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CONSTITUTIONAL LAW

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I

FREEDOM OF EXPRESSION: FLAG ABUSE STATUTES

UNITED STATES involvement in Vietnam had a dramatic effect on many American institutions. It sparked widespread demonstrations by supporters and protesters who often used the American flag to aid them in expressing their views. Although this conduct became the focus of frequent state and federal litigation challenging the validity of regulatory statutes,¹ the Supreme Court actually addressed the issue for the first time in 1974.²

The 1969 case of *Street v. New York*³ presented the Court with an opportunity to speak to the validity of flag abuse statutes. Street contended that his burning a flag on a New York street corner in protest of the shooting of James Meredith was protected by the first amendment as a valid form of expression. The Court, however, did not reach that question, reversing his conviction on the ground that the statute was overbroad.⁴ *Street* contained the clear implication that states could continue to enforce flag abuse statutes directed exclusively against non-verbal conduct.⁵

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Donald L. Beschle, Neil J. Fogarty and Peter Jude Niemiec are staff members of the *Annual Survey of American Law*. Mr. Beschle wrote "Freedom of Expression: Flag Abuse Statutes." Mr. Fogarty wrote "Freedom of the Press: Libel." Mr. Niemiec wrote "Due Process: Criminal Jurisdiction by Kidnapping."

1. Flag abuse litigation was almost nonexistent in the period between World War II and the Vietnam War. For an historical sketch of flag abuse statutes and litigation, see Rosenblatt, *Flag Desecration Statutes: History and Analysis*, 1972 Wash. U.L.Q. 193.

For purposes of this article, "abuse" will be used to refer to all forms of prohibited behavior regarding the flag; "desecration" will be used to refer only to those actions impairing the physical integrity of the flag (e.g., burning, tearing); and "improper use" will indicate those actions short of interference with the flag's physical integrity.

2. The only previous Supreme Court statement on the issue was *Halter v. Nebraska*, 205 U.S. 34 (1907), which had affirmed the state's right to prohibit commercial use of the flag.

3. 394 U.S. 576 (1969).

4. *Id.* at 585-94.

5. The Court found the New York statute making it a crime to "cast contempt upon [the flag] . . . either by words or act" (N.Y. Penal Law § 1425(16)(d) (1909), superseded by N.Y. Gen. Bus. Law § 136(d) (McKinney 1967)), clearly violated the first

The inevitable need to decide the questions left open in *Street*⁶ was finally satisfied last year in *Smith v. Goguen*⁷ and *Spence v. Washington*.⁸ In *Goguen*, the Court overturned a conviction under the Massachusetts flag abuse statute on the ground that the statute was impermissibly vague. In *Spence*, decided three months later, the Court for the first time asserted that the first amendment protects expressive, albeit nonverbal, conduct toward the flag.

On January 30, 1970, police officers in the downtown business district of Leominster, Massachusetts, saw Valarie Goguen wearing a four-by-six-inch American flag sewn to the seat of his pants. A complaint was filed against Goguen under the Massachusetts flag abuse statute, which applies to "whoever publicly mutilates, tramples upon, defaces or treats contemptuously the flag of the United States."⁹ It did not charge Goguen with any act of physical desecration, but asserted only that he "did publicly treat contemptuously the flag of the United States."¹⁰ His subsequent conviction was affirmed by the Massachusetts Supreme Judicial Court.¹¹ Goguen's release from custody, however, was ordered on a writ of habeas corpus by a federal district court, which found the provisions under which he had been convicted unconstitutionally vague and overbroad.¹² The Court of Appeals for the First Circuit affirmed the order.¹³

Reaching no other question, the Supreme Court affirmed on the ground of vagueness.¹⁴ Any statute which makes behavior criminal must give fair notice of exactly those actions being prohibited.¹⁵ Noting

amendment in its effort to punish words. 394 U.S. at 590-94. In separate dissents, four Justices stated their belief that Street had been convicted for his actions, not his words, and that a state clearly could regulate actions directed toward the flag. Among the dissenters was no less a defender of first amendment rights than Justice Black. For an example of post-*Street* flag abuse prosecutions, see *People v. Radich*, 26 N.Y.2d 114, 257 N.E.2d 30 (1970), aff'd per curiam by an equally divided Court, 401 U.S. 531 (1971).

6. A hint that the Court was merely waiting for the first amendment issue to present itself came in an opinion by Justice Harlan, in which he was joined by Justice Brennan, concurring in the dismissal of the appeal in *Cowgill v. California*, 396 U.S. 371 (1970). He stated that the record had not indicated whether the action of the appellant in cutting up a flag and wearing it as a vest had any "recognizable communicative aspect," thereby making decision of the issue inappropriate. *Id.* at 371-72.

7. 415 U.S. 566 (1974).

