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FLAG BURNING, FLAG WAVING AND THE LAW

INTRODUCTION

The flag burning incidents during the Spring of 1967 demonstrated a new method of protesting against American involvement in Vietnam.[1] President Lyndon B. Johnson's commitment to a policy of escalation produced widespread opposition. Reacting to the increasing clamor of dissent, the President actively enlisted supporters to augment public acceptance of his policy.[2] Opponents of the war felt they lacked correspondingly effective access to the media.[3] Whether their contention was correct was unimportant. The significant fact was that their fear of failing to reach the public led them to adopt the alternative tactic of demonstration—the "poor man's printing press."[4] Of all the methods of demonstration, none attracted the attention of the public more than the burning of the American flag.

The subject of this note is whether flag desecration, as an act of protest, is protected by the First Amendment.[5] An attempt is made to illustrate the legislative and judicial treatment of the subject. To date, legislators and judges have been reluctant to treat flag desecration as a First Amendment issue. It is submitted, however, that a First Amendment issue does, indeed, exist. Moreover, the methods employed by the courts to solve First Amendment problems offer no simple solution to the issue of flag desecration. The emotional attachment of the general public to the national symbol poses the primary difficulty. Before deciding to protect the sensitivities of its citizens, perhaps the state should consider whether that task is a function of the law.

FLAGS AND THE LAW

Only in comparatively recent history has the flag become a significant symbol of national government. The demise of Kingship, the emergence of the nation-state and the importance of gathering citizens to fight in wartime are possible factors in this development.[6] Historically, the people

1. *See* N.Y. Times, March 24, 1967, at 25, col. 1; *Id.*, April 15, 1967, at 36, col. 4; *Id.*, April 16, 1967, at 1, col. 3; *Id.*, April 19, 1967, at 3, col. 4; *Id.*, April 20, 1967, at 23, col. 8; *Id.*, May 13, 1967, at 17, col. 2.

2. For a forceful account of these events, see Finman & McCaulay, *Freedom to Dissent: The Viet Nam Protests and the Words of Public Officials*, 1966 WIS. L. REV. 632.

3. *Id.* at 683.

4. The use of the "poor man's printing press" is illustrated in Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, SUP. CT. REV. 1, 30 (Kurland ed. 1965).

5. U.S. CONST. amend. I.

6. For a history on flags, see 10 ENCYCLOPEDIA BRITANNICA, *Flag* 454 (11th ed. 1910).

of the United States have shown a definite attachment to a flag. Indeed, such attachment inspired the national anthem. During the War Between the States a man was hung in New Orleans for desecrating the Union flag.[7] Yet, significantly, it was not until 1942 that Congress enacted a flag code providing guidelines for the proper use of the national emblem.[8] Concern for the flag appears to be more profound in the United States than in most other countries, and since the turn of the century this concern has greatly increased.[9]

Improper treatment of the flag first became a legal issue during the 1890's after the founding of the American Flag Association.[10] The Association sought legislation to curb the use of the flag in political campaigns and advertising. Taking its grievance to the states, the Association argued that when political candidates used the flag in the campaign of 1896, hostile audiences often mutilated it, thus provoking street fights.[11]

Between 1895 and 1906 twenty-eight states enacted statutes prohibiting the use of the flag in advertising.[12] Most of those statutes stated that "[no person shall] publicly mutilate, deface, defy, trample upon, or by word or act cast contempt upon [the flag]."[13] Two state courts subsequently held that the clause prohibiting the use of the flag in commercial advertising violated the due process clause of the Fourteenth Amendment.[14] In *Halter v. Nebraska,*[15] however, the United States Supreme Court upheld such a statute. Justice Harlan, speaking for the Court, stressed the reasonableness of the restraint on advertising and the importance of the flag as a national symbol.[16] Only Justice Peckham dissented, without opinion.[17]

The "red scare" at the outbreak of World War I evoked a new

7. Fleming, *Hail to the Flag!*, READER'S DIGEST, April, 1969, at 185.

8. Flag Code Resolution, 36 U.S.C. §§ 171-82 (1964).

9. It is difficult to document the absence of an attitude. Compare the history of flag usage in 10 ENCYCLOPEDIA BRITANNICA, *Flag* 454 (11th ed. 1910). For the years in which flag protection statutes were enacted, see Appendix.

10. *See Commissioner's Prefatory Note,* 9B UNIFORM LAWS ANN. 48 (1966).

11. Halter v. Nebraska, 205 U.S. 34 (1906); People v. Von Rosen, 13 Ill. 2d 68, 147 N.E.2d 327 (1958); People v. Street, 20 N.Y.2d 231, 229 N.E.2d 187 (1967); People *ex rel.* McPike v. Van de Carr, 178 N.Y. 475, 70 N.E. 965 (1904).

12. Halter v. Nebraska, 205 U.S. 34, 39 n.1 (1906).

13. See Appendix.

14. Ruhstrat v. People, 185 Ill. 133, 57 N.E. 41 (1900); People *ex rel.* McPike v. Van de Carr, 178 N.Y. 475, 70 N.E. 965 (1904).

15. 205 U.S. 34 (1906).

16. *Id.* at 42-43.

17. Justice Peckham was vehemently opposed to any regulation of business. *See* Skolnik, *Rufus Peckham,* 3 JUSTICES OF THE UNITED STATES SUPREME COURT 1789 TO 1969, at 1685-1703 (1969). On the other hand, Justice Harlan frequently voted to sustain regulatory statutes which he deemed reasonable. Filler, *John M. Harlan,* 2 JUSTICES OF THE UNITED STATES SUPREME COURT 1789 TO 1969, at 1281-94 (1969).

concern among the state legislators, prompting them to condemn conspiracies to overthrow the government.[18] During this period, the remaining states enacted appropriate statues, usually with higher penalties. The Texas statute, passed in 1918, punished flag burning by imprisonment from two to twenty-five years.[19]

During the 1940's, the refusal of the Jehovah's Witnesses to salute the flag aroused heated debate.[20] The Supreme Court apparently resolved the issue in *Minersville School District v. Gobitis,*[21] ruling that the state could compel school children to salute the flag. The Court, however, reversed itself in 1943.[22] Another 1943 decision declared unconstitutional a statute prohibiting the dissemination of teachings calculated to create an attitude of stubborn refusal to salute the flag.[23] In 1967, however, the Georgia and New York courts tested and upheld the constitutionality of their flag desecration statutes.[24]

Before discussing the recent Supreme Court treatment of flag burning it is important to analyze the judicial treatment of draft card burning cases, since both involve the unlawful destruction of property to express a political viewpoint. On August 30, 1965, Congress passed an act prohibiting draft card destruction.[25] The Second Circuit, in *United States v. Miller,*[26] recognized an abridgement of speech by the statute, but maintained that the slight infringement was clearly outweighed by the administrative advantage of the registrant's continual possession of his draft card. The First Circuit, however, declared the statute unconstitu-

18. *See* T. EMERSON, D. HABER & N. DORSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 55-66 (1967).

