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## Constitutional Law--Freedom of Speech--Desecration of National Symbols As Protected Political Expression

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## NOTES

### CONSTITUTIONAL LAW—FREEDOM OF SPEECH—

#### Desecration of National Symbols As Protected Political Expression

Protest groups have long recognized the publicity value of engaging in dramatic kinds of symbolic behavior to express their disapproval of government policy, and recently they have resorted to the desecration of traditionally "sacred" symbols to achieve this end. Recourse to conduct offensive to the patriotic and religious sensibilities of large segments of the population seems to have paralleled the advent of widespread civil disobedience as an instrument of political persuasion. Specifically, dissent over the Vietnam war has produced a number of incidents involving public disrespect for the American flag.<sup>1</sup> Thus, a need has arisen to analyze the extent to which the first amendment protects this particular form of expression.

Two recent New York cases present the relevant issues in sharp perspective. In *People v. Radich*,<sup>2</sup> the defendant publicly exhibited certain articles of "protest art" which incorporated cherished political and religious symbols into graphic portrayals of political themes. Among the "constructions" which the defendant displayed were an American flag stuffed and shaped to suggest the figure of a human body hanging from a noose and a phallic symbol wrapped in a flag and protruding from a cross.<sup>3</sup> According to testimony taken at the trial, the purpose of the exhibit was to protest symbolically "church-condoned American aggressive warfare in Vietnam."<sup>4</sup> The Criminal Court of the City of New York found the defendant guilty<sup>5</sup> of violating a New York statute making it a misdemeanor to "publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by words or act" the American flag.<sup>6</sup> The court held

1. For a general discussion of the free-speech aspects of the Vietnam protest movement in the United States, see Finman & Macaulay, *Freedom To Dissent: The Vietnam Protests and the Words of Public Officials*, 1966 Wis. L. Rev. 632. For examples of desecration of the American flag, 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. 53 Misc. 2d 717, 279 N.Y.S.2d 680 (N.Y. City Crim. Ct. 1967).

3. For publicity that surrounded the case, see generally, LIFE, March 31, 1967, at 18; N.Y. Times, Dec. 30, 1966, at 2, col. 2; *id.*, May 21, 1967, § 2, at 33-35.

4. 53 Misc. 2d at 719, 279 N.Y.S.2d at 683. See also the dissenting opinion of Judge Basel, 53 Misc. 2d at 723, 279 N.Y.S.2d at 687:

Defendant contends artist is not showing contempt for the flag. He supports what it symbolizes, liberty, equality, freedom, but he protests by means of these "constructions" that those virtues have been abandoned by United States conduct in Vietnam. The ideals the flag represents, he argues, are enchained, its inspiration publicly hangs in shame before the world, and the church and State are jointly to be charged as violators of the innocent.

5. The penalty inflicted by the three-judge panel, one judge dissenting, was a \$500 fine or sixty days in jail.

6. N.Y. PENAL LAW § 1425(16)(d) (McKinney 1944). The statute also forbids the use

that defendant's constructions constituted contemptuous use of the flag and that his conduct was not protected by the first amendment.<sup>7</sup>

In the second case, *People v. Street*,<sup>8</sup> the defendant burned an American flag on a New York street corner to protest the shooting of civil rights leader James Meredith in Mississippi. The defendant told a small group of onlookers that "if they let that happen to Meredith we don't need an American flag."<sup>9</sup> Noting that "insults to a flag have been the cause of war,"<sup>10</sup> the New York Court of Appeals affirmed his conviction under the same flag desecration statute applied in *Radich*.<sup>11</sup>

The initial question in analyzing these cases is whether the first

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of the flag for commercial or advertising purposes. All fifty states currently have similar enactments. See also 9B UNIFORM LAWS ANNOTATED 51-54 (1966).

7. It is unclear whether the court meant that use of the flag in works of protest art is a form of expression not protected by the first amendment or that although such conduct is within the amendment's scope, it is subject to regulation under the given circumstances. The opinion contains language to the effect that freedom of speech does not include "a license to desecrate the flag." 53 Misc. 2d at 720, 279 N.Y.S.2d at 684. But the court also stated that there is a sufficient countervailing interest in maintaining public order to justify any indirect restraint on expression, and that the state may exercise its police power to restrict acts which pose an "immediate threat to public safety, peace, or order." 53 Misc. 2d at 720, 279 N.Y.S.2d at 684 [quoting from *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940)]; accord, *People v. Street*, 20 N.Y.2d 231, 229 N.E.2d 187, 282 N.Y.S.2d 491 (1967), *appeal filed*, 36 U.S.L.W. 3162 (U.S. Oct. 5, 1967) (No. 688).

In the companion civil case, *United States Flag Foundation, Inc. v. Radich*, 53 Misc. 2d 597, 279 N.Y.S.2d 233 (Sup. Ct. 1967), plaintiff founded its cause of action on the New York flag desecration statute, *supra* note 6. Recovery was granted; the court summarily rejecting defendant's first amendment defense.

8. 20 N.Y.2d 231, 229 N.E.2d 187, 282 N.Y.S.2d 491 (1967), *appeal filed*, 36 U.S.L.W. 3162 (U.S. Oct. 5, 1967) (No. 688). A decision in this case is expected before the publication date of this Note.—Ed.

9. 20 N.Y.2d at 234, 229 N.E.2d at 189, 282 N.Y.S.2d at 491.

10. 20 N.Y.2d at 236, 229 N.E.2d at 190, 282 N.Y.S.2d at 495 [quoting from *Halter v. Nebraska*, 205 U.S. 34, 41 (1907)].

11. For other state and lower federal court decisions concerning flag desecration statutes, see *Hinton v. State*, 223 Ga. 177, 154 S.E.2d 246 (1967) (conviction affirmed for contemptuously tearing flag in midst of civil-rights rally); *State v. Kent*, Hawaii 1st Cir. Ct., No. 36,423, Dec. 9, 1966 (conviction for contemptuous use of the flag reversed); *People v. Von Rosen*, 13 Ill. 2d 68, 147 N.E.2d 327 (1958) (use of flag in advertising); *State v. Peacock*, 138 Me. 339, 25 A.2d 491 (1942) (contempt for flag by words only); *State v. Schlueter*, 127 N.J. 496, 23 A.2d 249 (1941) (defendant convicted for crumpling flag and tossing it to ground); *People v. Picking*, 288 N.Y. 644, 42 N.E.2d 741, 33 N.Y.S.2d 317 (1942), *cert. denied*, 317 U.S. 632 (1942) (use of flag in advertising); *Ex parte Starr*, 263 F. 145 (D. Mont. 1920) (ten- to twenty-year sentence imposed for abusive words toward flag); *People ex rel. McPike v. Van de Carr*, 178 N.Y. 425, 70 N.E. 965, 86 N.Y.S. 644 (1904) (certain portions of flag desecration statute excised on constitutional grounds).