8. 418 U.S. 405 (1974).

9. Mass. Gen. Laws ch. 264, § 5 (1971).

10. 415 U.S. at 570.

11. *Commonwealth v. Goguen*, 279 N.E.2d 666 (Mass. 1972).

12. *Goguen v. Smith*, 343 F. Supp. 161 (D. Mass. 1972).

13. *Goguen v. Smith*, 471 F.2d 88 (1st Cir. 1973).

14. 415 U.S. at 572-73.

15. See, e.g., *Papachristou v. Jacksonville*, 405 U.S. 156 (1972).

that casual use of the flag has become widespread, the Court reasoned that the statute could not have intended to make every informal use of the flag a criminal act. Furthermore, nothing in the statute, or in any state judicial interpretation, gave law enforcement personnel any guidance in its application. The police and courts were thus "free to react to nothing more than their own preferences for treatment of the flag."¹⁶

Although the Court spoke directly only to the problem of vagueness, the *per se* validity of flag abuse statutes was referred to in dicta, as well as in the separate concurrence of Justice White¹⁷ and the dissents of Justice Blackmun,¹⁸ in which Chief Justice Burger joined, and Justice Rehnquist.¹⁹ After finding the Massachusetts statute impermissibly vague, the Court stated that "[c]ertainly nothing prevents a legislature from defining with substantial specificity what constitutes forbidden treatment of United States flags."²⁰ The Court referred specifically to the federal flag desecration statute as exemplary,²¹ giving no hint that flag abuse statutes might be found inherently constitutionally objectionable.

On May 10, 1970, only a few days after the invasion of Cambodia and the shootings at Kent State University, a college student in Seattle was arrested and charged with a violation of Washington's "improper use" statute²² for hanging a United States flag, with a peace symbol

16. 415 U.S. at 578.

17. Justice White specifically endorsed the validity of well-drawn laws regulating the use of the flag. Massachusetts, he contended, has the right to prohibit "treatment" of the flag, but not to use as the touchstone of a criminal violation the question of whether that treatment is "contemptuous." 415 U.S. at 587-90. That approach would not punish the conduct, but rather the accompanying idea. Justice White would, however, uphold a statute which proscribed only conduct, without regard to its message.

18. Justice Blackmun contended that Goguen was being prosecuted for harming the physical integrity of the flag by wearing it on his pants, not for engaging in any communicative conduct. Punishment for this kind of physical desecration, he stated, does not violate the Constitution. 415 U.S. at 590-91.

19. Justice Rehnquist's dissent pointed out the lack of any hint in the record that Goguen had intended a specific message by his conduct. 415 U.S. at 593. Even had there been such evidence, however, Rehnquist contended that the government may still regulate use of the flag as legitimately as it may regulate the use of such private property as firearms or controlled drugs, if it determines that such regulation is in the public interest. *Id.* at 595.

20. *Id.* at 581-82.

21. *Id.* at 582 n.30. 18 U.S.C. § 700(a) (1968) provides:

Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it shall be fined not more than \$1000 or imprisoned for not more than one year, or both.

22. Wash. Rev. Code § 9.86.020 (1956), which provides in part: "No person shall . . . place or cause to be placed any word, figure, mark, picture, design, drawing or advertisement of any nature upon any flag . . . of the United States."

of removable black tape attached to it, upside down in the window of his apartment.²³ At his trial, defendant Spence testified that he had displayed the flag in protest of Cambodia and Kent State, and that he had intended to associate the flag with peace rather than war.²⁴ Spence was convicted following a charge to the jury which indicated that the act of displaying a flag with a peace symbol attached was sufficient to convict.²⁵ The conviction was reversed by the Washington Court of Appeals,²⁶ only to be reinstated by the Washington Supreme Court.²⁷

In a per curiam opinion, the United States Supreme Court reversed "on the ground that as applied to appellant's activity the Washington statute impermissibly infringed protected expression."²⁸ Finding it undisputed that Spence had availed himself of a means of communication by displaying the flag, the Court was faced with the issue of whether any valid governmental interest justifies interference with that expression.

The Search for a Valid State Interest.—Taken by itself, *Smith v. Goguen* does not prevent state regulation of flag abuse; it merely requires that such statutes be drawn with greater specificity than was the Massachusetts misuse statute, which is comparable to those of a number of states.²⁹ Although the Supreme Court was not the first to adopt this view,³⁰ the judiciary has stopped short of implying that a legislature cannot draw a sufficiently specific statute. Nor has any state seen the invalidation of its desecration statute, invariably a more specific provision than the accompanying misuse statute.³¹ It is *Spence* which raises

23. 418 U.S. at 406.

