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COMMENT

CONSTITUTIONAL LAW — SYMBOLIC SPEECH — Colorado Flag Desecration Statute

INTRODUCTION

COLORADO's present flag desecration statute will be replaced on July 1, 1972 by section 40-11-204 of the new Colorado Criminal Code.¹ The applicable portion of the new statute provides:

- (1) It shall be unlawful for any person to mutilate, deface, trample upon, burn, cut, or tear any flag in public:
 - (a) With intent to cast contempt or ridicule upon such flag; or
 - (b) With intent to outrage the sensibilities of persons liable to observe or discover the action or its results; or
 - (c) With intent to cause a breach of the peace or incitement to riot; or
 - (d) Under such circumstances that it may cause a breach of the peace or incitement to riot.
- (2) "Flag" as used in this section, means any flag, ensign, banner, standard, colors, or replica or representation thereof which is an official or commonly recognized symbol of the United States of America or the State of Colorado.²

Recently, statutes such as this have frequently been used to prosecute persons for acts ranging from representing the flag with dollar signs instead of stars, to writing "Give peace a chance" and placing peace symbols on flags to be worn on jackets, to the actual burning or tearing of flags³ — acts which were or may have been intended to convey specific ideas of a political nature to observers. The fact that today these statutes are often enforced against dissenters⁴ whose conduct constitutes symbolic speech, and not against the original targets of the statutes — those who used flags for advertising and commercial purposes⁵ — has caused several federal courts to invalidate

¹ Ch. 121, § 40-11-204, [1971] Colo. Sess. Laws 480.

² *Id.* § 40-11-204(1)-(2).

³ See Note, Flag Desecration — the Unsettled Issue, 46 NOTRE DAME LAWYER 201 (1970).

⁴ See generally Note, *Desecration of the American Flag*, 3 IND. LEGAL F. 159 (1969), and Note, *Freedom of Speech and Symbolic Conduct: The Crime of Flag Desecration*, 12 ARIZ. L. REV. 71 (1970).

⁵ See UNIFORM FLAG ACT, 9B UNIFORM LAWS ANN. (1966), Commissioners' Prefatory Note.

similar statutes in other states. It is the object of this comment to briefly examine cases which invalidated those statutes and to suggest that the Colorado statute may similarly be unconstitutional.

I. THE CONSTITUTIONAL ATTACK

In dealing with flag desecration statutes, courts have typically relied on the first amendment freedom of speech protection in one of two ways, *i.e.*, as protection of words spoken, or as protection of words implicit in symbolic conduct. Although opinions usually mention both approaches, whether or not the statute will be declared unconstitutional may depend upon which variation on the freedom of speech doctrine is emphasized.

A. *Street v. New York*

The first of these two doctrines is that arising from the most recent⁶ Supreme Court case involving flag desecration—*Street v. New York*.⁷ Street was convicted under a statute that made it a misdemeanor to “publicly mutilate, deface, defile or defy, trample upon, or cast contempt upon either by words or act”⁸ any flag of the United States. Street had burned a flag in response to the shooting of James Meredith. When questioned by police, the defendant stated “If they let that happen to Meredith we don’t need an American flag.”⁹ The Supreme Court reversed his conviction because he may have been convicted for his words or for both his words and his deeds, rather than solely for his conduct, on the basis that the statute had been unconstitutionally applied. The *Street* doctrine, therefore, would not allow conviction under a statute which failed to distinguish between words and acts in its prohibition of flag desecration.

Street has been cited by a few courts as authority for the constitutionality of flag desecration laws. In *Sutherland v.*

⁶ *Halter v. Nebraska*, 205 U.S. 34 (1907), is an early case in which the Nebraska flag desecration law was declared constitutional. However, in that case, defendants had displayed a flag on the label of a bottle of beer as a means of advertising and free speech or symbolic speech was not an issue. See generally *Desecration of the American Flag*, 3 IND. LEGAL F. 159 (1969).

⁷ 394 U.S. 576 (1969).

⁸ N.Y. PENAL LAW § 1425(16)(d) (1909). In 1967, § 1425(16), was superseded by § 136 of the General Business Law, which in par. d defines the offense in identical language. See *N.Y. Gen. Bus. Law* § 136(d) (McKinney 1968); 394 U.S. at 578 n.1.