Significantly, the Supreme Court has never considered the validity of using a state flag desecration statute to punish this type of political protest. In an early decision the Court upheld a state's prohibition on the exploitation of the flag for commercial purposes. *Halter v. Nebraska*, 205 U.S. 34 (1907). There is, however, an obvious distinction between the protection the Constitution accords commercial advertising and that given to political protest. Compare *Breard v. Alexandria*, 341 U.S. 622, 641-45 (1951) and *Valentine v. Chrestensen*, 316 U.S. 52 (1942), with *New York Times v. Sullivan*, 376 U.S. 254 (1964) and text accompanying notes 20-23 *infra*. Moreover, the *Halter* case, *supra*, was disposed of without mention of any first amendment issues.

amendment is at all applicable to protect expressions of this type. The Supreme Court has made it clear that not every communication qualifies for protection under the free-speech guaranty. Yet, with regard to the *form* which expression takes, the Court has consistently acknowledged that, as used in the first amendment, the term "speech" encompasses activities other than conventional verbal communication. Thus, the Court reversed on first amendment grounds a Communist youth leader's conviction under a California statute prohibiting the display of a red flag, the implicit assumption being that the exhibition of the red flag as a form of symbolic protest constituted "speech."<sup>12</sup> Similarly, the Court recognized a flag salute ceremony as a "form of utterance" when it declared a state statute requiring school children to participate in such a ceremony to be an unconstitutional abridgement of freedom of speech and religion.<sup>13</sup> More recently, a sit-in demonstration was deemed to be a form of speech.<sup>14</sup> Therefore, the *forms* of communication employed by the defendants in *Radich* and *Street* should not preclude application of the free speech guaranty.

The Court has indicated that the *content* of particular expressions may render the free speech guaranty inapplicable in a limited number of cases. Expressions may not claim first amendment pro-

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

13. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) [overruling *Minersville School District v. Gobitis*, 310 U.S. 586 (1940)]. The Court recognized that "speech" may include "symbolic" expression:

There is no doubt that . . . the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind.

319 U.S. at 632-33.

14. *Garner v. Louisiana*, 368 U.S. 157, 201 (1961) (Harlan, J., concurring):

We would surely have to be blind not to recognize that petitioners were sitting at these counters, where they knew they would not be served, in order to demonstrate that their race was being segregated in dining facilities in this part of the country.

This characterization of sit-ins was accepted by the opinion of Fortas, J., joined by Chief Justice Warren and Justice Douglas in *Brown v. Louisiana*, 383 U.S. 131, 141-42 (1966) ("stand-in" at public library).

For other forms of communication which have been regarded as forms of expression within the scope of the first amendment, see *NAACP v. Button*, 371 U.S. 415, 428-31 (1963) (litigation as a form of free speech); *NAACP v. Alabama*, 357 U.S. 449, 460-63 (1958) (close connection between freedom of association and freedom of speech); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) (motion pictures as free speech); *Thornhill v. Alabama*, 310 U.S. 88 (1940) (labor picketing as free speech). See generally Comment, *Zoning, Aesthetics, and the First Amendment*, 64 COLUM. L. REV. 81, 91-93 (1964).

Courts have also assumed that draft-card burning can be a form of symbolic expression. Compare *O'Brien v. United States*, 376 F.2d 538, 541 (1st Cir. 1967), cert. granted, 389 U.S. 814 (1967) (No. 232), with *United States v. Miller*, 367 F.2d 72, 79 (2d Cir. 1966), cert. denied, 386 U.S. 911 (1967). See also *People v. Stover*, 12 N.Y.2d 462, 469, 191 N.E.2d 272, 240 N.Y.S.2d 734 (1963), appeal dismissed, 375 U.S. 42 (1963), where the court assumed that hanging offensive articles on a clothesline to protest high taxes was a form of symbolic expression.

tections if they are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed"<sup>15</sup> by the public interest in limiting their dissemination.<sup>16</sup> Expressions

15. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

16. *Beauharnais v. Illinois*, 343 U.S. 250, 257 (1952); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). The notions of "weighing" and "ad hoc balancing" are used by courts in different contexts and these terms should be, but often are not, distinguished. As used in the text, the term "weigh" refers to the process by which certain types of expression, because of their content, are defined as being either within or beyond the protection of the first amendment. While this process involves the balancing of competing public and private interests, once it is complete a settled line emerges between protected and unprotected expression. Thus, whatever is defined as falling within the scope of the first amendment thereafter remains so. Similarly, those forms of expression, such as "fighting words," which are outside the scope of the first amendment remain outside in every subsequent case in which the disputed expression is deemed to be within the excluded category.

Judicial weighing of interests has also been used in cases involving the regulation of conduct. Although neutral in terms of the content of the expression, this type of balancing is aimed at restricting methods of expression which would otherwise be available. Compare *Schneider v. State*, 308 U.S. 147, 161 (1939), with *American Communications Ass'n v. Douds*, 339 U.S. 382 (1950). See also the following expression of the doctrine in *Konigsberg v. State Bar*, 366 U.S. 36, 50-51 (1961):

[G]eneral regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved.

Finally, "ad hoc balancing" has recently come to the fore, primarily in cases involving compelled disclosure of membership lists. Some commentators have suggested that this "balancing test" is being utilized to justify direct restrictions on the content of speech. See Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1428-29 (1962). For cases in which the "ad hoc balancing test" has been applied, see *Aptheker v. Secretary*, 378 U.S. 500 (1964); *Brotherhood of Ry. Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964); *Gibson v. Florida Legislative Com.*, 372 U.S. 539 (1963); *NAACP v. Button*, 371 U.S. 415 (1963); *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961); *In re Anastaplo*, 366 U.S. 82 (1961); *Konigsberg v. State Bar*, 366 U.S. 36 (1961); *Braden v. United States*, 365 U.S. 431 (1961); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Barenblatt v. United States*, 360 U.S. 109 (1959); *Bates v. Little Rock*, 361 U.S. 516 (1960); *Uphaus v. Wyman*, 360 U.S. 72 (1959); *Dennis v. United States*, 341 U.S. 494, 517 (1951) (Frankfurter, J., concurring). For comments generally supporting the "ad hoc balancing test," see W. MENDELSON, *JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT* (1961); Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75; Kauper, Book Review, 58 MICH. L. REV. 619 (1960); Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CALIF. L. REV. 821 (1962). For comments generally opposed to the test, see *Communist Party v. Subversive Activities Control Bd.*, *supra*, at 164 (Black, J., dissenting); *In re Anastaplo*, *supra*, at 110 (Black, J., dissenting); *Barenblatt v. United States*, *supra*, at 141 (Black, J., dissenting); T. EMERSON, *TOWARD A GENERAL THEORY OF FIRST AMENDMENT*, 53-56 (1966) reprinted from 72 YALE L.J. 877 (1963); Bendich, *The Civil Rights Revolution and the First Amendment—"The Reds and the Blacks,"* 2 LAW COMMENTARY 33 (1964); Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865 (1962); Cahn, *Mr. Justice Black and the First Amendment "Absolutes": A Public Interview*, 37 N.Y.U.L. REV. 549 (1962); Frantz, *The First Amendment in Balance*, 71 YALE L.J. 1424 (1962) [followed by Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CALIF. L. REV. 821 (1962); Frantz, *Is the First Amendment Law?—A Reply to Professor Mendelson*, 51 CALIF. L. REV. 729 (1963); and Mendelson, *The First Amendment and the Judicial Process: A Reply to Mr. Frantz*, 17 VAND. L. REV. 479 (1964)]; Meiklejohn, *The Balancing of Self-Preservation Against Political Freedom*, 49 CALIF. L. REV. 4 (1961). For a general consideration of the compelled disclosure cases,

included in this category are the lewd and obscene,<sup>17</sup> the defamatory,<sup>18</sup> and "fighting words."<sup>19</sup> However, the essence of the free speech guaranty is that *political* protest, precisely because of its *content*, is so intrinsically valuable as a stimulant to free thought and discussion that it can never be *wholly* excluded from the protection of the first amendment on the basis of minimal social importance.<sup>20</sup> This was recently exemplified by the Court's holding in

see Bendich, *First Amendment Standards for Congressional Investigation*, 51 CALIF. L. REV. 311 (1963).

