
flag is to be deplored no less in these vexed times than in calmer
periods of our history,” but it revealed reluctance to decide the
one paramount issue.

Each of the four dissenters filed a separate opinion. The Chief
Justice, concerned with what he considered excessive reliance
on speech, felt that the real issue was whether public and
deliberate “desecration” could be constitutionally punished. He
interpreted the record of the trial proceedings as showing that
words had been employed only to show Street’s purpose in burn-
ing the flag, and that in issue were in reality only the questions
whether flag burning was protected symbolic speech, and whether
Street had burned the flag while casting contempt upon it or in a
dignified manner. In respect to the latter, the Chief Justice
mentioned that the transcript showed that counsel referred to a
U.S. Code provision “that a flag, when it is in such a condition
that it is no longer a fitting emblem for display, should be de-
stroyed in a dignified way, preferably by burning.” The trial
judge had identified the issue as being one of dignified burning
versus contemptuous burning, so conviction had to be based on
a finding of “desecration.”

The words mentioned in the indictment had been produced
at the trial, the Chief Justice went on, only to show that Street
had burned the flag with the intent to “desecrate;” otherwise the
state would have proved only the burning, and left open the
possibility that burning had been designed to destroy it in a
dignified manner. Street had been convicted for his act, not his
words, and the record was not ambiguous. He felt that both the
federal and state governments do have the power to protect the
flag from acts of “desecration.”

Mr. Justice Black agreed with the unanimous New York Court
of Appeals in construing the statute (as applied to Street) as
making it an offense publicly to burn the flag in protest:

---

92 Id. at 594.
If I could agree with the Supreme Court's interpretation of the record as to the possibility of the convictions resting on these spoken words. I would firmly and automatically agree that the law is unconstitutional [but he added] It passes my belief that anything in the Federal Constitution bars a State from making the deliberate burning of the American flag an offense. It is immaterial to me that words are spoken in connection with the burning. It is the burning of the flag that the State has set its face against.94

Mr. Justice White thought it was "fantastic" that the Court could infer from the record a possibility that the defendant had been convicted for both burning and uttering words. Likewise, it was wrong to say that if Street had been convicted for both, the conviction should be reversed if the speech conviction was unconstitutional; the law had long been that one good count along with a bad one or among bad ones sustained a conviction. Under the decision as it now stood, thought Mr. Justice White, any conviction for flag burning, where the defendant's words are critical to proving an intent or other element of the crime, would be invalid, since a conviction would be based in part on speech.

Mr. Justice Fortas thought that if the flag were only a chattel, under rules governing personal property, it would still be subject to state regulation, to avoid danger to life or property. "If the arsonist asserted that he was burning his shirt or trousers or shoes as a protest against the Government's fiscal policies, for example, it is hardly possible that his claim to First Amendment shelter would prevail against the State's claim of a right to avert danger to the public and to avoid obstruction to traffic as a result of the fire."95 He saw no basis for applying a different rule to flag burning, but he thought the flag was a special kind of personality—a person might "own" a flag but ownership was subject to special burdens and responsibilities, and as far back as 1907 the court had upheld the validity of a law prohibiting use of the flag for advertising.96 As for protest, it does not exonerate lawlessness. "And the prohibition against flag burning on the

95 Id. at 616.
96 Reference of course is to Halter v. Nebraska, 205 U.S. 34 (1907).
public thoroughfare being valid, the misdemeanor is not excused merely because it is an act of flamboyant protest."\textsuperscript{97}

Validity of prohibition of flag destruction as a protest has thus not yet been decided. But of the dissenting four, three—Chief Justice Warren and Messrs. Justice Fortas and Black—are no longer on the bench. Mr. Justice Harlan, author of the majority opinion, is deceased. Mr. Justice White, still on the court, has implied a belief that profanation may be penalized, but any prediction of how the court as presently constituted would decide the issue would be hazardous.

If "desecration" could not be utilized to express \textit{disagreement} with a policy of the government, it might be inquired if "desecration" could be utilized to express \textit{agreement}. Street's conviction seems to answer the question in the negative. When Street burned his flag he was in fact supporting a government policy, for the federal government at that time was committed to protect James Meredith and the activities in which he was engaged. In short, Street was protesting the failure of the government to implement its own policy.

The Supreme Court came close to another ruling on the New York statute in 1971,\textsuperscript{98} when concern was with neither word nor act but the use of flags as three-dimensional objects called constructions. The defendant, an art dealer, exhibited for sale in his gallery certain objects fashioned out of flags by an artist, Marc Morrel; one in the display window consisted of an American flag stuffed and shaped in a form suggesting a human body hanging from a yellow noose about its neck. Another was in the form of a large cross with a bishop's mitre as a head piece, the arms wrapped in ecclesiastical flags, and an erect phallus wrapped in an American flag protruding from a vertical standard. The exhibit, with the theme of peace, was accompanied by a musical background of taped anti-war songs.

\textsuperscript{97} Street v. New York, 576, 617 (1969). Since the Supreme Court's refusal to rule that the New York Statute was unconstitutional insofar as it prohibited only flag burning, New York courts have continued to prosecute for the act of burning. \textit{See} People v. Burton, 27 N.Y.2d 198, 265 N.E.2d 66 (1970), where conviction was sustained of a defendant who had attached a flag to a vacant building, saturated it with lighter fluid, and set it afire, exclaiming, "I am going to burn Johnson, Humphrey, and Wallace just as I am going to burn this flag."