⁹ 394 U.S. at 579.

*DeWulf*¹⁰ a three-judge district court¹¹ refused to declare the Illinois flag desecration statute void on its face and treated *Street* as controlling:

Thus, the Supreme Court was presented with the question of whether a statutory provision, nearly identical to the one challenged in the present case, was void on its face for overbreadth. It chose to limit its holding to the *statute as applied* and refused to make a broader holding. This court views that Supreme Court refusal to be of controlling significance to the question of overbreadth presented in this case.¹²

Although the North Carolina law was declared unconstitutional both for vagueness and overbreadth in *Parker v. Morgan*,¹³ a three-judge district court indicated that it did not believe all flag desecration laws are necessarily unconstitutional. In *Parker*, the court stated that the definition of a flag — a definition very similar to that in most statutes¹⁴ — was “simply unbelievable,” and that the definition alone was sufficient to void the statute. The North Carolina law also referred to casting contempt “by words or act” (emphasis added) — which the court held to be clearly invalid under *Street*.

The District of Columbia Circuit Court of Appeals in *Hoffman v. United States*¹⁵ agreed that Abbie Hoffman’s conduct (wearing a shirt that came within the statutory definition of a flag, but which was not an actual flag) did not come within the condemnation of the federal flag desecration statute, and reversed his conviction. It did not reach the constitutional

¹⁰ 323 F. Supp. 740 (S.D. Ill. 1971).

¹¹ Most of the recent flag desecration cases were requests that state statutes be declared unconstitutional. A three-judge district court must be empanelled before granting an interlocutory or permanent injunction restraining the enforcement, operation, or execution of a state statute. 28 U.S.C. § 2281 (1970). The district judge to whom application was made and at least one circuit judge must be on the court designated by the chief judge. 28 U.S.C. § 2284 (1970). When civil suits are required to be heard and determined by a three-judge district court, unless otherwise provided by law, appeals are made directly to the Supreme Court. 28 U.S.C. § 1253 (1970).

¹² 323 F. Supp. at 747.

¹³ 322 F. Supp. 585 (W.D.N.C. 1971). Plaintiff Parker had worn a jacket on the back of which he had sewn an American flag, over which was superimposed the legend “Give peace a chance” and the depiction of a hand with index and middle finger forming a “V.” Plaintiff Berg had affixed a flag to the ceiling of his automobile for his own personal enjoyment and satisfaction, and “apparently without any purpose to communicate an idea.” *Id.* at 587 (emphasis added).

¹⁴ This comment does not attempt to distinguish the relatively minor differences in statutory language. One possible point of discussion, however, is whether the statute purports to proscribe casting contempt on the flag by “words or act” as in *Street v. New York*, 394 U.S. 576 (1969), or only by “an act” as in *Hoffman v. United States*, 445 F.2d 226 (D.C. Cir. 1971). If the statutes are voided on the grounds that the conduct is symbolic speech, it would appear to make no difference whether acts alone, or words and acts, were proscribed.

¹⁵ 445 F.2d 226 (D.C. Cir. 1971).

question, but added, "[W]e have little doubt that the interest of the people in the flag of the United States enables Congress by appropriate legislation to protect it from desecration."¹⁶ As authority, the court cited the dissenting opinions in *Street* and the fact the majority in *Street* did not dispute their allegations.

In summary, those courts which have relied predominantly on *Street* have regarded a prohibition on words spoken as the fatal element in statutes of broad scope. The alternative theory, discussed below, does not rely on a distinction between words and acts.

B. *United States v. O'Brien*

Most federal courts have characterized flag desecration as *symbolic speech* and applied the theory of *United States v. O'Brien*.¹⁷ Though it affirmed the conviction of one who had burned his draft card, the court in *O'Brien* noted that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element may justify incidental limitations on first amendment freedoms. Lower courts have generally found that flag desecration statutes do not meet the *O'Brien* criteria,¹⁸ and the forbidden conduct violates first amendment freedoms.