24. *Id.* at 408. The Court accepted as undisputed the fact that appellant "wanted people to know that [he] thought America stood for peace." *Id.*

25. *Id.*

26. *State v. Spence*, 5 Wash. App. 752, 490 P.2d 1321 (1971).

27. *State v. Spence*, 81 Wash. 2d 788, 506 P.2d 293 (1973).

28. 418 U.S. at 406.

29. For a list of state flag abuse statutes, see note 76 *infra*.

30. In 1973, a New Jersey court found that state's misuse statute overly broad in *State v. Zimmelman*. 62 N.J. 279, 301 A.2d 129 (1973). Because the statute could just as easily be used to prosecute people for patriotic uses of the flag, as for those uses which the state might well have a valid interest in regulating, the court found it unconstitutional. Commentators have noted that flag abuse statutes have been used only to prosecute statements of political dissent. See, e.g., Note, 66 Mich. L. Rev. 1040, 1056 (1968).

Also in 1973, the Court of Appeals for the Second Circuit found the Connecticut flag abuse statute invalid for its use of the overly broad term "misuse" as one of the activities prohibited in treatment of the flag. *Thoms v. Heffernan*, 473 F.2d 478 (2d Cir. 1973). Although the United States Supreme Court remanded for further consideration in light of *Spence* (*Heffernan v. Thoms*, 418 U.S. 908 (1974)), it is doubtful that the outcome of the case will be affected.

31. For a discussion of the validity of current flag abuse statutes, see notes 76-81 *infra* and accompanying text.

serious doubts about the state's power to prosecute under any statute for misuse, and contains implications for flag desecration prosecutions as well. Even after *Spence*, however, there appears to be a residual area of activity which may still be regulated by a well-drawn flag abuse statute.

For a defendant to invoke *Spence*, it seems clear that his activity must include some recognizably communicative content. The *Spence* Court stressed the importance of the clear conveyance of a message, pointing out "that this was not an act of mindless nihilism."³² A defendant who cannot clearly establish that his acts were meant to convey a message will probably be unable to rely on *Spence*. The case-by-case adjudication which may be necessary to determine what constitutes "a particularized message" is reminiscent of the Court's approach to the issue of obscenity, an approach which has offered little guidance to lower courts and subsequent litigants.³³ However, even the presence of such communicative intent will not bar a conviction for violating the statute, if the countervailing state interest is sufficiently important or substantial.

In the 1968 case of *United States v. O'Brien*,³⁴ the Supreme Court addressed the validity of statutes which regulate conduct containing both speech and nonspeech elements. The statute under which O'Brien was prosecuted for burning his draft card makes it an offense to destroy, mutilate, alter or forge a Selective Service registration certificate.³⁵ O'Brien claimed that enforcement of the statute infringed his first amendment right of free speech by prohibiting this form of protest.

The *O'Brien* Court found a substantial government interest sufficient to justify regulation of expressive conduct in the administrative convenience of draft cards for the Selective Service System and its local

32. 418 U.S. at 410.

A flag bearing a peace symbol and displayed upside down by a student today might be interpreted as nothing more than bizarre behavior, but it would have been difficult for the great majority of citizens to miss the drift of appellant's point at the time that he made it.

Id.

33. In the recent decision of *Jenkins v. Georgia*, 418 U.S. 153 (1974), the Supreme Court seemed to be signaling a retreat from its articulated position in *Miller v. California*, 413 U.S. 15 (1973), in which it had allowed local communities almost unlimited freedom to determine what is "patently offensive." By ruling that even a properly charged jury could not find certain material obscene (418 U.S. at 160), the Court evidenced a commitment to the proposition that it has the ultimate power to decide whether a particular instance of expression qualifies for the protection of the first amendment.

34. 391 U.S. 367 (1968).

35. 50 U.S.C. § 462(b) (1970).

boards.³⁶ Because the government interest in administrative efficiency is not present in flag abuse cases, the Court will have to find another valid government interest to satisfy the *O'Brien* analysis—something it was unable to do in *Spence*.³⁷

Breach of the Peace.—The strongest justification for the prohibition against flag abuse seems to be a state's interest in preserving public order. While Justice Harlan's warning that "insults to the flag have been the cause of war"³⁸ may sound somewhat anachronistic, the flag's ability to convey strong emotional messages can easily carry with it the possibility that public insult to the flag will promote violence.

Even pure speech has been found subject to regulation in those limited instances³⁹ where the utterance constitutes a "clear and present danger," rather than merely "induces a condition of unrest" or "even stirs people to anger."⁴⁰ The Court's decision to give great leeway to the exercise of first amendment rights, even when they run afoul of the interest of public peace, is best demonstrated by *Brandenburg v. Ohio*⁴¹ and *Cohen v. California*.⁴² *Brandenburg* involved the prosecution of a Ku Klux Klan leader who had advocated the duty and necessity of criminal actions to further the cause of white supremacy. While conceding the state's power to punish for inciting to riot, the Court distinguished the instant situation as having been one where the jury had not been required to find clear danger or imminent lawless action, but had been improperly allowed to convict merely for the abstract advocacy of the propriety and necessity of violence.⁴³

Defendant Cohen had been convicted under a "disturbing the peace" statute for wearing a jacket inscribed with the words "Fuck the

36. 391 U.S. at 378-82.