17. *Roth v. United States*, 354 U.S. 476, 484 (1957). Compare the Court's refusal to distinguish between socially useful and nonuseful ideas in *Winters v. New York*, 333 U.S. 507, 510 (1948). Although in *Roth* the test of obscenity was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest," in later cases only "hard-core pornography" was likely to be condemned, since a further requirement that the material be "utterly without redeeming social importance" was added to the obscenity test. See, e.g., *Redrup v. New York*, 386 U.S. 767 (1967); *Mishkin v. New York*, 383 U.S. 502 (1966); *Ginzberg v. United States*, 383 U.S. 463 (1966); *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts*, 383 U.S. 413 (1966); *Jacobellis v. Ohio*, 378 U.S. 184 (1964); *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962); *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684 (1959). Although of questionable merit, the suggestion might be made that the phallic-symbol "construction" in the *Radich* case is "hard-core pornography" within the Supreme Court's test, and therefore should be completely outside the protection of the first amendment. Compare Justice Stewart's dissent to the denial of certiorari in *Fort v. Miami*, 389 U.S. 918 (1967). See generally T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 89-91 (1966), reprinted from 72 YALE L.J. 877 (1963); Cairns, Paul, & Wishner, *Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence*, 46 MINN. L. REV. 1009 (1962); Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1; Lockhart & McClure, *Obscenity Censorship: The Constitutional Issue—What is Obscene?*, 7 UTAH L. REV. 289 (1961); Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standard*, 45 MINN. L. REV. 5 (1960); A. Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 262.

18. *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952):

Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary . . . to consider the issues behind the phrase "clear and present danger." Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances. Libel . . . is in the same class.

It might be argued, relying on *Beauharnais*, that the defendant in *Radich* defamed the "church" as an institution by the insinuation in his "constructions" that churches condone war. However, it should be noted that it is questionable today whether the "devoid of social value" approach still has validity in the *Beauharnais* context. The literature at issue there was part of an effort by a group of dissidents to engender support for legislative action on a question of wide public interest and importance. It was therefore political in nature and its condemnation by the Court would seem to have encroached upon precisely what the first amendment is designed to protect. See, e.g., *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Terminiello v. Chicago*, 337 U.S. 1 (1949).

19. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). See *Cantwell v. Connecticut*, 310 U.S. 296, 309-10 (1940) ("Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."). But cf. *Cox v. Louisiana*, 379 U.S. 536, 551 (1965); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). On the "fighting words" doctrine generally, see Wade, *Tort Liability for Abusive and Insulting Language*, 4 VAND. L. REV. 63, 102-10 (1950).

20. See, e.g., *Beauharnais v. Illinois*, 343 U.S. 250, 270 (1952) (Black, J., dissenting); A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 25-27 (1948); A. Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245.

*New York Times v. Sullivan*,<sup>21</sup> that even libelous utterances, which have traditionally been excluded from the safeguards of the first amendment,<sup>22</sup> may be protected if they are expressions "of grievance and protest on one of the major public issues of our times."<sup>23</sup>

*Radich* and *Street* both seem to have involved this type of intrinsically valuable political protest. In *Street*, it was apparent that defendant's flag burning was incident to a *political* commentary on racial injustice since he verbally stated his purpose prior to acting. Any question as to whether the defendant in *Radich* was engaged in expressing a *political* grievance on a vital public issue would seem to be precluded by the Supreme Court's holding in *Bond v. Floyd*<sup>24</sup> that the refusal of the Georgia House of Representatives to seat a newly-elected Negro because of his avowed support for American Negroes refusing to serve in Vietnam constituted a denial of his right of free speech. If statements that the principles which the American flag symbolizes are being compromised by government policy in Vietnam were protected political expressions, conveying the same idea graphically should also be within the scope of the free speech guaranty.<sup>25</sup> Thus, to say that the expressions in the two principal cases are "devoid of social value" would be contrary to the very purpose of the first amendment.<sup>26</sup>

21. 376 U.S. 254 (1964).

22. See, e.g., *Konigsberg v. State Bar*, 366 U.S. 36, 49, n.10 (1961); *Roth v. United States*, 354 U.S. 476, 486-87 (1957); *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952); *Pennkamp v. Florida*, 325 U.S. 331, 348-49 (1946); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); *Near v. Minnesota*, 283 U.S. 697, 715 (1931); T. EMERSON, *supra* note 17, at 68-69.

23. *New York Times v. Sullivan*, 376 U.S. 254, 271 (1964); accord, *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966) ("The thrust of *New York Times* is that when interests in public discussion are particularly strong, as they were in that case, the Constitution limits the protections afforded by the law of defamation."); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964); see *Time, Inc. v. Hill*, 385 U.S. 374 (1967); cf. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). For general literature in the area, see also Berney, *Libel and the First Amendment—A New Constitutional Privilege*, 51 VA. L. REV. 1 (1965); Kalven, *The New York Times Case: A Note on the "Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 204-05, 213-19; A. Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 259; D. Meiklejohn, *Public Speech and the First Amendment*, 55 GEO. L.J. 234, 238-39 (1966); Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 49 CORNELL L.Q. 581, 601-08 (1964).

24. 385 U.S. 116 (1966).

25. Judge Basel, dissenting in *People v. Radich*, 53 Misc. 2d 717, 724, 279 N.Y.S.2d 680, 688 (N.Y. City Crim. Ct. 1967), referred to the 100,000 people who marched on the United Nations in protest against American Vietnam policy, and such notable public figures as Senators Fulbright, Hatfield, and Morse, each of whom has expressed opposition to the war in Vietnam. "No one would seriously argue they be jailed for expressing verbally or in writing what the artist here makes visual."

26. Justice Black has frequently expressed the fear that while obscenity or "fighting words" may be proscribed today under the "devoid of social value" test, the experience of mankind indicates that this type of elastic exception to first amendment freedoms can, and probably will, be expanded to include political or religious unorthodoxy tomorrow. See *Smith v. California*, 361 U.S. 147, 155 (Black, J., concurring). See also

However, the fact that these expressions of protest are protectible under the first amendment does not complete the analysis.<sup>27</sup> The first amendment does not confer an unlimited license to communicate.<sup>28</sup> An individual's right to express his views must be reconciled with the public's interest in tranquility and security. If an exercise of the right presents a sufficient threat to that interest, the state is justified in imposing reasonable restrictions upon the expression in order to protect the public welfare.<sup>29</sup> It is, therefore, necessary to determine whether the interest of the State of New York was sufficient to make permissible the regulation of the expressions of Radich and Street.