\textsuperscript{98} People v. Radich, 53 Misc.2d 717; probable jurisdiction noted by United States Supreme Court, 400 U.S. 864; \textit{aff'd per curiam}, 402 U.S. 989 (1970).
A divided state court upheld conviction, on the ground that in its police power the state might restrict acts posing "an immediate threat to public safety, peace, or order," and "desecration" might lead to this. The exhibited constructions constituted a contemptuous use of the flag. A section of the same statute excluded ornamental pictures from the prohibition, but the majority felt that the constructions were not ornamental even by contemporary community standards; nor could they be considered "pictures." "[T]he legislative intent was to protect from prosecution the printed, painted, or affixed use of the American flag solely for ornamental, as distinguished from advertising purposes." So the court disposed of the argument that the act was class legislation, in violation of the equal protection clause. Any contemptuous use would fall within the statute, whether two-dimensional or three-dimensional.\(^9\)

A dissenter chose to treat the exhibit—flags, music, and all—as a whole, and that as an act of protest. "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."\(^10\)

The United States Supreme Court affirmed the judgment of the New York court \textit{per curiam}. And divided four to four, Mr. Justice Douglas not participating. In such situations, the judgment of the lower court stands.\(^11\)

In a similar case involving the same defendant and decided only three weeks earlier,\(^12\) the Supreme Court of New York County in an action brought by a private party, has upheld

\(^{9}\) For a discussion of the notion that the medium in which the idea is communicated carries important social and personal consequences, and is the nexus of choice of medium and freedom of expression, see M. McLuhan, \textit{Understanding Media: The Extension of Man} 7-21 (1964). "In a culture like ours, long accustomed to splitting and dividing all things as a means of control, it is sometimes a bit of a shock to be reminded that, in operation and practical fact, the medium is the message." Id. at 7. \textit{See also}, Note, 68 Colum. L. Rev. 1091, \textit{supra} note 53, and \textit{Sutherland v. DeWulf}, where the court, in remarking that the flag burners could have "conveyed any possible idea that they may have intended to any conceivable audience by means other than burning the flag in a public place. The guarantee of free speech is more concerned with the \textit{substance} of the speech than the \textit{form} of the communication," clearly showed it had missed the point.

\(^{10}\) \textit{People v. Radich,} 279 N.Y.S.2d 680, 686 (1967).


\(^{12}\) \textit{United States Flag Foundation v. Radich,} 53 Misc.2d 597 (1967).
recovery of damages. Without attempting to balance the principles of freedom of expression and avoidance of breach of peace, it declared that "the desecration of our flag cannot be utilized as a symbolic act to publish or exhibit disagreement with or opposition to the policies of our Government" and "to permit such desecration under the guise of freedom of speech would certainly weaken, if not destroy, one of our most cherished symbols."

Another opportunity to decide a profanation case was sidestepped when the Supreme Court denied certiorari for a decision of the Second Circuit Court of Appeals, which had held the New York statute unconstitutional. Its decision, Long Island Vietnam Moratorium Committee v. Cahn, disagreed with a decision of a three judge court of the Eastern District of New York that § 136(a) of the General Business Law was merely inapplicable to an emblem, and it flatly declared that statute in violation of the Fourteenth Amendment.

The emblem was the so-called "peace emblem" appearing on decals and buttons: a representation of the national flag with seven white stars in a blue canton, and eleven red and white stripes, with a symbol resembling a white trident, facing downward, in a white circle, superimposed. The court felt that anyone seeing the emblem could instantly conclude that it was a representation of the flag, so the statute was applicable. As so construed, the statute was overbroad, as "traditional First Amendment activity may be swept within its ambit." Quoting from the lower court:

\begin{quote}
The district attorney's broad reading of the sub-section would make criminal the possession of all of those reproductions on the face of President John F. Kennedy superimposed\end{quote}

\footnote{Id.}
\footnote{Id.}
\footnote{Id.}
\footnote{Id.}
\footnote{Id.}
\footnote{322 F.Supp. 559 (E.D.N.Y. 1970).}
\footnote{See note 80, supra.}
\footnote{At issue in Gwathmey v. Town of East Hampton, 437 F.2d 351 (2d Cir. 1970), was a flag like the United States flag, except that the peace symbol formed the canton. The decision in Long Island Vietnam Moratorium Comm. decided the same day, was held controlling. See also State v. Liska, 268 N.E.2d 824 (Ohio 1970), where prosecution for use of a decal of this nature under the Ohio statute, Ohio Rev. Code § 2921.05 (Anderson 1967), was successful.}
\footnote{Long Island Vietnam Moratorium Comm. v. Cahn, 437 F.2d 344, 348 (2d Cir. 1970).}
upon a picture of the American flag which hang on the walls of shops, homes and offices all over this country. And what of the millions of celluloid campaign buttons which for generations, including the time before this statute was enacted, have carried the photographs of the aspiring Presidential and other candidates against a background of one or more American flags in full color?\textsuperscript{111}