[W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377.

37. 418 U.S. at 412-13.

38. *Halter v. Nebraska*, 205 U.S. at 41.

39. States may not regulate pure speech unless the words are (1) by their very nature an infliction of injury or a spur to an immediate breach of the peace, (2) not an essential part of the exposition of an idea, and (3) of very slight social value as weighed against the state's interest in order. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

40. *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). See also *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting), for a reminder that "every idea is an incitement."

41. 395 U.S. 444 (1969).

42. 403 U.S. 15 (1971).

43. 395 U.S. at 447.

Draft" while in a courthouse. Since walking through a courthouse is not itself criminal, the Court reasoned that the conviction had to have been based on the inscribed words alone. Therefore, the standard became the strict one of "fighting words," in light of which Cohen's conviction could not stand.⁴⁴

The key distinction between the *Brandenburg/Cohen* line of decisions and the flag abuse cases is, of course, that the latter have not been characterized as "pure speech," but rather as symbolic speech or "speech-plus." Where speech is accompanied by conduct, states have greater latitude in defending their interests by legislation.

An absolutist whenever freedom of speech was involved, Justice Black was the primary exponent of the speech/conduct bifurcation. This position no doubt grew from his recognition that almost all conduct could be interpreted as involving an element of speech, making almost no law enforceable unless the absolute protections of the first amendment were limited only to the speech itself, rather than extended to the accompanying conduct.⁴⁵

On the other hand, Justice Douglas has emphasized the converse, that almost all speech is accompanied by conduct,⁴⁶ and that a scrupulous search for some element of conduct to justify legislative regulation could lead to the infringement of first amendment freedoms. It now appears that where conduct is essential to the communication of the message, it constitutes speech and can be prohibited only under the "clear and present danger" standard established in *Chaplinsky*. Where the conduct is not essential, the state's interest in preserving the peace might be satisfied by a lesser showing of a likelihood of disorder. Whatever the standard for finding a danger of breach of the peace, it seems likely that in some form this interest will continue to serve as a valid justification for flag abuse statutes.⁴⁷

The issue, of course, will not be whether a breach actually occurred, but whether the defendant should reasonably have anticipated such a

44. In reversing the conviction, the Court concluded: "We have been shown no evidence that substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities with execrations like that uttered by Cohen." 403 U.S. at 23.

45. See Yarbrough, *Justice Black and His Critics on Speech-Plus and Symbolic Speech*, 52 *Tex. L. Rev.* 257 (1974).

46. "The act of praying often involves body posture and movement as well as utterances." *Brandenburg*, 395 U.S. at 435 (Douglas, J., concurring).

47. Commentators who have generally rejected other bases for these statutes have accepted preservation of peace as valid. See, e.g., Note, *Flag Desecration—The Unsettled Issue*, 46 *Notre Dame Law.* 201 (1970); Comment, *Flag Desecration Statutes in Light of U.S. v. O'Brien and the First Amendment*, 32 *U. Pitt. L. Rev.* 513 (1971).

result.⁴⁸ The facts of *Spence* suggested no such danger there,⁴⁹ and thus the Court was not required to address the legitimacy of this state interest. However, given the fact that even pure speech can be regulated under certain narrow circumstances in the interest of public order, it seems highly probable that a flag abuse prosecution based on the same interest could survive an *O'Brien* analysis and remain valid after *Spence*.

Protection of Passersby.—The *Spence* Court reaffirmed the principle that “the public expression of ideas may not be prohibited merely because the ideas themselves are offensive to some of their hearers.”⁵⁰ The further assertion, however, that “appellant did not impose his ideas upon a captive audience,”⁵¹ may be a signal that in circumstances where those who do not want to hear the message conveyed have no way of avoiding it, flag abuse statutes may act to protect the public. In *Lehman v. Shaker Heights*,⁵² handed down the same day as *Spence*, the Court upheld a local statute prohibiting the public transit system from accepting political advertising. It thus appears that a municipality may protect the public from unwanted communication in a “captive audience” situation, despite the fact that the communication is clearly within the protection of the first amendment.⁵³ While the likelihood of many flag abuse cases involving a captive audience seems slight, a flag abuse statute might be justified in such a case.⁵⁴

Protecting the Flag.—Nearly seventy years ago the Supreme Court asserted that the desire to protect a national symbol adequately justifies state regulation of flag use.⁵⁵ Although lower courts have employed that rationale frequently,⁵⁶ few have attempted to identify the government interest involved. The Court of Appeals for the Ninth Circuit, however, attempted an explanation, reasoning that the right of a

48. See the reasoning of the court in *People v. Cowgill*, 274 Cal. 2d 923, 78 Cal. Rptr. 853 (1969), appeal dismissed, 396 U.S. 371 (1970).