Whether a particular state-imposed restriction is reasonable depends of course on the facts of each case. However, the Supreme Court seems to look to certain factors as guidelines in determining the degree of protection to be accorded any expression within the scope of the first amendment.

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Roth v. United States, 354 U.S. 476, 509-13 (1957) (Douglas, J., dissenting, joined by Black, J.); Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865 (1960).

27. It is significant that the Supreme Court has often based its analysis of cases involving symbolic expressions of protest on a perceived dichotomy between "speech" and "speech mixed with conduct." Thus, the Court has emphasized that the first amendment does not "afford the same kind of freedom to those who would communicate ideas by conduct" as to "those who communicate ideas by pure speech." Cox v. Louisiana, 379 U.S. 536, 555 (1965). It has usually been relatively easy for the Court to label a given expression as "pure speech" or "speech mixed with conduct." Thus, such "pure form[s] of expression" as newspaper commentary, a telegram to a public official, or an address delivered from a soapbox are readily distinguishable from a protest march, picketing, or a sit-in demonstration to convey the same idea. However, the situation presented in *Radich*, as well as in some other cases involving expression by means of symbols [see *People v. Stover*, 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734 (1963), *appeal dismissed*, 375 U.S. 42 (1963)], is unique, since the disputed expression neither utilizes "vocal sounds" or printed words, nor does it employ "physical movements" to communicate its idea. This is because a well understood symbol embodies within itself sufficient meaning to communicate an idea passively by its very existence.

28. See *Adderley v. Florida*, 385 U.S. 39, 48 (1966). See also *Cox v. Louisiana*, 379 U.S. 536, 554-55 (1965); *Schneider v. State*, 308 U.S. 147, 160-61 (1939).

29. Thus, the state may exercise its police power to regulate *conduct* which threatens community order, and the fact that such regulation has an adverse indirect effect on expression, otherwise permissible, does not necessarily invalidate the state's action provided that alternative channels of communication remain open. See, e.g., *Kovacs v. Cooper*, 336 U.S. 77 (1949); *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941); *Cantwell v. Connecticut*, 310 U.S. 296, 304-07 (1940); *Schneider v. State*, 308 U.S. 147, 160-61 (1939); *Hague v. C.I.O.*, 307 U.S. 496, 515-16 (1939); *Lovell v. City of Griffen*, 303 U.S. 444, 451 (1938). See also *Adderley v. Florida*, 385 U.S. 39 (1966) (Black, J., writing the majority opinion); *Barenblatt v. United States*, 360 U.S. 109, 141-42 (Black, J., dissenting and indicating agreement with these cases).

When reasonable regulation of conduct is likely to have an indirect effect on the expression of ideas, the Court will "weigh" the community interest involved against the individual's freedom of speech to insure that the regulation is neutral in its impact on varying points of view, does not impose a licensing scheme, and leaves open reasonably adequate alternative means of reaching the public with all points of view. See, e.g., *Cox v. Louisiana*, 379 U.S. 536, 554-55 (1965). See also discussion of judicial "weighing" in note 16 *supra*.



One factor is whether the expression will engender a violent reaction which will threaten the peace of the community. The Court's most explicit statement of the import of this factor came in *Feiner v. New York*,<sup>30</sup> in which a speaker had attempted to provoke a group of Negroes to take violent action against white people. In affirming the speaker's breach of the peace conviction, the Court made it clear that he "was neither arrested nor convicted for the making or the content of his speech. Rather it was the reaction which it actually engendered."<sup>31</sup> Therefore, even if the content of an expression is protectible under the first amendment, communication of that content may entail sufficient arousal potential to justify regulation.<sup>32</sup>

Nevertheless, the arousal potential factor must be weighed very carefully since effective political comment necessarily provokes strong

30. 340 U.S. 315 (1951); Note, *Municipal Regulation of Free Speech in the Streets and Parks*, 46 ILL. L. REV. 489 (1951); Comment, *Constitutional Law—Municipal Control of Public Streets and Parks As Affecting Freedom of Speech and Assembly*, 49 MICH. L. REV. 1185 (1951). Compare *Kunz v. New York*, 340 U.S. 290 (1951) and *Terminiello v. Chicago*, 337 U.S. 1 (1949).

31. 340 U.S. at 319-20.

32. Another form of communication considered high in arousal potential is the motion picture. Although films have been accorded the protections of the free speech guaranty [*Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952)], the Supreme Court has adopted the position that "capacity for evil . . . may be relevant in determining the permissible scope of community control," and that films are not "necessarily subject to the precise rules governing any other particular method of expression." *Id.* at 502-03. See generally, Nimmer, *The Constitutionality of Official Censorship of Motion Pictures*, 25 U. CHI. L. REV. 625 (1958); Note, *Constitutional Law—Due Process—Freedom of Expression—Motion Picture Censorship*, 52 MICH. L. REV. 599 (1954). Presumably this independent "capacity for evil" is a function of the motion picture's alleged ability to arouse a heightened emotional response. See Note, *Motion Pictures and the First Amendment*, 60 YALE L.J. 696, 704-08 (1951) (communications studies on the effectiveness of motion pictures as a medium of expression) and sources cited therein. Belief in the greater ability of motion pictures to arouse emotions may explain why prior submission of films to a censor in advance of exhibition is permitted [*Times Film Corp. v. Chicago*, 365 U.S. 43 (1961); cf. *Freedman v. Maryland*, 380 U.S. 51 (1965)], although a similar requirement for printed matter would be unconstitutional [*Smith v. California*, 361 U.S. 147 (1959)]. The same may also account for the view that certain sexual acts which can be described vividly in books perhaps cannot be displayed graphically on the screen.

See *Trans-Lux Dist. Corp. v. Bd. of Regents*, 14 N.Y.2d 88, 92-93, 248 N.Y.S.2d 857, 860 (1964), *rev'd mem.* 380 U.S. 259 (1965) [on the basis of *Freedman v. Maryland*, 380 U.S. 51 (1965)]:

It is my view that a filmed presentation of sexual intercourse, whether real or simulated, is just as subject to State prohibition as similar conduct if engaged in on the street. I believe the nature of films is sufficiently different from books to justify the conclusion that the critical difference between advocacy and actual performance of the forbidden act is reached when simulated sexual intercourse is portrayed on the screen.

This view, however, seems to ignore the fact that a motion picture is sheltered from the view of all but those who seek admittance. Since a person who voluntarily enters a movie theater ordinarily does so with some expectation of what he will see, the same conduct that would be potentially obtrusive when observed in public might not be as startling when viewed in the context of the movie. Hence, it does not follow that the degree of arousal potential would be the same.

reactions. The Supreme Court has stated that "a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."<sup>33</sup> Therefore, focusing solely on the arousal potential of an otherwise protected expression as the justification for imposing restrictions could frustrate the purpose of the first amendment.<sup>34</sup> Recognizing this difficulty, the Court has indicated that a high degree of arousal potential justifies restricting expression only if there are no other means available for maintaining peace in the community.<sup>35</sup> If the state can preserve order by controlling the *response*, thereby permitting communication of the idea rather than suppressing it, it has a *duty* to do so.