19. See Texas statute in Appendix.

20. For an excellent discussion of the issue during the 1940's see D. MANWARING, RENDER UNTO CAESAR (1962).

21. 310 U.S. 586 (1940).

22. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

23. Taylor v. Mississippi, 319 U.S. 583 (1943) (declaring ch. 178, § 1, [1942] Miss. Laws unconstitutional). *See also* Johnson v. State, 204 Ark. 476, 163 S.W.2d 153 (1942) (affirming conviction for calling the flag a "rag"); State v. Smith, 155 Kan. 158, 127 P.2d 518 (1942) (reversing conviction for refusing to salute).

24. Hinton v. State, 223 Ga. 174, 154 S.E.2d 246 (1967) (flag desecration during civil rights demonstration); People v. Street, 20 N.Y.2d 231, 229 N.E.2d 187 (1967) (flag burning by Negro incensed at James Meredith shooting); People v. Radich, 53 Misc. 2d 717, 279 N.Y.S.2d 680 (Crim. Ct. 1967), *aff'd,*——N.Y.2d——,——N.E.2d —— (1970), in 38 U.S.L.W. 2473 (March 10, 1970) (flag desecration in sculpture exhibit protesting the Vietnam War); United States Flag Foundation, Inc. v. Radich, 53 Misc. 2d 597, 279 N.Y.S.2d 233 (Sup. Ct. 1967) (civil action arising from same sculpture protest). *See A Test Case for Old Glory,* LIFE, March 31, 1967, at 18.

25. The Universal Military and Service Training Act, 50 U.S.C. § 462(b) (Supp. I, 1965) states:

> Any person . . . (3) who forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes . . . shall upon conviction, be fined not to exceed $10,000 or be imprisoned for not more than five years, or both.

26. 367 F.2d 72 (2d Cir. 1966).

tional, stressing the unreasonableness of the statute in light of a regulation already in force requiring that the registrant have the card in his possession at all times.[27] The Supreme Court, in *United States v. O'Brien,*[28] adopted both the Second Circuit decision and its rationale. Would the Court have stricken the statute had it found no reason for requiring that registrants keep their draft cards? Admittedly, both the government's interest and the abridgement of free expression were very slight.[29] The Court did not mention other government interests, namely, the highly emotional response of the public to draft card burnings and the need to demonstrate national commitment to the war in Vietnam.

Congress reacted to the flag burning incidents[30] in much the same manner as it responded to the draft card burnings.[31] During the first session of the Ninetieth Congress, members introduced ninety bills making flag desecration a federal crime.[32] Congress had enacted legislation on the subject in 1917, but the federal statute applied only to the District of Columbia.[33] A subcommittee of the House Judiciary Committee heard testimony for five days.[34] Most of the witnesses were House members who had introduced bills on the subject.[35] The American Civil Liberties Union and several professors questioned the constitutionality of the bills,[36] but the committee was unconvinced and reported one of the bills favorably.[37] The Congressional debate was boisterous,[38] and after much patriotic rhetoric the House passed the bill 387 to 16.[39] The

27. O'Brien v. United States, 376 F.2d 538 (1st Cir. 1967). For the possession requirement see 32 C.F.R. § 1617.1 (1959).

28. 391 U.S. 367 (1968).

29. *See* O'Brien v. United States, 376 F.2d 538 (1st Cir. 1967). The court mentions the importance of the registrant carrying his draft card at all times in case the files are destroyed. Query, how will the draft board know who is to turn in his card if there are no records? Will the registrant go to his draft board out of a sense of obligation?

30. *See* note 1 *supra.*

31. For Congressional debates supporting a federal flag burning statute, see 113 CONG. REC. 948, 1760, 8497, 10007, 10042, 10319, 10320, 10380, 10647, 10849, 10898, 10902, 11464, 11681, 11695, 11697, 11703, 11727, 11919, 11923, 11935, 11977, 12042, 12044, 12046, 12303, 12306, 12378, 12792, 16442-98 (1967).

32. *Id.* at 16449.

33. Act of February 8, 1917, ch. 34, 39 Stat. 900 (repealed 1968).

34. *See Hearings on H.R. 271 and Similar Proposals to Prohibit Desecration of the Flag Before Subcomm. No. 4 of the House Comm. on the Judiciary,* 90th Cong., 1st Sess., ser. 4 (1967).

35. *Id.* at Index.

36. *Id.* at 136 (Lawrence Speiser of the A.C.L.U.); *Id.* at 233 (Edward Morris of Bowling Green State University); *Id.* at 279 (Herbert O. Reid of Howard University School of Law); and *Id.* at 306 (Monroe H. Freedman of George Washington University National Law Center).

37. 113 CONG. REC. 15530 (1967).

38. *Id.* at 16642-98.

39. *Id.* at 16498.

Senate concurred without debate and the bill became law July 5, 1968. The Flag Desecration Act punishes one "[who] knowingly casts contempt upon the [flag] by publicly mutilating, defacing, defiling, burning, or trampling upon it" by imprisonment up to one year and/or $1000 fine.[40] According to the Congressional debates, the intent of the statute is: 1) to insure uniformity throughout the states; 2) to make the federal government the protector of the national emblem; 3) to stop demonstrations that encourage the Hanoi government; 4) to protect the morale of the Amercian servicemen; and 5) to protect the sensibilities of the American citizens.[41]

The flag burning incident in *Street v. New York*[42] took place a year before the widely publicized protests of 1967 which so inflamed the Congress. Sidney Street, a black New York City bus driver, was listening to the radio in his home on July 6, 1966, when he heard of the shooting of civil rights demonstrator James Meredith. Street owned two flags, one with forty-eight stars, the other with fifty stars. He took the forty-eight starred flag, walked to a nearby corner with it folded under his arm, lit a match to the flag and dropped it onto the pavement. About thirty people gathered, but no disruption occurred. Police, attracted by the crowd, heard Street say, "we don't need no damn flag!" When asked if he had burned the flag, he replied: "Yes, that is my flag; I burned it. If they let that happen to Meredith, we don't need no damn flag!"[43] The state charged Street with violating the New York flag desecration statute which states that no one shall "publicly mutilate, deface, defile, defy, trample upon, or cast contempt upon the flag either by words or acts."[44] Street was found guilty and the Court of Appeals affirmed.[45] Street's appeal to the United States Supreme Court[46] urged reversal on four grounds: 1) the statute was overbroad as applied; 2) the statute was overbroad on its face; 3) the statute was vague and indefinite; and 4) the statute punished one who burned the flag as an act of protest and such protest is protected by the First Amendment.