49. 418 U.S. at 412.

50. *Id.*, quoting *Street v. New York*, 394 U.S. at 592.

51. 418 U.S. at 412.

52. 418 U.S. 298 (1974).

53. For a discussion of the right to be free from an unwanted message, see particularly the concurring opinion of Justice Douglas. *Id.* at 305-08. (Douglas, J., concurring).

54. For an argument that the “right to escape” is the only right to be free of speech worthy of judicial approval, see Haiman, *Speech v. Privacy: Is There a Right Not to Be Spoken To?* 67 *Nw. U.L. Rev.* 153 (1972).

55. *Halter v. Nebraska*, 205 U.S. at 41-43.

56. See, e.g., *State v. Saulino*, 29 Ohio Misc. 25, 27-28, 277 N.E.2d 580, 582 (1971); *State v. Bunch*, 26 Ohio Misc. 161, 162, 268 N.E.2d 831, 832 (1970); *State v. Spence*, 81 Wash. 2d 788, 799, 506 P.2d 293, 300 (1973). See also Justice White’s concurring opinion in *Goguen* that “one need not explain fully a phenomenon to recognize its existence.” 415 U.S. at 587 (White, J., concurring).

nation to establish a flag is an aspect of its sovereignty, and that the "necessary and proper" clause of the Constitution empowers the government to protect what it has the right to establish.⁵⁷ This argument is reminiscent of Justice White's contention in *Goguen* that the flag, even when in the possession of a private citizen, is "national property," a "monument" which the government may regulate.⁵⁸ Justice White's view seems to equate "national" with "governmental." If an individual uses the flag only at the government's sufferance, it certainly follows that any regulation of that use is justified.

Justice White's "national property" theory suggests no limits on the scope of the government's power to regulate flag abuse. For example, the issue of how much resemblance a design must bear to the original was disputed in *Herrick v. Commonwealth*.⁵⁹ In that case, a flag abuse conviction was reversed because the flag in question, similar to the United States flag except that the stars were in a peace-symbol configuration, was found not to be within the protection of the statute.⁶⁰ A flag abuse statute protecting any flag which a reasonable person would believe to represent the United States flag⁶¹ seems defensible if the purpose of the statute is to prevent possible breaches of the peace. However, when a statute is designed to protect national property, it is difficult to justify its use to regulate something other than the American flag.⁶² The "national property" argument also raises the question whether the interest could be asserted by others besides the federal government. If the flag may be regulated because the government which created it has the power to protect it, the individual states have no standing to assert a proprietary interest in the United States flag.⁶³

It is not, however, inconsistent to view the flag as "national property" and still assert that "[t]he flag has never been a trademark of government."⁶⁴ If the flag belongs to the nation as a whole, it is arguably material in the public domain which can be used by any

57. *United States v. Crosson*, 462 F.2d 96 (9th Cir.), cert. denied, 409 U.S. 1061 (1972).

58. 415 U.S. at 587 (White, J., concurring).

59. 212 Va. 789, 188 S.E.2d 209 (1972).

60. See also *State v. Nicola*, 182 N.W.2d 870 (N.D. 1971). But cf. *State v. Saulino*, 29 Ohio Misc. 25, 277 N.E.2d 580 (1971).

61. Alabama has such a statute. Ala. Code tit. 14, § 192 (1967).

62. In *Parker v. Morgan*, 322 F. Supp. 585 (W.D.N.C. 1971), the court struck down a North Carolina statute which attempted to regulate any design which could possibly be taken to resemble the flag, calling it "uncommonly bad," and condemning its attempt to appropriate the colors red, white and blue, and the designs of stars and stripes.

63. The Supreme Court has held that statutes protecting the American flag are not limited to those passed by Congress. *Halter v. Nebraska*, 205 U.S. 34 (1907).

64. *Parker v. Morgan*, 322 F. Supp. 585, 588 (W.D.N.C. 1971).