In following the usual practice of refusing to accord the same degree of state control, or lack of it, to symbolic speech and pure speech, the court examined the criteria set forth by Mr. Justice Harlan in \textit{Street v. New York}, and found no valid state interest in the statutory prohibitions respecting the flag. The statute had not been meant to forbid incitement of onlookers, to proscribe expression tending to provoke violent retaliation, to protect the sensibilities of passers-by, or to ensure respect for the flag. In the case at bar, the state had no valid interest in forbidding the emblem, which was a legitimate means of expressing political views. The statute was also denounced because it did not provide enforcement officials adequate guidance concerning what was proscribed:

Because of its overbreadth, the statute vests local law enforcement officers with too much arbitrary discretion in determining whether or not a certain emblem is grounds for prosecution. It permits only that expression which local officials will tolerate; for example, it permits local officials to prosecute peace demonstrators but to allow "patriotic" organizations and political candidates to go unprosecuted. This opportunity for discriminatory selective enforcement . . . renders the statute unconstitutional.\textsuperscript{112}

The question which the \textit{Street} court did not answer—whether the states might without violating the Fourteenth Amendment protect the flag from non-verbal acts of "desecration"—has been affirmatively answered by a California court which aligned itself with the Warren-Black-Fortas-White grouping, but whose judgment the Supreme Court also declined to review. In \textit{People v.}
Cowgill, a protester had worn on the streets a flag cut up and sewn into a vest and was prosecuted under a statute making it a misdemeanor publicly to mutilate, deface, defile, or trample upon a flag of the United States.

Accepting, as other courts had done, the O'Brien case indicated that "an apparently limitless variety of conduct" could not "be labeled 'speech' whenever the person engaging in the conduct" intended to express an idea. The California court went on to the next step, that when speech and non-speech elements are combined in the same conduct, the state could penalize the non-speech element and engage in justified limitations on freedoms. The state has an interest in preventing breaches of peace, and so this conviction was sustained. The fact that no breach occurred here because of the wearing of the vest was immaterial, as on another occasion there might have been a breach. It added that Georgia and New Jersey had come up with the same answer.

Analysis of the Georgia case cited in Cowgill reveals a different fact situation, reasoning, and philosophy, so that one can question its pertinence. There, some 250 people gathered at the Crisp County, Georgia, court house, in a 1966 freedom march. Defendants, members of the crowd, proceeded to lower United States and Georgia flags from their poles. One of the defendants declared that the black community was then in mourning, and he intended to lower the flag to half mast to symbolize the mourning. As the flag was being lowered, others in the group closed in, removed the flags from the lanyard, tearing the United States flag and damaging the Georgia flag, and then shook the flags in the faces of police officers stationed nearby.

Conviction under the Georgia statute was sustained, the court expressly denying that the statute was vague or that a

---

116 GA. CODE ANN. § 26-7202 (1917). It shall also be unlawful for any persons, firm or corporation to mutilate, deface, defile or contemptuously abuse the flag or national emblem of the United States by any act whatever. Georgia Sessions Law, at 985 (1960), extended this to the state flag. GA. CODE ANN. § 86-1210 (1960).
question of freedom of speech was involved. *Halter v. Nebraska* was applied; the Georgia statute had been enacted after that decision and followed the language of the Nebraska statute there upheld, so it could be assumed that the Georgia legislature was cognizant of the decision. The conduct sought to be prohibited was the showing of disrespect for the flag. Nothing was said about breach of the peace as an element upholding validity, though in fact the flag had been profaned in a breach of peace. It is submitted the case would have rested on sounder ground if it had been related to breach of the peace, rather than treatment of the flag as a sacred object *per se*.

The flag had been torn from a flagpole in front of a court house. The point was not mentioned, but it is possible that that flag belonged to the county, in which case a new factor could have been introduced: destruction of public property.

The act of protest was against the failure of the county to observe the same mourning which the black community was observing. The published report does not describe the nature of the mourning, a point which, it is submitted, might be of political or psychological interest, if not legal significance, if the mourning had been proclaimed by a higher governmental level.

Nor can the New Jersey case be of much help in a freedom of expression controversy. There, a German girl was prosecuted, just before the United States entered World War II, under a New Jersey statute which declared that "any person who publicly mutilates, tramples upon or otherwise defaces or defiles any flag, standard, color or ensign of the United States or state flag of this state, whether the same be public or private property, is guilty of a misdemeanor." To show off before some men, she proclaimed herself a Nazi, and pulled a small American flag from the front of her motorcycle, broke the staff, crumbled the flag, and then threw it to the ground. Conviction turned entirely on her contention that the statute intended to penalize an act with a willful, malicious, or evil intent. Freedom of expression was not argued. The court, in approving the charge to the jury that the defendant must have done the act with an evil intent,

---

117 See discussion, supra.
thought that the words "deface" and "defile" had the meaning of "dishonor," and "dishonor" was purposeful, implying a lively sense of shaming or equivalent acquiescent callousness.