The Court, speaking through Justice Harlan, declared the statute unconstitutional as applied and reversed the conviction.[47] Neither the indictment, the instructions nor the trial verdict specified whether Street

40. Flag Desecration Act, 18 U.S.C. § 700 (Supp. IV, 1968).
41. 113 CONG. REC. 10007, 16442, 16459 (1967).
42. 394 U.S. 576 (1969).
43. *Id.* at 579.
44. See Appendix. *See also* N.Y. GEN. BUS. LAW § 136 (McKinney 1968), *formerly* N.Y. PENAL LAW § 1425 (16)(d) (McKinney 1944).
45. People v. Street, 20 N.Y.2d 231, 220 N.E.2d 187 (1967).
46. Street v. New York, 394 U.S. 576 (1969).
47. *Id.* at 594.

was punished for his words or for his acts. The Court indicated that the state conviction may have been for his words alone.[48] Justice Harlan contended that Street's verbal advocacy of his feelings towards the flag was protected by the First Amendment.[49] The reversal followed since the conviction may have been unconstitutional.[50] Justices Stewart, Marshall, Brennan and Douglas joined Justice Harlan in his opinion. Justices Black, Fortas, White and Chief Justice Warren dissented in separate opinions.[51] All of the dissenters reasoned that the Court stretched the facts to avoid a decision as to the constitutionality of the statute and stated explicitly that they would affirm the conviction.[52]

Since *Street,* lower courts have continued to uphold flag desecration statutes where the defendant has been convicted for an overt act. *O'Brien*[53] has been heavily cited in the three federal decisions affirming convictions for violating the federal flag desecration statute.[54] A New York court overruled the demurrer to an indictment against the editors of a college newspaper which depicted a nude girl draped with a flag.[55] In California, the conviction of a man who wore a vest made from a flag was affirmed.[56] On appeal to the United States Supreme Court, the appellant's case was dismissed for want of a substantial federal question.[57] Justices Harlan and Brennan concurred on the grounds that the record was inadequate.[58] Justice Douglas was of the opinion that probable jurisdiction should have been noted.[59] Although the majority did not state their reason for dismissing the appeal, it may be assumed that the absence of a First Amendment issue was decisive. The majority was apparently not convinced that one expresses oneself by wearing a vest.

Thus, the attachment which Americans feel for their flag has been

48. *Id.* at 589-90.

49. *Id.* at 591. Justice Harlan cited *Cox v. Louisiana,* 379 U.S. 536 (1965), *Edwards v. South Carolina,* 372 U.S. 229 (1963) and *Terminiello v. City of Chicago,* 337 U.S. 1 (1949).

50. The Court relied heavily upon *Stromberg v. California,* 283 U.S. 359 (1931), where a general verdict under a statute prohibiting the flying of a red flag, for any one of three reasons, was reversed because at least one of these reasons violated the First Amendment.

51. Street v. New York, 394 U.S. 576, 594, 609, 610, 615 (1969).

52. *Id.* at 605 (Warren, C.J. dissenting). The other justices issued shorter opinions summarizing the views expressed by Chief Justice Warren.

53. *See* note 28 *supra* and accompanying text.

54. United States v. Ferguson, 302 F. Supp. 1111 (N.D. Cal. 1969); Joyce v. United States, 259 A.2d 363 (D.C. Cir. 1969); Hoffman v. United States, 256 A.2d 567 (D.C. Cir. 1969).

55. People v. Keough, —— Misc. 2d ——, 305 N.Y.S.2d 961 (Monroe County Ct. 1969).

56. People v. Cowgill, 274 Cal. App. 2d 174, 78 Cal. Rptr. 853 (Super. Ct. 1969).

57. Cowgill v. California, 90 S. Ct. 613 (1970).

58. *Id.* at 614.

59. *Id.* at 615.

reflected in legislative and judicial decisions. Whether these decisions are consistent with the Constitution is a question which the Supreme Court has not faced.

FLAG DESECRATION AND FREE SPEECH

The Court in *Street* applied the First Amendment to the defendant's *words*. Thus, the question of whether Street's *acts* constituted a First Amendment problem was left unanswered.

It is submitted that the Court should not solve the flag burning question by simply stating that the First Amendment is not involved. The essential characteristic of a flag is its symbolic importance.[60] Flag burning is conduct symbolizing certain political ideas. The medium conveys more sharply the message of the protestor.[61] Yet, classifying all conduct as symbolic speech would destroy the utility of the First Amendment. To qualify as symbolic speech the "speaker" must intend that his acts be interpreted as symbolic in nature and have a reasonable expectation that this will be accomplished.[62] Since "the medium is the message,"[63] it is not important that the message be capable of verbalization.

The Supreme Court has recognized First Amendment rights in cases where defendants wore black arm bands,[64] failed to salute the flag[65] and waved a red flag.[66] In *O'Brien,* where protestors demonstrated their political views by burning their draft cards, the Court also found a free speech issue. Only after the Court had weighed the importance of this particular form of expression with the interest of the Selective Service System did it affirm the conviction. Likewise, the Court, in ruling on the constitutionality of flag burning statutes, must consider the First Amendment issue.

The Court has, in certain circumstances, stated that particular classes of expression are *beyond* First Amendment protection.[67] It may be argued that flag burning is a "fighting word" as defined by *Chaplinsky v. New York*[68] and, therefore, outside the First Amendment. The Court in

60. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Stromberg v. California, 283 U.S. 359 (1931); Halter v. Nebraska, 205 U.S. 34 (1906).

61. *See* H. MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN (1964).

62. These qualifications of symbolic behavior are suggested in Note, *Symbolic Conduct,* 68 COLUM. L. REV. 1091, 1117 (1968).

63. H. MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 7 (1964).

64. Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969).

65. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

66. Stromberg v. California, 283 U.S. 359 (1931).

67. Roth v. United States, 354 U.S. 476 (1957) (obscenity); Beauharnais v. Illinois, 343 U.S. 250 (1952) (group libel); Chaplinsky v. New York, 315 U.S. 568 (1942) (fighting words).

68. 315 U.S. 568 (1942).