American to communicate his feelings toward his country. Noting that the flag carries different messages for different people, the *Spence* Court suggested limiting the state's interest to preventing the destruction or permanent disfigurement of the flag, so that it would not "lose its capacity of mirroring the sentiments of all who view it."⁶⁵ It would seem then that one who does not destroy the flag, but merely uses it as a means of communication, has nothing to fear from the state. The Court has still to decide whether the general state interest in preserving the flag sufficiently justifies statutes prohibiting desecration.⁶⁶

The extent of the government's power to regulate flag abuse may be further clarified in the near future. The Supreme Court recently disposed of several flag abuse cases which were pending before it at the time of the *Spence* decision. The flag burning conviction involved in *State v. Farrell*⁶⁷ was vacated and remanded for further consideration in light of *Spence*,⁶⁸ despite the fact that *Farrell* was a clear case of desecration, rather than misuse. *People v. Sutherland*⁶⁹ involved a flag burning incident which prompted a passing motorist to stop his car and try to extinguish the flames.⁷⁰ Although this fact bolsters the lower court's conclusion that the act posed a threat to public order distinguishing it from *Spence*, *Sutherland* was similarly vacated and remanded for further consideration.⁷¹

The clearest indication that states may continue to regulate flag abuse in certain instances came in the Court's disposition of *Van Slyke v. Texas*.⁷² The defendant and other students were gathered in the Commons of Rice University at the time of the Cambodia invasion. Van Slyke initially blew his nose on the flag, which prompted another student to tell him that he was breaking the law, and that he intended to report him if he would not stop. At that point Van Slyke unzipped his pants and began to masturbate by rubbing his genitals on the flag.⁷³ His conviction in a Texas district court was upheld by the Court of Criminal Appeals.⁷⁴ His subsequent appeal to the Supreme Court was

65. 418 U.S. at 413.

66. The *Spence* Court commented in a footnote that this interest in preserving the flag is directly related to expression; therefore, in the absence of any other articulated government interest, a statute based thereon will not satisfy the four-step *O'Brien* test. *Id.* at 414 n.8.

67. 209 N.W.2d 103 (Iowa 1973).

68. *Farrell v. Iowa*, 418 U.S. 907 (1974).

69. 9 Ill. App. 3d 824, 292 N.E.2d 746 (1973).

70. *Id.* at 826, 292 N.E.2d at 747-48.

71. *Sutherland v. Illinois*, 418 U.S. 907 (1974). The lower court in *Farrell* had also relied on the likelihood of a breach of the peace. 209 N.W.2d at 107.

72. 418 U.S. 907 (1974).

73. *Van Slyke v. State*, 489 S.W.2d 590, 591-92 (Tex. Crim. App. 1973).

74. *Van Slyke v. State*, 489 S.W.2d 590 (Tex. Crim. App. 1973).

dismissed for lack of a substantial federal question on the same day that the Court remanded *Farrell* and *Sutherland*.⁷⁵ While conclusions must be cautiously drawn from a dismissal without opinion, *Van Slyke* does seem to indicate that all instances of flag abuse are not equally entitled to first amendment protections.

Validity of Current Statutes.—The validity of the flag abuse statutes possessed by all fifty states and the federal government⁷⁶ warrant re-examination in light of *Goguen* and *Spence*. Almost all states⁷⁷ have some variant of the standard provision prohibiting certain treatment of the flag short of physical destruction or mutilation.⁷⁸ After *Goguen* and *Spence*, however, the presence of communicative content in the action will bar a prosecution based solely on the state's interest in preserving the flag.

A permissible conviction might possibly be based on protecting the sensibilities of passersby if a "captive audience" situation exists, and on a threat to breach of the peace if that threat actually exists. Those

75. 418 U.S. 907.