Necessity for an intention to profane has been reannounced recently. This doctrine acquitted Miss Schleuter but it saved a flag burner charged under a Washington statute.\textsuperscript{110} That enactment did not in words require that profanation be done intentionally, and the charge that the jury was required to find only that the defendant had performed the physical act, was rejected on appeal.\textsuperscript{120}

The First Amendment issue was not discussed, for the decision turned instead upon whether profanation condemned by the statute was \textit{malum in se} or \textit{malum prohibitum}. If the offense was the former, then intention had to be shown; if it were the latter, mere performance of the act was sufficient to convict. The defendant's state of mind thus became an issue of fact, to be ascertained by the jury. The court decided that flag "desecration" was \textit{malum in se}, reasoning that the interdicted conduct was done with an evil design or purpose.\textsuperscript{121}

Application of the rule that a penal statute must be strictly construed has taken place in flag cases. It led, in \textit{Hoffman v. United States},\textsuperscript{122} to the declaration that Congress had intended to condemn only "physical mutilation, defacement, or defilement of the flag, its 'physical dishonor or destruction';" therefore wearing of a flag shirt was not sufficient. The Court of Appeals of Lucas County, Ohio, did likewise with a defendant who had worn a sarape made of a flag, with a hole cut in the flag for his head; there had been no active mutilation, though someone must have cut the flag to make the hole.\textsuperscript{123}

\textsuperscript{110} \textit{WASH. REV. CODE} §§ 9.86.010-070 (1919).
\textsuperscript{112} \textit{State v. Turner}, 478 P.2d 747 (Wash. 1970). A recent Iowa case has disagreed as to the requirement of intent under a profanation statute. \textit{State v. Waterman}, 190 N.W.2d 809 (Iowa 1971). Since the profanation there was of a non-protest type it is discussed in the next section.
\textsuperscript{121} A subsequent amendment (Laws of 1969, 1st Ex. Sess., ch. 110, at 823) of the statute requiring that the act be done knowingly and publicly was said by the court to supply in words what had earlier been implied in law. \textit{State v. Turner}, 478 P.2d 747 (Wash. 1970).
The Supreme Court has not yet ruled on the constitutionality of the federal statute, though validity has been upheld by the District of Columbia Court of Appeals, reversed on other grounds by the Court of Appeals for the District of Columbia. Abbie Hoffman, anti-establishment activist, having been subpoenaed to testify before the House of Representatives Committee on Un-American Activities (now the Internal Security Committee) was arrested in 1968 before entering a House Office Building in Washington for wearing a shirt that resembled an American flag. Charged with violating the above quoted 18 U.S.C. § 700 (a), in that he did "knowingly cast contempt upon the flag of the United States by publicly mutilating, defacing and defiling" the flag, he referred to himself at the trial as "what people might call a Hippie" and a "revolutionary artist," though in his brief he used the expression, "civil rights advocate."

The Circuit Court did not reach the constitutional objections but in three separate opinions declined to apply the statute to the particular action. By a strict construction the court arrived at the conclusion that merely wearing a flag-like shirt was not sufficient evidence of contemptuous defiling; Judge MacKinnon thought that the two lower courts had concluded the wearing had actually been contemptuous because Hoffman had been a controversial figure associated with unpopular causes. Judge Robb confined the offense to "a physical mutilation, defacement, or defilement," which Hoffman was not shown to have done.

A district court and the District of Columbia Court of Appeals have upheld the statute. In *Joyce v. United States*, the defendant was standing at the rear of the crowd along the parade route on Inauguration Day 1969, holding a small flag four by six inches. He removed it from its stick, tore it, folded it lengthwise, and with the assistance of a companion, tied it to his right index

(Footnote continued from preceding page)
(S.D.N.Y. 1967) (unpublished), both cases discussed infra. The fact that a protester had draped a clean flag about his shoulders while appearing for his draft physical attired only in a pair of shorts, led a Pennsylvania court to conclude that the flag had not been defiled. Commonwealth v. Sgorbati, 49 D. & C.2d 173 (Pa. 1970). The court also ruled that the gesture was allowed under a statutory exemption when flags were used in political demonstrations. See note 38, supra.

finger; then he raised his right hand in a V sign and waved it back and forth above his head. The District Court, decided there was sufficient evidence from which could be found beyond a reasonable doubt that he had knowingly cast contempt upon the flag by publicly mutilating it, under the 1968 statute. Though the reversed decision in Hoffman v. United States was referred to in the Joyce case as decisive of the issue, the Joyce and Hoffman cases are not analogous. Joyce had used a genuine flag; Hoffman had not.

Another incident in the 1969 rash of flag misuse brought into play the analogy of draft card burning—as well as the novel use of the doctrine of national sovereignty to uphold constitutionality and conviction.127 A protester burned a flag in a demonstration on the steps of a United States District Court House and was charged with violating the year old federal act. He argued that his act was one of political protest and the statute was therefore unconstitutional.

The United States District Court128 applied the standards in United States v. O'Brien. Legally, then, the draft card and the flag were equated as the court gave its interpretation of that decision: when speech and non-speech elements are combined in the same course of conduct, incidental limitations of first amendment rights can be tolerated only if the four criteria of the O'Brien case are satisfied. Notably absent was any discussion of the likelihood that flag destruction would lead to a breach of the peace. The court found that all four of the criteria were satisfied.

The authority of Halter v. Nebraska in protest cases is beginning to be questioned. One Duncombe was charged before a New York police justice with having committed malicious mischief under § 1425 (16) (d), the flag profanation statute quoted above; he had worn a flag as a sarape. The United States District Court129 denied that the substantive constitutional issues were insubstantial, despite Halter v. Nebraska. That case “was decided

---

127 The court referred to United States v. Curtiss-Wright Export Corporation, 299 U.S. 304 (1936), a case concerned chiefly with the power of the executive in foreign relations. The selection of a flag was one of the “concomitants of nationality,” and the power to select a flag embraced the power to protect it from contemptuous destruction.  
several years before the protections of the First Amendment were held to be firmly applicable to the states through the Fourteenth Amendment," mentioning, in a footnote, that the issue of relationship between the two amendments was unsettled as late as Gitlow v. United States, the case generally regarded as the first in which the free speech provisions of the First Amendment were engrafted upon the Fourteenth.