Chaplinsky limited the decision to abusive expressions directed to an individual. The Court, however, has never extended it to speech, verbal or symbolic, directed to a group.

The Supreme Court has recently struck down several statutes which regulate First Amendment rights in a vague and indefinite manner.[69] For the purpose of this note, it will be assumed that the flag desecration statutes are sufficiently precise to pass the constitutional test.

The issue, then, is whether flag desecration as a means of protest is protected by the First Amendment. The Supreme Court has yet to adopt a free speech theory applicable to all situations. Thus, several tests which the Court has used must be considered.

Clear and Present Danger Test

The clear and present danger test, as enunciated by Justice Holmes, allows the regulation of expression when that expression creates a clear and present danger of producing an evil which the state has a right to prevent.[70] As the statutes are presently worded, the clear and present danger test is ill-suited to solve the problem of flag desecration. While none of the statutes indicate precisely what interest of the state requires protection, it may be assumed that the legislatures were most concerned with maintaining public order and respect for the nation's symbol.[71]

If public order was the concern which prompted the passage of flag desecration statutes, the statutes meet constitutional difficulties on two grounds. First, the statutes do not distinguish between circumstances which pose a clear and present threat to public order and those circumstances which do not pose such danger. Thus, the statutes infringe on nonobjectionable activities and are unconstitutionally overbroad.[72] To cure this defect, the legislature should prohibit flag desecration only where there is a clear and present danger of public disorder.

Secondly, the clear and present danger test has inherent difficulties that have limited its use.[73] The most serious of those is defining the

69. United States v. Robel, 389 U.S. 258 (1967); Whitehall v. Elkins, 389 U.S. 54 (1967); Keyishian v. Bd. of Regents of Univ. of New York, 385 U.S. 589 (1967); Aptheker v. Secretary of State, 378 U.S. 500 (1964); Baggitt v. Bullitt, 377 U.S. 360 (1964).

70. Schenck v. United States, 249 U.S. 47 (1919).

71. *See* notes 29 and 32 *supra* and accompanying text.

72. The Supreme Court has recently struck down several statutes that are overbroad on their face. *See* United States v. Robel, 389 U.S. 258 (1967) (Subversive Activities Act relating to defense plants); Elfbrandt v. Russell, 384 U.S. 11 (1966) (loyalty oath); NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288 (1964) (statute regulating foreign corporations); NAACP v. Button, 371 U.S. 415 (1963) (statute regulating solicitation of legal business).

73. *See* Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 910-12 (1963); McKay, *The Preference for Freedom*, 34 N.Y.U.L. REV. 1182, 1203-12 (1959).

proximity of danger required before the state may intervene. *Brandenberg v. Ohio* provides the most recent interpretation of proximity.

> These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[74]

Aside from the difficulty of defining proximity, the clear and present danger test conflicts with the underlying policy of the First Amendment. The test provides protection only when the speaker's words have no effect. As soon as the audience reacts to the speaker he is denied protection. The possibility that a hostile audience can "veto" the speaker's right of free expression has led the Court to abandon the clear and present danger test, even in the face of imminent riot.[75]

The state's interest in promoting respect for the nation's flag would not seem to justify the statute under the clear and present danger test. Neither Congress nor the states have the power to *compel* respect. As Justice Jackson declared in *West Virginia Board of Education v. Barnette,* "[c]ompulsory unification of opinion achieves only the unanimity of the graveyard."[76] If the state cannot compel respect, it follows then that the state cannot declare disrespect unlawful. Of course, the real interest of those who wish to prohibit flag desecration is the survival and strength of the country it symbolizes. It is highly unlikely that flag burning creates a clear and present danger of weakening or resulting in the overthrow of the United States government.

Bad Tendency Test

The bad tendency test asserts that "[freedom of speech] does not protect publications or teachings which tend to subvert or imperil the government."[77] The state may punish "utterances inimical to the public welfare, tending to incite crime, disturb the peace, or endanger the foundations of organized government by unlawful means."[78] Because of

74. 395 U.S. 444 (1969).

75. For cases where public order was seriously threatened yet the First Amendment prevailed see Watts v. United States, 394 U.S. 705 (1969); Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969); Gregory v. City of Chicago, 394 U.S. 111 (1969); Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965); Cox v. Louisiana, 379 U.S. 536 (1951); Edwards v. South Carolina, 372 U.S. 229 (1963). *Cf.* Feiner v. New York, 340 U.S. 315 (1951).

76. 319 U.S. 624, 641 (1943).

77. Gitlow v. New York, 268 U.S. 652, 667 (1925).

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

the minimal protection provided for First Amendment rights, the Court would not use this test today. The case that applied the test most clearly, *Whitney v. California,*[79] was explicitly overruled by *Brandenburg v. Ohio.*[80] The reason that this test deserves comment is not that the Court would apply it, but that the general public might prefer it.[81]

Balancing Test

Justice Harlan defined the balancing test in *Barenblatt v. United States.*

> Where First Amendment rights are asserted . . . resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown.[82]

The sole determining factor in the application of the balancing test to flag desecration statutes is the selection of the "competing private and public interests." The respect and honor that citizens owe their country outweighs the social value of Sidney Street's right to express himself by burning the flag. On the other hand, the right of citizens to express opposing political beliefs is far more vital to society than the maintenance of a cloth symbol. Thus, by its choice of the competing interests, the Court assures a certain result.[83]

It is doubtful that the Court would apply the balancing test today. The test was first recognized in *American Communications Association, C.I.O. v. Douds*[84] in 1950. Although *Douds* and its legacy have never been overruled, neither have they been followed since 1961.[85] The cases

79. *Id.*

80. 395 U.S. 444 (1969).

81. *See* H. McCloskey, *Consensus and Ideology in American Politics,* in AMERICAN GOVERNMENTAL INSTITUTIONS 385 (1968). McCloskey's article deals with a recent Gallup Poll showing that forty-seven percent of the people interviewed believed that the right against self-incrimination interfered with the fight against subversion, *Id.* at 389; seventy-seven percent felt that there was no freedom to be an atheist, *Id.* at 390; fifty percent insisted that authors with "wrong" political beliefs did not deserve to have their books published, *Id.* at 391; and twenty-five percent thought that the legal process was too slow and unreiliable when dealing with Communists, *Id.* at 391.

82. 360 U.S. 109, 126 (1959).

83. *See* Konigsberg v. State Bar of California, 366 U.S. 36, 71 (1961) (Black, J. dissenting); Barenblatt v. United States, 360 U.S. 109, 144 (1959) (Black, J. dissenting); Frantz, *Is the First Amendment Law?—A Reply to Professor Mendelson,* 51 CAL. L. REV. 729, 746-49 (1963).