The cases of *Cox v. Louisiana*<sup>36</sup> and *Edwards v. South Carolina*<sup>37</sup> are illustrative of this principle. In *Cox*, a group of 2,000 civil-rights demonstrators conducted a protest march to the Baton Rouge, Louisiana, courthouse, where they sang hymns and listened to a civil-rights speech. In response to the "muttering and grumbling" of on-looking whites, the police dispersed the group and arrested its leader, charging him with breach of the peace. The Court held that this interference with the expression of a political grievance constituted

33. *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). For a more current statement of this view, see *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964), where the Court declared that "debate on public issues *should be* uninhibited, robust, and wide-open," and that it may include "vehement, caustic, and sometimes unpleasantly sharp" criticism (emphasis added).

34. It might be argued that desecration of the flag is not essential to the voicing of political protest and that therefore the state should be permitted to minimize the arousal potential inherent in that form of expression by requiring the speaker to communicate his views in a more orthodox manner. See *Kovacs v. Cooper*, 336 U.S. 77 (1949). But see *Adderley v. Florida*, 385 U.S. 39, 49-51 (1966) (Douglas, J., dissenting): The right to petition for redress of grievances . . . is not limited to writing a letter or sending a telegram to a Congressman; it is not confined to appearing before the local city council, or writing letters to the President or Governor or Mayor. . . . Conventional methods of petitioning may be, and often have been, shut off to large groups of our citizens. Legislators may turn deaf ears; formal complaints may be routed endlessly through a bureaucratic maze; courts may let the wheels of justice grind very slowly. Those who do not control television and radio, those who cannot afford to advertise in newspaper or circulate elaborate pamphlets may have only a more limited type of access to public officials. Their methods should not be condemned as tactics of obstruction and harassment as long as the assembly and petition are peaceable . . . .

It may also be true that "symbolic" expression which cuts through the current mass of propaganda competing for the public's attention is the most effective medium through which an artist can "invite dispute" on important public issues. See generally, T. EMERSON & D. HABER, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 964-71 (2d ed. 1958) (collection of communication studies); Rose, *The Study of the Influence of the Mass Media on Public Opinion*, 15 *KYKLOS* 465 (1962) (brief summary of psychological research methods and findings in the field of public opinion formation).

35. See, e.g., *Cox v. Louisiana*, 379 U.S. 536 (1965); *Edwards v. South Carolina*, 372 U.S. 229 (1963). See also text accompanying note 39 *infra*.

36. 379 U.S. 536 (1965).

37. 372 U.S. 229 (1963).

a violation of the right of free speech, since there was no evidence that violence was actually threatened by the demonstrators or the onlookers, and since sufficient police were available to control any disturbance which might have occurred. In *Edwards*, the Court reversed a breach of the peace conviction<sup>38</sup> based on conduct similar to that involved in *Cox* because the protesters had been "convicted upon evidence which showed no more than that the opinions which they were peaceably expressing were sufficiently opposed to the view of the majority of the community to attract a crowd and necessitate police protection."<sup>39</sup>

On the other hand, in *Feiner*<sup>40</sup> the Court was concerned with the apparent inability of local authorities to control the situation created by the defendant's speech. Only two policemen were available to deal with a large crowd which had overflowed into the street and was "pushing, shoving and milling around,"<sup>41</sup> and at least one onlooker had threatened violence if the police did not act.<sup>42</sup> Given these circumstances, the Court found that imposing restrictions on the inflammatory expression was justifiable.<sup>43</sup>

38. *But see* *Adderley v. Florida*, 385 U.S. 39 (1966).

39. 372 U.S. at 237; *accord*, *Henry v. City of Rock Hill*, 376 U.S. 776 (1964). *But cf.* *Feiner v. New York*, 340 U.S. 315 (1951).

40. *See* notes 30-32 *supra* and accompanying text.

41. 340 U.S. at 317.

42. The earlier case of *Terminiello v. Chicago*, 337 U.S. 1 (1949), where the defendant's conviction was reversed on similar facts, can be distinguished because, although the speech was highly inflammatory, the situation was deemed more controllable. Not only was the address delivered in a closed auditorium so that the speaker was physically separated from his detractors, but a "cordon of policemen" was available to handle any disturbance that might have developed. However, *see* Justice Jackson's dissenting opinion. *Id.* at 13.

43. The Court seemed to apply a curiously twisted version of the "clear and present danger" test. This test has undergone numerous modifications since its inception. It was first articulated by Justice Holmes in *Schenck v. United States*, 249 U.S. 47, 52 (1919), and originally applied in criminal syndicalism cases where a statute called for direct censorship of ideas, rather than mere regulation of the manner of expression. Before suppression of the expression could be justified, the danger to a substantive interest of the state had to be so serious and *imminent* that there was no time for words to intervene. For the subsequent development of the test, *see* *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting); *Schaefer v. United States*, 251 U.S. 466, 482 (1920) (Brandeis, J., dissenting); *Gitlow v. New York*, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting); *Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring). In the 1930's and 1940's, the Court began to apply the test to challenges to legislation which regulated time, place, and manner of expression rather than its content. *See, e.g., Thornhill v. Alabama*, 310 U.S. 88, 104-05 (1940); *Carlson v. California*, 310 U.S. 106 (1940); *Cantwell v. Connecticut*, 310 U.S. 296, 308, 311 (1940); *Bridges v. California*, 314 U.S. 252, 261-63 (1941). The test was substantially reformulated, however, in *Dennis v. United States*, 341 U.S. 494 (1951), when the requirement of imminency was eliminated. *But see* *Yates v. United States*, 354 U.S. 298 (1957); *Scales v. United States*, 367 U.S. 203 (1961). For general literature on the "clear and present danger" test, *see* T. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 51-53 (1966) reprinted from 72 *YALE L.J.* 877 (1963); Anticau, *Dennis v. United States—Precedent, Principle or Perversion?*, 5 *VAND. L. REV.* 141 (1952); Lusk, *The Present Status of the "Clear and Present Danger Test"—A Brief History and*

Recently, the Supreme Court has indicated that expression which would otherwise be protected may nevertheless be restricted if it has the effect of disrupting the normal functioning of the community.<sup>44</sup> Although related to arousal potential, this factor is distinct and concerns the effect of the form of the expression rather than the reaction which the expression engenders. Thus, in the recent case of *Adderley v. Florida*,<sup>45</sup> the Court affirmed the criminal trespass convictions of student demonstrators who had congregated on the premises of a county jail on the ground that the demonstration was disruptive of the normal functioning of that institution. In *Brown v. Louisiana*,<sup>46</sup> which was somewhat similar in its facts to *Adderley*, the absence of disruptive activity seemed to be a decisive factor in the Court's reversal of several convictions for breach of the peace arising out of a "stand-in" conducted in a public library. The Court found it significant that there was no "disturbance of others, no disruption of library activities, and no violation of any library regulations."<sup>47</sup>

Applying these factors to the facts in *Radich*, it is clear that total foreclosure of the defendant's expression was not justified; indeed, it is questionable whether even a more limited type of restriction would have been permissible. The defendant did not display his "constructions" publicly where they might have attracted a violent crowd or disrupted normal community functioning. Instead, his exhibition took place in a private art gallery sheltered from the view of all but those who chose to enter. Thus, the rights of others to use public thoroughfares and facilities without interference was in no way impaired. And, given the setting in which they were pre-

*Some Observations*, 45 KY. L.J. 576 (1957); McKay, *The Preference for Freedom*, 34 N.Y.U.L. REV. 1182 (1959); Mendelson, *Clear and Present Danger—From Schenck to Dennis*, 52 COLUM. L. REV. 313 (1952); Richardson, *Freedom of Expression and the Function of Courts*, 65 HARV. L. REV. 1 (1951).