IV. NON-PROTEST PROFANATION

Flag designs have been used in manners that have nothing to do with protest. Prohibition of employment of flag designs in commercial advertising has been declared constitutional, but ornamentation, advocacy of political candidacies, and numerous other motivations have induced display of flag designs, and, as pointed out above, it has been in connection with such uses as well as advertising, rather than destruction or mutilation as acts of protest, that flag profanation statutes were first passed. Sometimes it is difficult to determine the significance of the use of a flag design in specific circumstances. One cannot be sure that the intention was to protest.

Use of a flag design in non-protest situations has become so prevalent that application of statutes prohibiting "defiling" or "defying" assumes a highly subjective character and raises constitutional points in fact situations that would never have occurred to framers of the statutes. Where flag designs are worn for non-protest purposes, the question of symbolic speech does not arise. The wearer may not be intending to express any opinion but may be attracted to the design for the same reason that any other mode of dress might appeal to him. He may even be impelled by patriotic motives; a 100% American may wear a red-white-blue tie adorned with stars and stripes for the same reason that an Irishman might wear green on St. Patrick's Day. Prosecution of such a person for flag profanation is incongruous. Though newspaper stories recount numerous arrests for odd uses

---

130 Id.
131 See e.g., use of a flag designed in a costume worn by Raquel Welch in the film, Myra Breckinridge.
132 For illustrations of numerous ways in which flag designs have been used, see LIFE, March 31, 1967, at 18.
of the national emblem, few non-protest, unconventional uses of the flag have reached the appellate courts for adjudication.

Illinois\textsuperscript{133} and New York\textsuperscript{134} courts have disagreed over prosecution for publishing within magazines, pictures of girls wearing little more than flags. Recently an Iowa court\textsuperscript{135} upheld a statute similar to the New York statute, under which was convicted a young man in a flag sarape who walked into and out of a hotel where he was employed. One desk clerk testified that upon seeing him "I was more or less crushed," and another, "It just made me sick." The defendant denied any intention of protesting: "I really had no intentions whatsoever of anything by wearing this flag."

Employing the four \textit{O'Brien} criteria in this non-protest situation, the court felt that the "government clearly has a substantial, genuine and important interest in protecting the flag from public desecration. That the state has a legitimate interest in preventing breaches of the peace which can result from reactions to any attempted defilement of the flag has long been recognized." The dubious precedent of \textit{Halter v. Nebraska} was quoted.

The court also thought it immaterial that no breach of the peace actually resulted, though it referred to the revulsion felt by the desk clerks, adding it was only a short step from such feeling to an act of retribution.\textsuperscript{136} The state was also said to have an interest in assuring that the defendant should show proper respect "to our national emblem." A minority of four justices entertained doubts over constitutionality.

Application of the criteria in the \textit{O'Brien} case actually is of little assistance in a discussion of constitutional aspects of prohibitions of this type of profanation. It is difficult to tell just what interest the state is attempting to protect, for the liberty involved is not necessarily one of free expression, but one of a more mundane nature. One can question the constitutional power of the government to dictate what a citizen shall wear, for ex-

\textsuperscript{133} People v. Von Rosen, 147 N.E.2d 327 (Ill. 1958).
\textsuperscript{135} State v. Waterman, 190 N.W.2d 809 (Iowa 1971).
\textsuperscript{136} The late Mr. Justice Harlan would hardly agree; see his comments in \textit{Street v. New York}, 354 U.S. 576 (1957). The Iowa court called \textit{United States v. Hoffman}, 445 F.2d 226 (D.C. Cir. 1971) authority, but with respect one must point out that the element of protest was clearly present in that case, and that Hoffman almost as an incitement had deliberately donned his flag shirt prior to appearing before a congressional committee. The situations are not analogous.
ample. But apart from the constitutional and legal aspects of this type of profanation, one can observe the tremendous difficulties of enforcement. Use of the national colors and design is so varied and widespread that almost a special police force would be needed to extirpate the practice.

V. CONCLUSION

A. Nature of Symbolism

Much of the confusion attendant upon a discussion of flag profanation stems from the fact that there has never been a consensus on what the flag symbolizes. Leaving aside sentimental utterances of patriotic citizens, one meets a startling diversity of opinion among responsible authorities. Does the flag symbolize the country, the United States as a nation, the United States as a state, the government of the United States, the constitution, the sum total of all the policies initiated and implemented by the government, just some of the policies, all the ideals possessed by the founders of the nation, some of them (depending upon the predilections of the speaker) or the whole American cosmos—state, government, people, politics, geography, ideals?