84. 339 U.S. 382 (1950).

85. For cases applying the balancing test, see Scales v. United States, 367 U.S. 203 (1961); Konigsberg v. State Bar of California, 366 U.S. 36 (1961); Barenblatt v. United States, 360 U.S. 109 (1959); Yates v. United States, 354 U.S. 298 (1957); Dennis v. United States, 341 U.S. 494 (1951). It is important to note that recent decisions invalidating statutes relating to subversive activities have relied upon the vagueness and

applying this test were concerned with maintaining national security.[86] When society's interest in national security is balanced with the right of a protestor to burn the American flag, the result is self-evident. The Court, in recent years, has refused to affirm such a narrow conception of First Amendment rights.[87]

Meikeljohn Test

According to Dr. Alexander Meikeljohn, noted political scientist and professor, the purpose of the First Amendment is to protect *political* speech. Although not a lawyer, his conception of free speech has profoundly affected the legal profession.[88] His theory is best expressed by a quotation from his book, *Political Freedom.*

> In the town meeting, the people of the community assemble to discuss and to act upon matters of public interest. . . . The basic principle is that the freedom of speech shall be unabridged. And yet the meeting cannot even be opened unless, by common consent, speech is abridged. . . . [The moderator's] business on its negative side is to abridge speech. For example, it is usually agreed that no one shall speak unless "recognized by the chair." Also, debaters must confine their remarks to "the question before the house." . . . If a speaker wanders from the point at issue, if he is abusive or in other ways threatens to defeat the purpose of the meeting, he may be and should be declared "out of order." . . . The town meeting, as it seeks for freedom of public discussion of public problems, would be wholly ineffectual unless speech were thus abridged. . . . It is not a dialectical free-for-all. It is self government.
>
> These speech-abridging activities of the town meeting indicate what the First Amendment to the Constitution does not forbid. When self-governing men demand freedom of speech they are not saying that every individual has an unalienable right to speak whenever, wherever, however he chooses. . . .
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> . . . .

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overbreadth doctrines and have not overruled the balancing test. *See* United States v. Robel, 389 U.S. 258 (1967); Whitehall v. Elkins, 389 U.S. 54 (1967); Keyishian v. Bd. of Regents of Univ. of New York, 385 U.S. 589 (1967); Aptheker v. Secretary of State, 378 U.S. 500 (1964); Baggitt v. Bullitt, 377 U.S. 360 (1964).

86. Barenblatt v. United States, 360 U.S. 109, 134 (1959).

87. *See* note 81 *supra* and accompanying text. Since 1961, when the last case involving the balancing test was decided, three of its five advocates have left the bench—Justices Frankfurter and Whittaker in 1962, and Justice Clark in 1967.

88. *See* Brennan, *The Supreme Court and the Meikeljohn Interpretation of the First Amendment,* 79 HARV. L. REV. 1 (1965).

> . . . What is essential is not that everyone shall speak, but that everything worth saying shall be said. . . . And this means that though citizens may, on other grounds, be barred from speaking, they may not be barred because their views are thought to be false or dangerous. No plan of action shall be outlawed because someone in control thinks it unwise, unfair, un-American. No speaker may be declared "out of order" because we disagree with what he intends to say. . . . *It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.* . . .
> . . . The freedom of ideas shall not be abridged.[89]

Thus, the Meikeljohn theory is applicable only when the state seeks to regulate the content of speech. If the state justifies the flag desecration statutes as an appropriate sanction *upon a particularly obnoxious idea,* the statutes are unconstitutional according to the Meikejohn test. The Court has implicitly adopted and explained the Meikeljohn theory in several recent decisions. In *New York Times Co. v. Sullivan,*[90] the Court, speaking through Justice Brennan, stated that debate on public issues "shall be uninhibited, robust, and wide open, and that it may include vehement, caustic, and unpleasantly sharp attacks on government and public officials."[91] *Cox v. Louisiana*[92] ruled that the function of free speech is to invite dispute.[93] Using the rationale of *Sullivan* and *Cox,* the Court upheld a state legislator's right to criticize American involvement in Vietnam.[94] The Court declared that "statements criticizing public policy and the implementation of it must be . . . protected."[95] In language easily applied to flag desecration statutes, the Court in *Tinker v. Des Moines Independent Community School District*[96] determined that before the state can abridge expression, it must show that its action is caused by more than a desire to escape a certain viewpoint. Thus, it is evident that the legislature cannot prohibit the expression of a certain *message.* If dissenters think society is oppressive and the Vietnam war is immoral, they have the constitutional right to express their opinions.

Regulation of Time, Place and Manner

Advocates of the flag desecration statutes argue quite convincingly

89. A. MEIKELJOHN, POLITICAL FREEDOM 24-27 (1960).
90. 376 U.S. 254 (1964).
91. *Id.* at 270.
92. 379 U.S. 536 (1965).
93. *Id.* at 551.
94. Bond v. Floyd, 385 U.S. 116 (1966).
95. *Id.* at 136.
96. 393 U.S. 503 (1969). *See also* Watts v. United States, 394 U.S. 705 (1969).

that the purpose of the statutes is to prohibit one particular method of expression rather than the specific message of the protestors.[97] The state has the power to regulate the time, place and manner of expression.[98] When the Court rules on the constitutionality of these regulations, it balances the interests of the state with the effect of the abridgement of the First Amendment.[99]

It is important to note that where the Bill of Rights is involved, the traditional deference to the state's legislative power does not restrain the Court from reviewing state statutes.[100] By declaring that the First Amendment has a "preferred position" in the Constitution, the Supreme Court has assumed the role of "super-legislator" of all statutes which affect that amendment.[101] Thus, the Court may, in determining the constitutionality of the flag statutes, review both the appropriateness and the effectiveness of the methods used to protect the state's interest.[102]

Public Order

The states have enacted flag desecration statutes partially to prevent the fighting that might accompany the malicious destruction of the

97. *See* 113 CONG. REC. 10647, 16441-98 (1967).

98. Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969); United States v. Harriss, 347 U.S. 612 (1954); Niemotko v. Maryland, 340 U.S. 268 (1951); Kovacs v. Cooper, 336 U.S. 77 (1949); Saia v. New York, 334 U.S. 558 (1948); Prince v. Massachusetts, 321 U.S. 158 (1944); Martin v. City of Struthers, 319 U.S. 88 (1943); Jamison v. Texas, 318 U.S. 413 (1943); Valantine v. Christianson, 316 U.S. 52 (1942); A.F.L. v. Swing, 312 U.S. 321 (1941); Cantwell v. Connecticut, 310 U.S. 296 (1940); Thornhill v. Alabama, 310 U.S. 88 (1940); Schneider v. New Jersey, 308 U.S. 147 (1939).