In *Feiner* it seemed that the speaker was interrupted not because the ideas he was advocating were deemed to be imminently dangerous, but because it was feared that the reaction of the hostile crowd created a clear and present danger that he would be harmed. On the other hand, the Court did mention at one point that the speaker had passed the bounds of argument or persuasion and had undertaken incitement to riot. *Feiner v. New York*, 340 U.S. 315, 321 (1951). But see *Brown v. Louisiana*, 383 U.S. 131, 133, n.1 (1966) ("Participants in an orderly demonstration in a public place are not chargeable with the danger, unprovoked except by the fact of the constitutionally protected demonstration itself, that their critics might react with disorder or violence."); *Cox v. Louisiana*, 379 U.S. 536, 551 (1965); *Edwards v. South Carolina*, 372 U.S. 229, 236 (1963) (distinguishing *Feiner*). On the general problem of the "heckler's veto," see H. KALVEN, *THE NEGRO AND THE FIRST AMENDMENT* 140-60 (1965); Note, *Freedom of Speech and Assembly: The Problem of the Hostile Audience*, 49 COLUM. L. REV. 1118, 1123-24 (1949); Note, *Constitutional Law—Free Speech and the Hostile Audience*, 26 N.Y.U.L. REV. 489 (1951).

44. See *Cox v. Louisiana*, 379 U.S. 536, 554-55 (1965).

45. 385 U.S. 39 (1966).

46. 383 U.S. 131 (1966).

47. 383 U.S. at 142.

sented, the sculptures themselves probably constituted less of an abrupt transgression on individual sensibilities than would a similar display on a street corner. Since those who voluntarily enter an art gallery generally do so with some expectation of what they will see, there was less likelihood that the reaction of the onlookers would be violent. Nevertheless, the New York trial court in *Radich* was concerned that the "constructions" would tend to evoke a strong physical response and indicated that this justified *total* prohibition of the display.<sup>48</sup> Even assuming that this fear of a violent reaction was justified, the court's action seems contrary to the notion that the state has some initial obligation to attempt to protect a speaker from a hostile audience prior to resorting to the alternative of suppressing his expression.<sup>49</sup> Protecting the defendant from some outraged patrons in an art gallery would have been a simpler proposition than guarding the large groups of civil rights demonstrators in *Cox* and *Edwards* from belligerent whites.<sup>50</sup>

In *Street*, on the other hand, the flag-burning incident occurred on a street corner in a large city and thus was quite likely to attract a crowd. Some disruption of normal community functioning was a probable consequence. Moreover, burning the flag in public would appear to be the type of inflammatory expression which would offend the patriotic sensibilities of passers-by and provoke a violent spontaneous reaction from them.<sup>51</sup> Indeed, the New York Court of Appeals characterized the flag-burning as "an act of incitement, literally and figuratively 'incendiary' and as fraught with danger to the public peace as if he had stood on the street corner shouting epithets at passing pedestrians."<sup>52</sup> These factors indicate that keeping

48. The majority in *Radich* cited *Halter v. Nebraska*, 205 U.S. 34, 41 (1907), a case in which the Supreme Court upheld a similar flag desecration statute involving the use of the flag in advertising, and which referred to the fact that often "insults to a flag have been the cause of war." The New York court reasoned that the prohibited use of the flag in advertising is less of a "desecration," and therefore less of a threat to public order than the exhibition of the flag in defendant's protest art. 53 Misc. 2d 717, 721, 279 N.Y.S.2d 680, 684-85 (N.Y. City Crim. Ct. 1967). *But see* the brief discussion of this point in note 11 *supra*.

49. *See generally* Comment, *The University and the Public: The Right of Access by Nonstudents to University Property*, 54 CALIF. L. REV. 132, 149, n.78 (1966).

50. Local officials have been effectively enjoined from interfering with civil rights and antiwar parades and rallies that would appear to have been potentially more inflammatory than "contemptuous" displaying of the flag in an art gallery. *See, e.g.*, *Hurwitt v. City of Oakland*, 247 F. Supp. 995 (N.D. Cal. 1965) (injunction granted prohibiting city officials from interfering with a protest march against the Vietnam war); *Williams v. Wallace*, 240 F. Supp. 100 (M.D. Ala. 1965) (Selma to Montgomery march), discussed in Marshall, *The Protest Movement and the Law*, 51 VA. L. REV. 785, 787-92 (1965); *Farmer v. Moses*, 232 F. Supp. 154 (S.D.N.Y. 1964) (world's fair).

51. There was, however, no evidence in the opinion of any violent reaction.

52. 20 N.Y.2d 231, 237, 229 N.E.2d 187, 191, 282 N.Y.S.2d 491, 496 (1967), *appeal filed*, 36 U.S.L.W. 3162 (U.S. Oct. 5, 1967) (No. 688). *Compare* *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), where the Supreme Court acknowledged that insulting epithets, which by their very utterance tend to inflict injury or incite to an immediate breach of the peace, may be prevented and punished in order to preserve public order.

the peace might have been impossible. Therefore, although Street's expression was protected by the free speech guaranty, the state might have been justified in subjecting it to reasonable restrictions necessary to preserve order in the community. However, the court's application of the New York statute completely to foreclose the expression was improper. At best, "reasonableness" would seem to justify only statutory limitations as to the "time, place and manner"<sup>53</sup> of the expression. By this analysis the defendant's conviction should have been upheld only if the state had properly enacted a statute regulating the time and place of expression and the defendant had failed to abide by the requirements of that statute.<sup>54</sup>

The remaining question is whether the preceding analysis must be modified because the expressions in *Radich* and *Street* involved the use of symbols having a special significance. Any such modification must be based on the notion that the state has an independent interest in promoting patriotism which justifies preventing desecration of "sacred" national symbols.<sup>55</sup>

This concept is not novel<sup>56</sup> and does not depend upon the effect that this form of expression has on public order. The idea that coerced national unity in matters of politics and religion is essential to the security of the state has resulted in restrictions on freedom of expression for centuries. Heresy and blasphemy were punishable offenses against the established church, and later seditious libel became the analogous crime against the state.<sup>57</sup> Even recently, it has been customary for national and local leaders to compel people to engage in appropriate gestures of respect for national emblems.<sup>58</sup> And, as to religious symbols, it would be erroneous to assume that state coercion of respect for religious ideals was confined to the Middle Ages. State blasphemy statutes, which deemed contempt, indignity, or irreverence toward God to be criminally libelous, were enforced in a number of American jurisdictions as late as the first quarter of this century.<sup>59</sup>

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53. *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941):

If a municipality has authority to control the use of its public streets for parades or processions, as it undoubtedly has, it cannot be denied authority to give consideration, without unfair discrimination, to time, place and manner in relation to the other proper uses of the street.