Mr. Justice Frankfurter referred to it as “the symbol of our national life.” Federal courts have also called it “the symbol of our national unity, transcending all internal differences, however large, within the framework of the Constitution.” Other courts have diverged widely. The New York Court of Appeals said it was “the symbol of our country, of the ideals embodied in our Constitution, and ... of the spirit which should animate our institutions.” In the opinion of the Illinois courts, it is “an emblem of national sovereignty”; and in Hawaii an extremely broad answer has been given:

137 "... 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." Parker v. Morgan, 322 F. Supp. 585, 588 (W.D.N.C. 1971).
140 People ex rel Fish v. Sandstrom, 279 N.Y. 523, 18 N.E.2d 840 (1939).
141 Ruhstrat v. People, supra.
The flag is an emblem which, if it can be said to represent anything, is a symbolic representation of the United States as a nation, a unified body politic embracing the bad as well as the good and welded into one by common bond of territory and history. It is not symbolic of segmented fragments of the American nation, whether they be American military might or race riots, Rocky mountain majesty or night life in Las Vegas, Vietnam involvement or peace marches against it.\footnote{Hon. Masato Doi, in orally delivered decision of Circuit Court of First Circuit, State of Hawaii, State v. Kent, No. 36, 423, December 9, 1966. The text is reprinted in \textit{Hearing Before Subcomm. No. 4, supra note 6}, at 175.}

An examination of debate in the House of Representatives on the adoption of the flag profanation statute likewise reveals lack of agreement.\footnote{113 CONG. REC. part 8 (daily ed. April 30, 1967).} The flag was said to be symbolic of America:

\begin{quote}
[O]ur great Nation; our national purpose; our unique way of life; our freedom, of our country, and of our greatness as a nation; all we love and value in our great Nation; the Nation—the Government of the United States—and all that it stands for; the American Nation, its people, and its free government; American dreams and aspirations, of American stubborness and courage, and of American purpose, sacrifice, and achievement; the greatness and pride of this land; the idea of federation, and the unity of 50 sovereign states; the dignity of the flag is indeed consistent with the idea of our States' rights and responsibilities; and our Nation's independence. . . . our freedom, and . . . the precious heritage won for us by brave men and women over the generations.
\end{quote}

One Congressman saw a property right in the flag, belonging to all Americans, so that burning a flag was likened to the burning of another's house. Another compared it to the Queen of England. The analyst can count in these few congressional utterances at least eight different and not all consistent elements which the flag is thought to symbolize.

One is impressed by the variety the further one proceeds into the writings of others. Woodrow Wilson described the flag as “the emblem of our unity, our power, our thought and purpose
as a nation. It has no other character than that which we give it from generation to generation.”

Robert G. Ingersoll had a less conservative interpretation:

The flag for which our heroes fought for which they died, is the symbol of all we are, of all we hope to be.
It is the emblem of equal rights.
It means free hands, free lips, self-government, and the sovereignty of the individual . . . .
It means the perpetual right of peaceful revolution . . . .
It means that all distinctions based on birth or blood have perished from our laws; that our Government shall stand between labor and capital, between the weak and the strong, between the individual and the corporation, between want and wealth, and give and guarantee simple justice to each and all.

The plethora of answers to the question—what does the flag symbolize?—evoked this answer from Mr. Justice Jackson, in *West Virginia Board of Education v. Barnette*:

Symbols of State often convey political ideas just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or bared head, a bended knee. 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.

A flag, therefore, often contains the meaning which the user or misuser wishes to put into it. The Confederate battle flag to many is a symbol of the Confederacy but since the outlawry of school segregation it is to others a symbol of resistance to integration, and even a mark of white racism in general.

---

144 Flag Day Address, June 14, 1917, in W. Wilson, *In Our First Year of War* 64 (1918).
145 *Political Speeches of Robert G. Ingersoll* 431-32 (Dresden ed. 1914).
147 See Smith v. St. Tammany Parish School Board, 316 F. Supp. 1174 (D. La. 1970), where a federal district court judge in an integration case ordered all indicia of segregation, even Confederate flags, removed from the schools, and Banks v. Muncie Community Schools, 433 F.2d 292 (7th Cir. 1970), where black students had objected to a school flag resembling a Confederate flag.
versely, testimony was presented to a House Subcommittee in 1967 that the national flag had been burned in some southern states as a protest against the national policy of racial integration. To some, the flag has represented the capitalist class.

The symbolism of a flag is thus subjective and even transitory, varying with the individuals involved, the circumstances, and the historical period. Almost as varied are the objects of protest when flags, foreign and American, are profaned. Recent public destructions of flags in anti-war demonstrations are protests against a policy of the United States government, and probably not, in most cases, against the United States as a nation, state, or country. Destruction of the swastika flag on the German vessel Bremen in New York harbor in 1935 was likewise a protest against a government policy, probably not against the German nation or state (though also against the German government of the day). When Secretary of War John A. Dix gave orders in 1861 to shoot anyone who attempted to haul down the national flag in New Orleans he had in mind persons who might challenge the sovereignty of the American state and government, though possibly not the American nation. Demonstrators profaned the flag of the U.S.S.R. in protest at the forcible removal of a Lithuanian defector from an American ship, but, curiously enough, the flag profaned was not of the country, nation, state, or government that was ultimately responsible, at least morally; it was of the government whose agents were allowed to seize the defector.

Unless, then, one is prepared to protect the flag as an object, and thereby embrace the cult of vexillatry, one must follow the statement of Mr. Justice Jackson above, and accord to protest flag profanation the constitutional protection given to all symbolic acts, regardless of the meaning placed in the symbol, and regardless of the object of the protest, except for the one set of circumstances discussed below.

The flag is a tangible symbol—secular, temporal, limited to a historical era, functional, and created by law, yet deeply rooted in

148 Hearings before Subcomm. No. 4, supra note 6, at 174.
151 Harrison, supra note 72, at 183.
152 The Sunday Star, December 6, 1970.
tradition and capable of evoking emotion and sincere devotion. But because of the disparity of opinion as to just what it symbolizes, one cannot prohibit any and all profanation, lest freedom of expression be endangered.