In *Hodsdon v. Buckson*¹⁹ a three-judge district court ruled the Delaware statute²⁰ was unconstitutionally overbroad and proscribed symbolic speech.²¹ The court stated that "[T]his law encompasses acts which bear no relation to any interest within

¹⁶ *Id.* at 228.

¹⁷ 391 U.S. 367 (1968).

¹⁸ The *O'Brien* criteria for upholding such a statute are:

- (1) It must be within the constitutional power of the government,
- (2) It must further an important or substantial governmental interest,
- (3) The governmental interest must be unrelated to the suppression of free expression, and
- (4) The incidental restriction on alleged first amendment freedoms must be no greater than is essential to the furtherance of that interest. 391 U.S. at 377.

¹⁹ 310 F. Supp. 528 (D. Del. 1970).

²⁰ The applicable portion of the statute read:

Whoever publicly mutilates, defaces, defiles, defies, tramples upon or casts contempt either by word or act, upon (the American flag) — Shall be fined not more than \$100 or imprisoned not more than 30 days or both. *Id.* at 531.

²¹ 310 F. Supp. at 534. Plaintiff was seeking declaratory and injunctive relief requiring the attorney general to stop prosecuting him for flying the United Nations flag in the position of honor with the United States flag at half mast.

the legislative competence and which are intended and understood as symbolic speech."²²

Another three-judge district court in *Crosson v. Silver*,²³ citing *O'Brien* as the controlling precedent, ruled the Arizona statute²⁴ unconstitutionally overbroad and an inhibition of symbolic speech.²⁵ The court determined with little discussion that flag desecration can be symbolic speech by noting:

While we need not here determine whether all conduct intended to express an idea is symbolic speech, we think it is *self-evident* that most if not all conduct associated with the United States flag is symbolic speech. . . . Further, such conduct is invariably successful in communicating the idea.²⁶

The court also declared:

We find nothing inherent in the act which stimulates those viewers who sympathize with the aims of the desecrator to engage in unlawful acts, such as rioting. *Nor is the protection of the "sensibilities of passersby" the proper concern of State.*²⁷

Language such as this definitely casts doubt on the validity of section 1(b) of the new Colorado statute.

In *Long Island Vietnam Moratorium Committee v. Cahn*,²⁸ another action brought before a three-judge district court to enjoin enforcement of a state flag desecration statute, the district court held the New York statute constitutional — but ruled that it did not apply to plaintiffs' emblem.²⁹ The Second Circuit

²² *Id.*

²³ 319 F. Supp. 1084 (D. Ariz. 1970).

²⁴ The statute declared unconstitutional read:

A person who publicly mutilates, defaces, defiles, tramples upon, or by word or act casts contempt upon a flag is guilty of a misdemeanor. . . . ARIZ. REV. STAT. ANN. § 41-793 (C) (1956).

It has subsequently been amended to read:

No person shall publicly cast contempt upon, mutilate, deface, defile, burn, trample or otherwise dishonor or cause to bring dishonor upon a flag in a manner likely to provoke retaliation. ARIZ. REV. STAT. ANN. § 41-793 (Supp. 1971-72).

The constitutionality of the new statute has not yet been ruled upon by the courts.

²⁵ 319 F. Supp. 1084 (D. Ariz. 1970). Plaintiff was seeking declaratory and injunctive relief restraining the county attorney from further criminal proceedings against her for publicly burning or aiding and abetting the public burning of a United States flag with intent to cast contempt upon the flag.

²⁶ *Id.* at 1086 (emphasis added).

²⁷ *Id.* at 1088 (emphasis added).

²⁸ 437 F.2d 344 (2d Cir. 1970), *aff'g* 322 F. Supp. 559 (E.D.N.Y. 1970). *Gwathmey v. Town of East Hampton*, 437 F.2d 351 (2d Cir. 1970), is a companion case to *Long Island Vietnam Moratorium Committee* in which the Second Circuit Court of Appeals ruled that because the New York statute was unconstitutional, there was no need to convene a three-judge district court to hear the plaintiffs' case.

²⁹ The emblem consisted of a circular representation of the American flag, having seven stars in the upper left-hand corner and eleven stripes colored red, white and blue, upon which the peace symbol was superimposed.