76. The federal flag abuse statute is 18 U.S.C. § 700 (1968). The state statutes are: Ala. Code tit. 14, § 190 (1967); Alaska Stat. § 11.60.220 (1970); Ariz. Rev. Stat. Ann. § 41-853 (Supp. 1973); Ark. Stat. Ann. § 41-1701 (1964); Cal. Mil. & Vet. Code § 614 (West Supp. 1974); Colo. Rev. Stat. Ann. § 40-11-204 (Supp. 1971); Conn. Gen. Stat. Rev. § 53-258(a) (1971); Del. Code Ann. tit. 11, § 1331 (1974); Fla. Stat. Ann. §§ 256.05-06, 779.21 (1975); Ga. Code Ann. § 26-2202 (1972); Hawaii Rev. Stat. §§ 733-1, -4, -6, -8 (1968); Idaho Code § 18-3401 (1972); Ill. Rev. Stat. ch. 56¼, § 6 (Supp. 1974); Ind. Ann. Stat. §§ 10-506 to 10-509 (Burns 1970); Iowa Code Ann. § 32.1 (1967); Kan. Stat. Ann. § 21-4114 (Supp. 1973); Ky. Rev. Stat. Ann. §§ 2.060, 2.990 (1971); La. Rev. Stat. § 14:116 (1974); Me. Rev. Stat. Ann. tit. 1, §§ 253-54 (1964); Md. Ann. Code art. 27, §§ 82-83 (1971); Mass. Gen. Laws Ann. ch. 264, § 5 (Supp. 1974); Mich. Comp. Laws §§ 750.245-46 (1968); Minn. Stat. § 609.40 (Supp. 1974); Miss. Code Ann. § 97-7-39 (1972); Mo. Rev. Stat. § 563.750 (1953); Mont. Rev. Codes Ann. § 94-3581 (1969); Neb. Rev. Stat. §§ 28-1101 to 28-1103 (1964); Nev. Rev. Stat. § 201.290 (1973); N.H. Rev. Stat. Ann. § 646 (Supp. 1973); N.J. Stat. Ann. §§ 2A:107-1, -2 (1969); N.M. Stat. Ann. § 40A-21-4 (1972); N.Y. Gen. Bus. Law § 136 (McKinney 1968); N.C. Gen. Stat. § 14-381 (Supp. 1974); N.D. Cent. Code § 12-07-04 (1960); Ohio Rev. Code Ann. § 2921.05 (1953); Okla. Stat. Ann. tit. 21, §§ 371-73 (1971); Ore. Rev. Stat. § 166.075 (1973); Penn. Stat. Ann. tit. 18 § 2102 (1973); R.I. Gen. Laws Ann. § 11-15-2 (1969); S.C. Code Ann. § 16-532 (1962); S.D. Compiled Laws Ann. § 22-9 (1967); Tenn. Code Ann. §§ 39-1601 to 39-1606 (1955); Tex. Rev. Civ. Stat. art. 6139 (1970); Utah Code Ann. §§ 76-14-1 to 76-14-4 (1953); Vt. Stat. Ann. tit. 13, §§ 1901-06 (1974); Va. Code Ann. §§ 18.1-423 to 18.1-428 (1974); Wash. Rev. Code Ann. §§ 9.86.020-30 (Supp. 1975); W. Va. Code Ann. § 61-1-8 (1966); Wis. Stat. §§ 946.05-06 (Supp. 1974); Wyo. Stat. Ann. § 6-106 (1959).

77. California, Colorado, Hawaii, North Carolina, Ohio and Oregon limit offenses to physical abuse of the flag. See note 76 supra.

78. Idaho Code § 18-3401 (1972) is typical. In relevant part it reads:

Any person who in any manner . . . shall cause to be placed any word, figure, mark, picture, design, drawing, . . . upon any flag . . . of the United States . . . or shall expose or cause to be exposed to public view any such flag . . . or cast contempt, either by words or acts, upon any such flag, . . . shall be punished by a fine . . . or imprisonment . . .

states which prohibit improper use also prohibit commercial exploitation of the flag.⁷⁹ These statutes are probably not affected by *Goguen* and *Spence*, and the longstanding principle that commercial advertising is not entitled to the full range of first amendment protections⁸⁰ has yet to be reconsidered.

Finally, all fifty states and the federal government have statutes prohibiting actions which interfere with the physical integrity of the flag.⁸¹ These statutes will probably be completely unaffected by *Goguen*, since they generally enumerate with specificity the actions considered objectionable. They should also be less affected by *Spence* than should improper use statutes, since acts falling under the former have a greater potential to incite violence.

II

FREEDOM OF THE PRESS: LIBEL

The increasing tension between an individual's right to protect his or her reputation, and freedom of the press, received its most recent resolution by the Supreme Court in *Gertz v. Robert Welch, Inc.*⁸² Previously, in *New York Times Co. v. Sullivan*,⁸³ the Supreme Court had articulated a first amendment bar to libel recoveries by "public officials," absent a showing of "actual malice."⁸⁴ The scope of the protection afforded publishers was expanded, initially to include news about "public figures,"⁸⁵ and finally was held to encompass "all discussion and communication involving matters of public or general concern without regard for whether the persons involved are famous or anonymous."⁸⁶

79. Idaho Code § 18-3401 (1972) reads in relevant part:

Any person who . . . shall expose to public view, manufacture, sell, give away, . . . any article or substance . . . upon which shall have been printed, painted, attached or otherwise placed, a representation of any such flag. . . . to advertise, call attention to, decorate, mark, or distinguish the article . . . shall be punished by a fine . . . or imprisonment . . .

80. *Valentine v. Chrestensen*, 316 U.S. 52 (1942). But see *Lehman v. Shaker Heights*, 418 U.S. 298, 308 (1974) (Brennan, J., dissenting).

81. Again, Idaho Code § 18-3401 (1972) is typical. In relevant part it reads: Any person who . . . shall publicly mutilate, deface, defile or defy, trample upon, or cast contempt, either by words or act, upon any such flag. . . . shall be punished by a fine . . . or by imprisonment

82. 418 U.S. 323 (1974).

83. 376 U.S. 254 (1964).