If the flag be held to symbolize the state, as that term is generally defined in constitutional and international law, one could logically protest the existence of that institution by destroying or mutilating its symbol. An anti-state protester, say an anarchist, could express himself against the state symbolically as well as by words.

If one considers it the symbol of the nation, it could be argued that one opposed to the concept of the nation (and there have been many in the world’s history) or the American nation could write against it as well as symbolically attack it by deed.

If the flag is thought to symbolize a federal republican union, an opponent of that system might not only speak against it, but physically attack its symbol, or even destroy the symbol if he thinks the principle of federalism has been compromised. Thus in view of Thomas Jefferson’s admonition in his First Inaugural Address—"If there be any among us who would wish to dissolve this union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat

---

153 There is some question about the propriety, or even the possibility of pledging allegiance to a flag. If one discards the feudal meaning of the term, allegiance connotes, according to Webster's New International Dictionary of the English Language, (2d. ed.):

... the tie or obligation of a subject to his sovereign or government; the duty of fidelity to one’s king, government, or sovereign state. Originally allegiance was a feudal, and therefore personal relation or obligation; this conception has given place in civilized nations to the political concept of it as a relation or obligation of a citizen to his sovereign or government, or of an alien to the government under which he resides. ... Devotion or loyalty to that which is entitled to obedience or service and respect; as, allegiance to science. Strictly speaking since the flag is a symbol one does not serve or obey it, though he may respect it. One owes allegiance to a country, a nation, a government, a ruler, a set of principles, or an ideology he does not owe allegiance to the symbol of those concepts. If, on the other hand, one is said to owe allegiance to the flag as an object, vexillatry becomes a species of idolatry, and the objection of Jehovah's Witnesses to saluting the flag acquires a logical as well as scriptural basis. Communists, incidentally, have been known to pledge allegiance to a red flag. People v. Mintz, 106 Cal. App. 725, 290 P.2d 93 (1930). The American's Creed, written by William Tyler Page, did not fall into this error. In part it reads, "I therefore believe it is my duty to my country to love it; to support its constitution; to obey its laws; to respect its flag; and to defend it against all enemies." 50 Cong. Rec. 4745 (1918).
one can hardly argue against symbolic opposition in the form of destruction of the symbol.

When one looks upon the flag as a means to express his opposition to government policies, then the problem of restricting expression becomes acute. If the state, nation, and government are not sacrosanct—and Mr. Justice Jackson went far in the direction of saying just that—certainly the government's policies are not, and a fortiori, its symbols. The practice is widespread of destroying or mutilating an object not out of disrespect for the physical form of the object, but to protest departure from that which the object is supposed to represent. Such behavior goes far back into ancient history and seems to have escaped the devotees of the cult. This being the case, it is difficult to condemn, on the theory of freedom of expression, abuse of a flag.

The flag, by virtue of its singular character and the esteem in which it is held by the American people, must be placed in a class by itself, in any discussion of its abuse as a means of non-symbolic speech, or protest. It therefore rates more selective treatment than a utilitarian object like a draft card or a test of printed words. If it is destroyed or mutilated in public, it is not at all impossible that the reaction from on-lookers would be different from what it might be if something else were subjected to like treatment.

But the flag is not an idol, fetish, charm, or the repository of the soul of the nation, as was the Golden Stool of the Ashanti in the Old Gold Coast. Nor can it become the country, by a process of transubstantiation, despite a remark on the floor of the House of Representatives: "He who publicly and intentionally desecrates

\footnote{154} BASIC WRITINGS OF THOMAS JEFFERSON 333 (P. Foner ed. 1944).
\footnote{155} The biblical Moses broke the stone tablets upon which the law had been inscribed not to protest that law or its source but because of the waywardness of his followers in department from divine teaching. Exodus 32:19.
\footnote{156} A Washington statute requiring applicants for teachers' licenses to swear or affirm, inter alia: 
... by precept and example [to] promote respect for the flag and the institutions of the United States of America and the State of Washington was held to violate the due process clause of the Fourteenth Amendment because of vagueness; the range of activities that might be deemed inconsistent with premises of the act was too broad. Even criticism of the design or color scheme of the state flag or unfavorable comparison of it with that of a sister State or foreign country could be deemed disrespectful and therefore violative of the oath. Bagott v. Bullitt, 377 U.S. 360, 377 (1964).
the precious symbol of our country is committing an actual assault upon the country. Regardless of the accident of his birth, he is an enemy and should be treated like an enemy, whether he be a foreign enemy or domestic enemy."

Laws against flag profanation appear to be peculiarly susceptible to use against persons who endorse unpopular causes. One who protests, in this manner, a government policy may easily be accused of attacking the whole social order. An objective of the profanation statutes may be to stimulate patriotism, but there have been instances in which virtually identical acts of misuse brought official displeasure in some instances but not in others. This danger was pointed out in Long Island Vietnam Moratorium Committee v. Cahn.