54. *Id.*

55. For an expression of this view, see *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 595 (1940), overruled by *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

56. Indeed, the deification of a symbol or "totem," the desecration of which meant banishment from the tribe, is the oldest form of religious belief. See G. THOMSON, *AESCHYLUS AND ATHENS* 1-2 (1966).

57. See generally L. LEVY, *LEGACY OF SUPPRESSION* 164 (1960).

58. See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943).

59. See *Maine v. Mockus*, 113 A. 39 (Me. 1921), 14 A.L.R. 871 (1921). See also *Commonwealth v. Kneeland*, 37 Mass. (20 Pick.) 206 (1838); *People v. Ruggles*, 8 Johns.

Today, however, such attempts to legislate religious orthodoxy would raise serious questions under the first amendment prohibition of laws "respecting an establishment of religion."<sup>60</sup> The Supreme Court has struck down a New York statute permitting the censorship of "sacrilegious" movies.<sup>61</sup> New York's highest court had interpreted the law to mean "that no religion, as that word is understood by the ordinary, reasonable person, shall be treated with contempt, mockery, scorn and ridicule . . . ."<sup>62</sup> The Supreme Court replied that "[a]pplication of the 'sacrilegious' test, in these or other respects, might raise substantial questions under the First Amendment's guaranty of separate church and state with freedom of worship for all."<sup>63</sup> With regard to freedom of expression, the Court pointed out that the state has no legitimate interest in protecting any or all religions from the expression of views distasteful to them.<sup>64</sup> Therefore, it would seem that the first amendment prevents a state from coercing respect for "sacred" religious symbols by imposing criminal sanctions against their abuse or "desecration."<sup>65</sup>

However, different standards occasionally seem to have been applied to permit the government to restrict desecration of its own symbols of authority. The result in a recent case involving draft-card burning as a form of protest seems to be a manifestation of this notion. Although the draft card is not a "sacred" national symbol, it has become a symbol of governmental authority and is now associated with patriotism in the public mind. In *United States v. Miller*,<sup>66</sup> the Court of Appeals for the Second Circuit upheld the

290 (N.Y. 1811). Under such statutes, the defendant's disrespectful display of the cross in *Radich* would certainly have been punishable.

60. U.S. CONST. amend. I.

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

62. *Joseph Burstyn, Inc. v. Wilson*, 303 N.Y. 242, 258, 101 N.E.2d 665, 672 (1951) (emphasis added). At another point, the New York Court of Appeals defined the term "sacrilegious" to mean "the act of violating or profaning anything sacred." *Id.* at 255, 101 N.E.2d at 670.

63. 343 U.S. 495, 505 (1952). For an extended discussion of the concept of sacrilege see Justice Frankfurter's concurring opinion. *Id.* at 507.

64. 343 U.S. at 505; accord, *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940), in which the Court reversed the breach of the peace conviction of a member of Jehovah's Witnesses who had attacked all organized religions as instruments of Satan and castigated the Catholic Church in such vehement terms as to offend the religious sensibilities of his audience. The Court recognized that:

[I]n the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader . . . at times resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

65. Of course, this does not mean that the state is powerless to prevent harmful conduct. Thus, if a man defaces the altar of a church or destroys a crucifix, such conduct is punishable as destruction of private property.

recent amendment to the Selective Service Act making it a federal crime knowingly to mutilate a draft card.<sup>67</sup> Although arguably this amendment was aimed at stifling this particular mode of political dissent, the Second Circuit maintained that it merely strengthened the existing provisions of the law requiring continuous possession of the draft certificate.<sup>68</sup> Even assuming that the legitimate national interest in the orderly operation of a conscription system does in fact justify requiring registrants to be in continuous possession of their draft cards<sup>69</sup> despite the fact that this may result in an indirect restraint on freedom of expression, it is difficult to discern what purpose is served by the additional provision making it a separate offense knowingly to effect the loss of possession by destruction or mutilation.<sup>70</sup> The most probable explanation of such a provision is that it was intended to prevent public displays of disrespect for this particular symbol of national authority.

The latter interpretation was adopted by the Court of Appeals for the First Circuit in *O'Brien v. United States*,<sup>71</sup> a case factually similar to *Miller*, when it decided that the Selective Service amendment was directed at those who choose to portray graphically their disagreement with government policy and was therefore unconstitutional. The court stated that to conclude that the "impact of such conduct would impede the war effort, and measure the sentence by the nature of his communication, would be to punish defendant, pro tanto, for exactly what the First Amendment protects."<sup>72</sup> Thus, the court apparently refused to modify the well-established constitutional limitations upon restraint of free speech simply because a national symbol was involved.<sup>73</sup>

However, in its recent decision in the *O'Brien* case, the Supreme Court rejected the First Circuit's interpretation and upheld the constitutionality of the Selective Service amendment.<sup>74</sup> While denying that an "apparently limitless variety of conduct can be labeled 'speech' " simply because the actor intends thereby to communicate an idea, the Court found that even if the *form* of expression used is subject to first amendment protection, the action may nonetheless be regulable.<sup>75</sup> Thus, since " 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important gov-

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66. 367 F.2d 72 (2d Cir. 1966), *cert. denied*, 386 U.S. 911 (1967).

67. 50 app. U.S.C. § 462(b)(3) (Supp. I, 1965) *as amended*, 79 Stat. 586 (1965).

68. 367 F.2d at 77.

69. *See* 367 F.2d at 77 for a discussion of this assumption.

70. *But see* *O'Brien v. United States*, 36 U.S.L.W. 4469, 4473 (U.S. May 27, 1968).

71. 376 F.2d 538 (1st Cir. 1967), *cert. granted*, 389 U.S. 814 (1967) (No. 232).

72. 376 F.2d at 542.

73. The court nonetheless found no constitutional objection to defendant's conviction for intentional nonpossession of his draft card under unamended statute. 376 F.2d at 541.

74. *O'Brien v. United States*, 36 U.S.L.W. 4469 (U.S. May 27, 1968).

75. 36 U.S.L.W. at 4472.



ernmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."<sup>76</sup> The Court posited that the constitutional power to raise and support armies justified the requirement of continuous possession of the draft certificate. But, unless it is assumed that burning a draft card is likely to interrupt the normal functioning of the community or arouse such a violent response that it could not be controlled by law enforcement officials, it would seem that there is no constitutional justification for *total* foreclosure of draft card burning under a statute prohibiting mutilation. Although the Court indicated that a "sizeable crowd" attacked O'Brien after he burned his draft card,<sup>77</sup> it apparently did not rely upon this fact in reaching its decision, nor did it consider the factors of controllability and normal community functioning. Perhaps the decision is best explained by the presence of a symbol of governmental authority in the case.