99. *Id.*

100. *See* Bates v. City of Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama, 357 U.S. 449 (1958); Saia v. New York, 334 U.S. 558 (1948); Marsh v. Alabama, 326 U.S. 501 (1946); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Martin v. City of Struthers, 319 U.S. 141 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940); Schneider v. New Jersey, 308 U.S. 147 (1939). *See also* Kovacs v. Cooper, 336 U.S. 77, 89 (1949) (Frankfurter, J. concurring) for a critical review of this practice.

101. *See* JUDICIAL REVIEW AND THE SUPREME COURT (L. Levy ed. 1967); D. SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW (1966).

102. The relationship between the First Amendment and judicial modesty was explored by Justice Rutledge in *Thomas v. Collins*, 323 U.S. 516 (1945).

> This case confronts us again with the duty our system places on the Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place secured by the First Amendment.

Id. at 529-30. In *Schneider v. New Jersey*, 308 U.S. 147 (1939), which struck down a statute prohibiting the distribution of hand-bills, the Court went so far as to suggest alternative means to achieve the legislative purpose of preventing littering.

> [I]f it is said that these means are efficient and convenient . . . the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press.

Id. at 164.

flag.[103] When viewed in light of such a purpose, these statutes are unnecessary. If demonstrators burn the flag at a time and place where it is reasonable to expect a public disturbance, and a disturbance does in fact occur, they have unquestionably disturbed the peace—an offense in every jurisdiction.[104] On the other hand, if one desecrates the flag where no threat to public order exists and no distrubance occurs, neither has he breached the peace, nor should he be prosecuted under a statute enacted to preserve the peace.[105] Since the flag desecration statutes punish both those who cause disorder and those who do not, they are overbroad and not suitable for the protection of the public order. A more properly written statute would prohibit creating a disturbance by burning the flag at a time and place where the offenders knew or should have known of the high probability that such a disturbance would result. Since none of the statutes are so worded, they are either overbroad or enacted for a purpose other than the prevention of public disorder.

Protection of the National Symbol

Without a doubt, Congress passed the federal Flag Desecration Act to prevent dishonoring of the national symbol.[106] The flag as a symbol has incalculable value. During the Congressional discussion on the statute, debators illustrated the flag's link with past traditions and its representation of a continuity of purpose.[107] The flag symbolizes the power and sovereignty of the national government. It signifies a political theory of liberty, justice and equality. It enables Americans who cannot conceptualize the traditions and the freedoms of their country to "rally 'round the flag" and thereby demonstrate their allegiance. Those who deny significance to such symbols forget that for many citizens, theories and ideas are of a mysterious and inscrutable nature. The flag is the common man's way of demonstrating his allegiance to those theories and ideas.

The Court faces the unenviable task of balancing the emotional need

103. State v. Peacock, 188 Me. 339, 25 A.2d 491 (1942); Halter v. State, 74 Neb. 757, 105 N.W. 298 (1905); People v. Street, 20 N.Y.2d 231, 229 N.E.2d 187 (1967).

104. *See* R. PERKINS, CRIMINAL LAW 399-409 (2d ed. 1969).

105. The facts in *Street v. New York*, 394 U.S. 576 (1969), and *People v. Radich*, 53 Misc. 2d 717, 279 N.Y.S.2d 680 (Crim. Ct. 1967), *aff'd*, —— N.Y. 2d ——, —— N.E.2d —— (1970), in 38 U.S.L.W. 2473 (March 10, 1970), show no threat to public order.

106. *See* notes 29-39 *supra* and accompanying text. Courts have also recognized a need to protect the flag from acts of disgrace. *See* Halter v. Nebraska, 205 U.S. 34 (1906); Hinton v. State, 223 Ga. 174, 154 S.E.2d 246 (1967); Halter v. State, 74 Neb. 757, 105 N.W. 298 (1905); United States Flag Foundation, Inc. v. Radich, 53 Misc. 2d 597, 279 N.Y.S.2d 233 (Sup. Ct. 1967); People v. Picking, 23 N.Y.S.2d 148 (Magis. Ct. 1940), *aff'd*, 263 App. Div. 366, 33 N.Y.S.2d 317, *aff'd*, 288 N.Y. 644, 42 N.E.2d 741 (1942).

107. For an indication of the flag's significant attributes as expressed by Congressmen, see 113 CONG. REC. 10380, 12898, 16442-98, A2310, A2658, A3018, A3536, A3671 (1967).

of people to have and protect a national symbol with the right of citizens to express their political views in an effective and peaceful manner. In the final analysis, flag desecration statutes serve to protect the sensibilities of the public. It cannot be too emphatically stated, however, that the First Amendment demands the protection of even the most abhorrent speech.[108] If the freedom of speech must be weighed, measured or balanced with public sensibilities, then First Amendment protection is illusory. Speech that offends no one needs no protection. Fortunately, the Supreme Court has never recognized public sensibilities as an interest to be balanced with the First Amendment. Therefore, once the Court identifies flag burning as symbolic speech, the statutes prohibiting it cannot be sustained to protect public sensibilities.[109]

Because the statutes may be unconstitutional does not mean that dissenters may burn the flag with impunity. Breach of the peace statutes protect the state from protestors who cause disorder by desecrating the flag at a time and place where disorder is the natural and probable consequence.[110]

Interests other than the protection of public order and sensibilities may be advanced by advocates of the flag desecration statutes. Flag burning may encourage draft resistance, the Hanoi government, free-love movements or any number of anti-establishment activities. It is questionable, however, whether the level of encouragement afforded by flag burning justifies a statute.

FLAGS AND THE LEGAL PROCESS

The inevitable Supreme Court decision on the constitutionality of the flag desecration statutes will either weaken the First Amendment or arouse the animosity of the "silent majority." It is submitted that this result is caused by a malfunctioning of the legal process. The purpose of the flag is to symbolize not only the national government, but also the traditions and freedoms to which the government is committed.[111] People desecrate the flag when they use it in degradation of that purpose.[112]

108. *See* notes 87-94 *supra* and accompanying text.

109. It is submitted that Justice Harlan was correct when he, while speaking for the Supreme Court in *Street,* denounced flag desecration as deplorable and distasteful. Street v. New York, 394 U.S. 576, 594 (1969). It appears that the purpose of flag burning is to polarize the two sides of an issue, making future rational debate impossible and confrontation inevitable. It is perhaps unfortunate that Congress thought these individuals to be so important as to warrant the weakening of the First Amendment.