The statement in Street v. New York, that promotion of patriotism is not a legitimate interest of the government, may be startling but can hardly be open to argument, if one assumes that the expression of all shades of political opinion is entitled to constitutional protection. "Patriotism" is capable of a variety of meanings, as is flag symbolism; it is often applied to the support of various aspects of the existing order, so the government should have no interest in restricting peaceful expressions of opinions which some people might not like. This is not to say, of course, that government officials should not employ national symbols, like flying the flag over post offices or displaying the flag in a courtroom.

Flag profanation laws, most of which are at least a half century old, may thus be classed as ritual of the cult of vexillarity, a tenet of which is veneration of the flag as an end in itself: the confusion of symbol and object, content and form, spirit and matter, animus and res. That tenet distinguishes in an extreme manner between a rightfully unique and justifiably respected object, on the one hand, and ordinary objects, on the other, in

---

157 113 CONG. REC. 16446 (1967) (remarks of Congressman Maston O'Neal of Georgia).
158 In Delaware one was prosecuted for flying the flag at half mast, on the wrong side of the United Nations flag, as a protest against the Vietnam war. Hodson v. Buckson, supra. Yet in April 1971, the Governor of Indiana ordered flags to be flown at half mast to protest the conviction of Lt. William R. Calley for the willful killing of South Vietnamese civilians. Newsweek April 12, 1971, at 27. In both cases someone wanted to protest a government policy or action.
such a way as to endanger the constitutional protection given symbolic speech.

This writer would not, however, accept the views of some that nonsymbolic and symbolic speech should be accorded the same status, especially in respect to flags. Flags are clearly *sui generis*. If violence results from their misuse, such misuse should be recognized as an aggravating factor in any prosecution for breach of peace, malicious mischief, or similar offense. There seems to be little reason why the aggravating factor should not be recognized by statute, rather than by judicial pronouncement, and such an enactment would make unnecessary the numerous acts which now make flag "desecration" a separate crime. By making flag "desecration" simply one degree, or variety, of breach of peace, the problem of flag profanation as symbolic speech can be eliminated, the perils of overbreadth removed, and the interest of the state in preserving order retained. The flag can then occupy its rightful place in American life. Similarly, those who use the flag in peaceful protest should be protected from the aggression of troublemakers.\footnote{Courts might not always agree with this. In Lapolla v. Dullaghan, 311 N.Y.S.2d 435 (1970), the Supreme Court of Westchester County, New York, enjoined school officials from lowering the flag at a high school, in response to a petition from students and faculty, as an expression for the four dead Kent State students and the Vietnam war casualties. A Veteran's group had indicated "they would take all necessary steps to prevent the lowering of the flag." The court feared imminence of a confrontation that would have a "negative effect on the community," and added, "The flag should not be a vehicle for the expression of political, social or economic philosophy," a rather broad statement which this writer feels the judge writing the opinion would, on more mature reflection, modify.}

B. Symbolic Speech and the Courts

Courts have not accorded parity to pure speech and nonsymbolic speech, though both types of expression are employed to disseminate an idea or voice a protest. The exact point at which treatment of the two types of "speech" begins to diverge has not yet been fixed with finality, although the Supreme Court has begun, in *O'Brien v. United States*, to chart out this territory. The criteria laid down in that case, especially that which recognizes an interest of the state superior to that of allowing untrammeled expression, appear to this writer to be sound, as does their application to flag cases.
Differences in opinions of lower courts, as well as the multiplication of flag profanation cases, make it virtually inevitable that the Supreme Court will settle the basic issue: May physical profanation of the flag as a means of symbolic expression be prohibited? No opinion is here ventured as to what the decision will be, but caution is expressed against placing reliance on the broad dicta in the bellwether case of Halter v. Nebraska, a case related to advertising, not political expression, and decided long before First Amendment freedoms were engrafted upon the Fourteenth. Nor can much significance be attached to the fact that four justices in the Street case court have left the bench.

There remains the question of non-protest use of the flag. Halter v. Nebraska allows states to restrict the use of the flag in advertising, and is in line with the practice of distinguishing between the protection of commercial advertising and that of political protests. There is some difference of opinion as to which type of freedom enjoys a superior position; in Radich v. New York, the New York City Criminal Court thought that prohibiting the use of the flag in advertising was less a "desecration", and therefore less a threat to the public order, than the particular type of profanation with which it was dealing, the modeling of flags into constructions. The present writer would reverse the priorities, and find greater profanation in commercial exploitation than there is in political protest, but regardless of one's philosophical leanings adequate constitutional grounds exist for the restraint of commercial use.

For prohibition of noncommercial, nonprotest uses little justification can be found on constitutional grounds. Absent threats to the peace, which would be extremely rare (for who would start a riot upon seeing a girl wearing a red, white and blue skirt adorned with stars and stripes?) a governmental interest in such restrictions on personal conduct is indeed hard to locate. Dicta in Long Island Vietnam Moratorium Committee v. Cahn respecting use of the design might also be applicable here. The court in the passage quoted above condemned prohibition of numerous

---

uses, mostly of a politically communicative nature, and it is probably not presumptuous to suppose that prohibition of non-protest uses would also be condemned. Why, for example, should not a presidential photograph not be embellished with the likenesses of flags?

Whether the actual enforcement of flag profanation laws is feasible or even possible is, of course, another question. Use of a flag design is so widespread that if steps were taken to curb all unconventional uses the patriots might be the first to protest. On the other hand, one need not be an adherent of the cult of vexillatry to urge that within the limits set by common sense, the public peace, and the right of expression, the national emblem should be accorded every respect.