Court of Appeals affirmed the judgment, but held the law unconstitutional both on its face because of overbreadth (it failed to provide adequate guidance to enforcement officials as to what was proscribed), and as applied in the case on the grounds that it was symbolic speech (this was the plaintiffs' means of expressing their views on a vital political issue).³⁰

Whether the Colorado statute would be declared unconstitutional or not will depend on the doctrine followed by the court. If the court should interpret *Street* as authority that some statutes can be constitutional, it may be upheld—and subsequently have its application limited by courts that determine it has been unconstitutionally applied. If the court should characterize flag desecration as symbolic speech satisfying the *O'Brien* criteria, as most other courts have done, the statute would probably be held unconstitutional on its face.

II. CONCLUSION

It is doubtful that the Colorado flag desecration statute could withstand a constitutional challenge. It is highly similar to the North Carolina, New York, Arizona, and Delaware statutes that federal courts have recently declared facially unconstitutional, unconstitutionally overboard, or as inhibitions of free (symbolic) speech. Moreover, the Colorado statute is not unlike the Maryland³¹ and federal legislation—legislation found to have been unconstitutionally applied in particular cases.

Since the Colorado statute shows a substantial legislative concern³² with the potential for riot which attends acts of flag desecration, the inciting to riot provisions of the Colorado

³⁰ *But see* *Oldroyd v. Kugler*, 327 F. Supp. 176 (D.N.J. 1970). Plaintiffs were seeking to enjoin enforcement of the New Jersey flag desecration statute. In a per curiam opinion, the three-judge district court granted the state's motion to dismiss. The court, probably as dictum, stated: "We find that the above statute on its face is precise, clear and constitutional." *Id.* at 177. Also in dictum, the court relied upon the lower court opinion in *Hoffman v. United States* which was subsequently reversed. 256 A.2d 567 (D.C. Ct. App. 1969), *rev'd*, 445 F.2d 226 (D.C. Cir. 1971).

³¹ *See* *Korn v. Elkins*, 317 F. Supp. 138 (D. Md. 1970) where a three-judge district court declined to hold the Maryland statute unconstitutional—only that it had been unconstitutionally applied where university officials attempted to prohibit publication of a student-supported magazine with a burning flag on the cover upon the advice of Maryland's Attorney General that it would be a violation of the law. The court specifically noted (at 142-43) that it did not reach the question of whether the statute was unconstitutional on its face.

³² Ch. 121, § 40-11-204(1)(b)-(d), [1971] Colo. Sess. Laws 480 (subsections quoted p. 451 *supra*).

Criminal Code³³ may enable the state to prosecute without sacrificing individual rights of communication protected by the first amendment. Of course, where the dissenting activity does not meet the five-person provisions of the code,³⁴ the riot provisions would not be a satisfactory prosecutorial tool in lieu of a voided flag desecration statute. Thus, when the activity is individualized — as in the cases explored in this comment — there is no reason to assume Colorado will be any more successful in stifling the first amendment freedom of speech than were the other states discussed above.

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³³ Ch. 121, § 40-9-102(1)-(2), [1971] Colo. Sess. Laws 467, adequately proscribes inciting to riot:

- (1) A person commits inciting riot if he:
 - (a) Incites or urges a group of five or more persons to engage in a current or impending riot; or
 - (b) Gives commands, instructions, or signals to a group of five or more persons in furtherance of a riot.
- (2) A person may be convicted under sections 40-2-101, 40-2-201, or 40-2-301, of attempt, conspiracy or solicitation to incite a riot only if he engages in the prohibited conduct with respect to a current or impending riot.
- (3) Inciting riot is a class 1 misdemeanor [with a minimum sentence of 6 months imprisonment, or \$500 fine, or both, and a maximum sentence of 24 months imprisonment, or \$5,000 or both — Section 40-1-106], but if injury to a person or damage to property results therefrom, it is a class 5 felony [with a minimum sentence of 1 year, or \$1,000 fine, and a maximum sentence of 5 years, or \$15,000 fine, or both — Section 40-1-105].

³⁴ *Id.* § 40-9-102(1).