110. *See* note 102 *supra* and accompanying text.

111. *See* note 104 *supra* and accompanying text.

112. Desecration is defined by WEBSTER'S THIRD INTERNATIONAL DICTIONARY (unabr. 1961) as "violat[ing] the sanctity of by diverting from sacred purposes, by contaminating or by defiling . . . divest[ing] of sacred character or treat[ing] as un-

Examples, then, of flag desecration are use in advertising and the discussion of contemporary issues.[113] Demonstrators desecrate the flag when they burn it to dramatize disagreement with a particular policy of the government or with a particular social viewpoint of society. Others desecrate the flag when they "wave" it to dramatize agreement with present governmental policy or contemporary societal norms.

Desecration of the flag by using it to camouflage issues appears quite frequently. Pertinent arguments on the Vietnam issue are ignored when antagonists hide behind the flag by burning it or waving it. Political candidates insult the flag and the intelligence of the voters by adding the national symbol to their arsenal of campaign weapons. Even the Congressional debate on the statute turned into "patriotic" rhetoric designed to impress the constituency.[114] There is a vast difference between the effects generated from flag burning and flag waving, but this difference should not hide the essential similarity—the use of the flag for political motives.

CONCLUSION

Once flag desecration is recognized as symbolic speech, it may only be prohibited by the presence of a compelling and overriding state interest. Society's interest in maintaining public order is substantial enough to prohibit flag desecration that causes a public disruption. In the absence of such a disruption, however, flag burning harms only the sensibilities of the public. It is submitted that First Amendment rights should not be abridged solely to appease public sensibilities. The problem—though not expressed by judicial decisions to date—is how the public will accept the decision that flag burning is constitutionally protected. Dare the Court declare the statute unconstitutional?

The present status of the law is difficult to justify. The legislature wishes to prevent desecration of the flag. The result is that one form of desecration is prohibited while another desecration is allowed—a stunning example of the "there ought to be a law" syndrome.

As long as people take the flag from its pedestal and employ it in the bellicosity of political debate, there will be those who will feel free to

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hallowed." BLACK'S LAW DICTIONARY 532 (4th ed. 1951) defines desecration as "violat[ing] sanctity of, profan[ing], or put[ting] to unworthy use."

113. Halter v. Nebraska, 205 U.S. 34 (1906).

114. *See* 113 CONG. REC. 16441-98 (1967). Not all the members of Congress participated in the "debate." Senator Stephen Young of Ohio urged that

> even though we are now engaged in the kind of armed conflict which always tends to bring out those super-duper, hysterical, self-appointed and proclaimed patriots, let us keep our perspective.

Id. at 13729.

burn it. It is no accident that demonstrators have singled out the flag as a subject of desecration. There is no respect for a symbol that debators have continuously used to cloak the inadequacies of their arguments. The remedy lies in the attitudes of the people—not in the law.

APPENDIX

State	Pertinent Provision	Initial Statutory Regulation	Date Current Statute Enacted	Maximum Penalty
Federal Statute 18 U.S.C. § 700 (Supp. IV, 1968)	knowingly casts contempt upon . . . by publicly mutilating, defacing, burning, or trampling upon it.	1968	1968	1 year $1,000
Alabama ALA. CODE tit. 14, § 190 (Supp. 1967)	publicly mutilate, deface, defile, defy, trample upon, or by word or act cast contempt upon. Whoever publicly and contemptuously burns or sets fire to the flag . . . is guilty of a felony.	1915	1967	2 years $10,000
Alaska ALASKA STAT. § 11.60.220 (1962)	publicly or wilfully mutilates, tramples upon, or tears down or wilfully and maliciously removes while owned by others or otherwise defaces or defiles	1913	1913	1 year $200
Arizona ARIZ. REV. STAT. ANN. § 41-793 (1956)	publicly mutilate, deface, defile, defy, trample upon, or by word or act cast contempt upon	1919	1919	1 year $2,000
Arkansas ARK. STAT. ANN. § 41-1701 (Repl. 1964)	shall in any manner mutilate, deface, or by word or act publicly exhibit contempt	1919	1919	30 days $100
California CAL. MIL. & VET. CODE § 614 (West 1955)	publicly mutilates, defaces, defiles, or tramples	1899	1929	6 months $500
Colorado Colo. Sess. Laws ch. 124, § 3, [1969]	Uniform Law (See Arizona)	1901	1969	6 months $500
Connecticut CONN. GEN. STAT. REV. § 8581 (1949)	publicly misuse, mutilate, trample upon, or otherwise deface or defile or put indignity upon (repealed effective 1971)	1902	1902	6 months $100
Delaware DEL. CODE ANN. tit. 11, § 533 (Supp. 1968)	Uniform Law (See Arizona)	1903	1903	30 days $100

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State	Pertinent Provision	Initial Statutory Regulation	Date Current Statute Enacted	Maximum Penalty
Florida FLA. STAT. ANN. § 256.06 (1962)	Uniform Law (See Arizona)	1919	1923	90 days $200
Georgia GA. CODE ANN. § 26-2803 (Revision 1969)	deliberately mutilates, defaces, or defiles	1917	1969	misdemeanor
Hawaii HAWAII REV. STAT. § 733-6 (1968)	Uniform Law (See Arizona)	1905	1905	30 days $100
Idaho IDAHO CODE ANN. § 18-3401 (1947)	Uniform Law (See Arizona)	1905	1905	30 days $100 $50 civil forfeit
Illinois ILL. REV. STAT. ch. 56¼, § 6 (1969)	Uniform Law (See Arizona)	1897	1968	5 years $5,000
Indiana IND. ANN. STAT. § 10-506 (1956)	Uniform Law (See Arizona)	1901	1967	1 year $1,000
Iowa IOWA CODE § 32.1 (1966)	publicly mutilate, deface, defile or defy, trample upon, cast contempt upon, satirize, deride, or burlesque either by words or act	1900	1917	30 days $100 $50 civil forfeit
Kansas KAN. STAT. ANN. § 21-4111 (Supp. 1969)	deface, damage, pollute, or otherwise publicly physically mistreat in a way that will outrage the sensibilities of persons likely to observe or discover the action	1905	1969	1 month $500
Kentucky KY. REV. STAT. § 2.060 (1969)	Uniform Law (See Arizona)	1930	1930	30 days $100
Louisiana LA. REV. STAT. § 14:116 (Supp. 1969)	publicly mutilate, defile, or by word or act cast contempt upon	1912	1912	90 days $100
Maine ME. REV. STAT. ANN. tit. 1, § 254 (1964)	Uniform Law (See Arizona)	1903	1919	6 months $500