The flag desecration statute under which Radich and Street were convicted<sup>78</sup> is another example of the idea that protection of important national symbols may justify relaxation of constitutional protections otherwise applicable. There are several additional arguments which can be levelled at this statute. Due process requires that criminal statutes contain predictable indicia of guilt so as to provide fair notice of the acts punishable thereunder.<sup>79</sup> Furthermore, the Supreme Court has indicated that the requisite standard of clarity will be particularly high if a statute may deter freedom of expression.<sup>80</sup> It would seem that such terms as "defile," "defy," and

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76. 36 U.S.L.W. at 4472.

77. 36 U.S.L.W. at 4469-70.

78. See text accompanying note 6 *supra*.

79. See generally *Ashton v. Kentucky*, 384 U.S. 195 (1966); *Giaccio v. Pennsylvania*, 382 U.S. 399 (1965); *Wright v. Georgia*, 373 U.S. 284 (1963); *United States v. Cardiff*, 344 U.S. 174 (1952); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939). Compare the following cases in which statutory language was held to be sufficiently definite: *Roth v. United States*, 354 U.S. 476 (1957); *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337 (1952); *United States v. Petrillo*, 332 U.S. 1 (1947); *Screws v. United States*, 325 U.S. 91 (1945); see generally Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

80. *Smith v. California*, 361 U.S. 147, 151 (1959):

[T]his Court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser.

The danger of vagueness in an area as "delicate and vulnerable" as first amendment freedoms does not depend so much upon the absence of fair notice to the accused as upon the existence of criminal statutes capable of sweeping unnecessarily broadly into the area of protected rights where "the threat of sanctions may deter their exercise almost as potently as the actual application of the sanctions" themselves. *NAACP v. Button*, 371 U.S. 415, 433 (1963). See also *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Baggett v. Bullitt*, 377 U.S. 360 (1964); *Garner v. Louisiana*, 368 U.S. 157 (1961); *Winters v. New York*, 333 U.S. 507 (1948); *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Stromberg v. California*, 283 U.S. 359 (1931). In *Cox v. Louisiana*, 379 U.S. 536, 551 (1965), a Louisiana statute making it a crime to congregate with others with the intent to provoke a breach of the peace or under

"cast contempt upon" fall short of this standard. What is contemptuous to one man may be a work of art to another.<sup>81</sup> Thus, given the high degree of subjectivity of judgments on the meaning of such terms, it is difficult to see how the terms used in the New York flag desecration statute establish any meaningful standards of guilt.

In addition to the lack of notice provided by such terms, their breadth can have another kind of adverse effect on freedom of speech. Since the terms are broad enough to encompass logically many kinds of conduct, the statute provides local officials with an opportunity to impose their own standards of political orthodoxy on the community.<sup>82</sup> Indeed, *Radich* may well illustrate this point. Under a broad interpretation of the New York statute, the flag is being "desecrated" every day by its use in advertising, on clothing, and in a variety of other ways.<sup>83</sup> However, in these instances enforcement of the statute is almost totally lacking. Ironically, the characteristic which distinguishes *Radich's* use of the flag from those which go unchallenged is that he attempted to express a political grievance.

It would be disconcerting to find that the Constitution permits political expression to be stifled merely because it employs a "sacred" symbol and thereby offends the patriotic sensibilities of those in power. The Supreme Court seemed to reject the notion of a preferred position for sacred national symbols in *West Virginia Board*

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such circumstances that a breach of the peace may occur was held unconstitutionally vague and indefinite in its overly-broad scope since it permitted punishment for peaceful expression or unpopular views. *See also* *Whitehill v. Elkins*, 389 U.S. 54 (1967); *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); *Ashton v. Kentucky*, 384 U.S. 195 (1966); *Elfbrandt v. Russell*, 384 U.S. 11 (1966); *Aptheker v. Secretary*, 378 U.S. 500 (1964).

81. *See* *Winters v. New York*, 333 U.S. 507, 510 (1948). It would seem that the concept of "desecration" is incapable of precise definition, particularly when what is sacred to one man may seem to be the "ranked error" to his neighbor. *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940).

82. In *Cox v. Louisiana*, 379 U.S. 536, 554-57 (1965), an ordinance forbidding obstruction of public passageways was invalidated, not because the state may not justifiably regulate conduct with indirect expressive effects, but because its overly-broad provisions permitted discriminatory application in the complete discretion of local officials.

Indeed, several commentators have suggested that the purpose of the federal flag desecration statute recently passed by the House of Representatives (H.R. 271, which passed by a vote of 385-16, specifies: "Whoever casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, or trampling upon it shall be fined not more than \$1,000 or imprisoned for not more than one year, or both.) is to eliminate this vivid form of opposition to the Vietnam war. *See, Hearings on H.R. 271 Before Subcom. No. 4 of the House Comm. on the Judiciary*, 90th Cong., 1st Sess., ser. 4 (1967).

83. *LIFE*, March 31, 1967, at 18-25. The article vividly portrays the use of the American flag on all kinds of merchandise, advertising, fashions, and stage dress. Among the commercial items adorned with the flag are clothing, handkerchiefs, linens, towels, theatrical garb, and martini olives. It would seem that, technically, each of these uses is in violation of the New York flag desecration law and similar statutes in other states. Also depicted is the frequent use of the flag in works of "hippy" art.

of *Education v. Barnette*.<sup>84</sup> In that case, it was argued that a compulsory flag salute was a permissible means of securing national unity. The Court assumed that officials could pursue national unity by persuasion and example,<sup>85</sup> but it held that compulsory affirmation of belief in a patriotic creed was contrary to the first amendment. Implicit in this holding is the idea that the mere presence of a sacred symbol does not justify altering the standard to be employed in determining the validity of state restrictions which have a repressive effect on freedom of expression. The Court's concluding language is particularly relevant:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.<sup>86</sup>

The Court emphasized that "there is no mysticism in the American concept of the State" or in the nature of its authority.<sup>87</sup> Thus, in the absence of an imminent threat to the peace of the community, the state should not be permitted to impose restrictions on political expressions which take the form of disrespect for "sacred" national symbols.<sup>88</sup>

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84. 319 U.S. 624 (1943), overruling *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940); cf. *Taylor v. Mississippi*, 319 U.S. 583 (1943).

85. 319 U.S. at 640.

86. 319 U.S. at 642. Consider also the following language from the Court's opinion: "[F]reedom to differ is not limited to the 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." 319 U.S. at 642.

87. 319 U.S. at 641. This statement should dispel the notion that the flag and other symbols of nationalism are somehow absolute and above the everyday exigencies of politics.

88. Of course, this does *not* mean that the state is powerless to regulate *conduct* for a proper purpose. Thus, if a man defaces a national monument or throws a rock through a Supreme Court window, his *conduct* may be punished although he might contend that his behavior was a form of "symbolic expression." And certainly no one would suggest that political assassination is a permissible form of "symbolic" protest. However, apart from such overt threats to public order, the state's legitimate interest in promoting patriotism is insufficient by itself to justify suppression of expressive behavior merely because it is disrespectful of sacred national symbols. This principle would apply whether a person displays the flag in works of protest art, sings words of dissent to the tune of the National Anthem, or burns a copy of the Declaration of Independence on the Fourth of July.