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State	Pertinent Provision	Initial Statutory Regulation	Date Current Statute Enacted	Maximum Penalty
Maryland MD. ANN. CODE art. 27, § 83 (1957)	Uniform Law (See Arizona)	1902	1918	1 year $1,000
Massachusetts MASS. GEN. LAWS ch. 264, § 5 (1932)	publicly mutilates, tramples upon, defaces, or treats contemptuously	1899	1917	1 year $100
Michigan MICH. COMP. LAWS § 750.246 (1968)	Uniform Law (See Arizona)	1901	1931	90 days $100
Minnesota MINN. STAT. § 609.40 (1965)	intentionally and publicly mutilates, defaces or casts contempt upon	1899	1969	90 days $300
Mississippi MISS. CODE ANN. § 2159 (1957)	Uniform Law (See Arizona)	1916	1916	30 days $100 $50 civil forfeit
Missouri MO. REV. STAT. § 563.750 (1959)	Uniform Law (See Arizona)	1903	1903	30 days $100
Montana MONT. REV. CODES ANN. § 94-3581 (1947)	Uniform Law (See Arizona)	1905	1918	5 years $1,000
Nebraska NEB. REV. STAT. § 28-1101 (Reissue 1964)	Uniform Law (See Arizona)	1905	1905	30 days $100
NEB. REV. STAT. § 28-1102.01 (Reissue 1964)	wilfully and maliciously deface, mutilate or destroy	1905	1955	30 days $100
Nevada NEV. REV. STAT. § 201.290 (1967)	publicly or wilfully mutilates, tramples upon, or who tears down or wilfully and maliciously removes while owned by others, or defames, slanders, or speaks evilly or in a contemptuous manner of or otherwise defaces or defiles	1919	1919	6 months $500

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State	Pertinent Provision	Initial Statutory Regulation	Date Current Statute Enacted	Maximum Penalty
New Hampshire N.H. REV. STAT. ANN. § 573:4 (1955)	publicly mutilate, trample upon, defile, deface or cast contempt upon either by words or acts	1899	1967	6 months $1,000
New Jersey N.J. STAT. ANN. § 2A:107-2 (1953)	publicly mutilates, tramples upon or otherwise defaces or defiles	1898	1904	3 years $1,000
New Mexico N.M. STAT. ANN. § 40A-21-4 (Repl. 1964)	offering any insult by word or act	1903	1963	100 days $100
New York N.Y. GEN. BUS. LAW § 136 (McKinney 1968)	Uniform Law (See Arizona)	1899	1917	misdemeanor
North Carolina N.C. GEN. STAT. § 14-381 (1953)	Uniform Law (See Arizona)	1917	1917	30 days $50 $50 civil forfeit
North Dakota N.D. CENT. CODE § 12-07-04 (1966)	Uniform Law (See Arizona)	1901	1901	30 days $25
Ohio OHIO REV. CODE ANN. § 2921.05 (Page Supp. 1969)	publicly mutilate, burn, destroy, defile, deface, trample upon, or otherwise cast contempt	1902	1967	1 year $1,000
Oklahoma OKLA. STAT. tit. 21, § 372 (Supp. 1969)	contemptuously or maliciously tear down, burn, trample upon, mutilate, deface, defile, defy, treat with indignity, wantonly destroy, or cast contempt, either by word or act	1919	1967	3 years $3,000
Oregon ORE. REV. STAT. § 162.720 (1965)	Uniform Law (See Arizona)	1901	1901	$100
Pennsylvania PA. STAT. ANN. tit. 18, § 4210 (1963)	wilfully and maliciously takes down, injures, removes, or in any manner damages or destroys	1897	1967	1 year $500
PA. STAT. ANN. tit. 18, § 4211 (1963)	Uniform Law (See Arizona)	1897	1967	1 year $1,000

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State	Pertinent Provision	Initial Statutory Regulation	Date Current Statute Enacted	Maximum Penalty
Rhode Island R.I. GEN. LAWS ANN. § 11-15-2 (1956)	Uniform Law (See Arizona)	1902	1902	30 days $100
South Carolina S.C. CODE ANN. § 16-532 (1962)	Uniform Law (with "jeer at" added) (See Arizona)	1916	1916	30 days $100 $50 civil forfeit
South Dakota S.D. COMP. LAWS ANN. § 22-9-1 (1967)	wilfully and maliciously deface, injure, or destroy . . . trail it in the dust with intent to dishonor	1897	1923	30 days $100
S.D. COMP. LAWS ANN. § 22-9-7 (1967)	Uniform Law (See Arizona)	1923	1939	misdemeanor
Tennessee TENN. CODE ANN. § 39-1607 (Supp. 1968)	wilfully and maliciously burns, tears, muddies, or otherwise soils or desecrates	1923	1967	3 years $1,000
TENN. CODE ANN. § 39-1603 (Supp. 1968)	Uniform Law (See Arizona)	1923	1967	3 years $3,000
Texas TEX. PEN. CODE ANN. art. 148 (1952)	Uniform Law (See Arizona)	1917	1917	30 days $100
TEX. PEN. CODE ANN. art. 152 (1952)	Uniform Law (See Arizona)	1917	1918	25 years
Utah UTAH CODE ANN. § 76-14-1 (1953)	Uniform Law (See Arizona)	1903	1903	30 days $100
Vermont VT. STAT. ANN. tit. 13, § 1903 (1959)	Uniform Law (See Arizona)	1898	1941	1 year $1,000
Virginia VA. CODE ANN. § 18.1-425 (Supp. 1968)	Uniform Law (with "burn" added) (See Arizona)	1932	1968	misdemeanor
Washington WASH. REV. CODE § 9.86.030 (Supp. 1969)	knowingly cast contempt. . . by publicly mutilating, defacing, defiling, burning, or trampling	1909	1969	gross misdemeanor

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State	Pertinent Provision	Initial Statutory Regulation	Date Current Statute Enacted	Maximum Penalty
West Virginia W. VA. CODE ANN. § 61-1-8 (1966)	Uniform Law (See Arizona)	1915	1915	30 days $100
Wisconsin WIS. STAT. § 946.05 (Supp. 1969)	intentionally and publicly mutilates, defiles, or casts contempt	1901	1967	1 year $500
Wyoming WYO. STAT. ANN. § 6-106 (1957)	publicly or wilfully mutilates, tramples upon, or who tears down or wilfully and maliciously removes while owned by others, or otherwise defaces, or defiles	1905	1905	1 year $250