84. Under this rule, liability does not attach unless the plaintiff can prove publication of defamatory falsehood in the knowledge that it is false or with reckless disregard for whether it is true or not. *Id.* at 279-80. For the common law treatment of libel, see text accompanying notes 131-32 *infra*.

85. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 162 (1967) (Warren, C.J., concurring in the result).

86. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 44 (1971).

This final extension by a fragmented Court in *Rosenbloom v. Metro-media*⁸⁷ was disapproved by the *Gertz* Court,⁸⁸ which established new standards for publishers' liability. Specifically, the Court withheld first amendment protection from alleged defamers of "private individuals."⁸⁹ Included in that class are those other than "public personalit[ies]," who have not been significantly involved in the newsworthy event.⁹⁰ While the Court's action afforded publishers less protection than they would have had under an extension of the *New York Times* standard,⁹¹ it simultaneously circumscribed the states' ability to impose liability. Under new standards promulgated by the majority, the states may neither impose liability without fault,⁹² nor permit recovery of presumed or punitive damages in the absence of "actual malice."⁹³

Nuccio, a Chicago policeman, was prosecuted for homicide and convicted for the second degree murder of a youth named Nelson. Petitioner Elmer Gertz was retained by the Nelson family to represent them in civil litigation against Nuccio. Respondent publishes *American Opinion*, a monthly outlet for the views of the John Birch Society. In an effort to alert the public to a nationwide communist conspiracy to discredit the police, the managing editor commissioned an article on the murder trial of officer Nuccio. As counsel for the Nelson family in the civil litigation, petitioner played no part in the criminal proceeding.⁹⁴ However, despite the remoteness of Gertz's relationship to the proceeding, an article published in March of 1969 accused him of being an architect of the alleged "frame-up" and a "Communist-fronter,"⁹⁵ and contained a number of other equally inaccurate representations.⁹⁶ The managing editor made no effort to verify or substantiate the charges against petitioner.⁹⁷

In entering judgment for respondent notwithstanding the jury's verdict,⁹⁸ the district court had accepted respondent's contention that

87. 403 U.S. 29 (1971).

88. 418 U.S. at 346.

89. *Id.* at 347.

90. *Id.* at 352.

91. *Id.* at 348.

92. *Id.* at 347.

93. *Id.* at 350.

94. *Id.* at 325-26.

95. *Id.* at 326.

96. The article labeled Gertz a "Leninist" and implied that he had a criminal record, as well as that he had been an official in a Marxist league which advocated violent seizure of the government. In addition to these serious inaccuracies, the publication contained the implication that the National Lawyers Guild, of which petitioner had been a member and officer 15 years before, had been primarily responsible for the 1968 demonstrations in Chicago. *Id.*

97. *Id.* at 327.

98. *Gertz v. Robert Welch, Inc.*, 322 F. Supp. 997 (N.D. Ill. 1970).

the first amendment privilege contained in the *New York Times* standard protected any public issue without regard to the status of the person defamed therein.⁹⁹ The Court of Appeals for the Seventh Circuit affirmed,¹⁰⁰ thereby endorsing the district court's anticipation of the *Rosenbloom* plurality's reasoning.¹⁰¹

Justice Powell's majority opinion is premised on a distinction between false ideas, which are absolutely protected by the first amendment, and false statements of fact, which, although not constitutionally valuable, are concededly "inevitable in free debate."¹⁰² The protection to be afforded the latter is determined by balancing the desire to avoid press self-censorship¹⁰³ against the state's interest in compensating individuals for harm inflicted on them by defamatory falsehoods.¹⁰⁴ Rejecting a case-by-case accommodation,¹⁰⁵ Justice Powell set forth two principal reasons for not requiring private individuals to meet the "actual malice" standard established for "public officials" in *New York Times* and adopted for "public figures" in *Curtis Publishing Co. v. Butts*.

The Court first found that the greater access to effective channels of communication enjoyed by "public" individuals makes "self-help" a more realistic possibility for them than for "private" persons.¹⁰⁶ The Court found its second justification in a combination of society's interest in the careful scrutiny of "anything that might touch on an official's fitness for office,"¹⁰⁷ and the voluntary action of the "public" person in assuming a position which invites attention and comment.¹⁰⁸ Therefore, the private individual is at once more vulnerable and more deserving of recovery. Finally, in addition to being overly solicitous

99. *Id.* at 999.

100. *Gertz v. Robert Welch, Inc.*, 471 F.2d 801 (7th Cir. 1972).

101. [Petitioner's] considerable stature . . . undermine [sic] the . . . assumption that he is not a "public figure" . . . Nevertheless, for purposes of decision we make that assumption and test the availability of the claim of privilege by the subject nature of the article.

Id. at 805.

A district court had also held that the *Rosenbloom* privilege extends to any newsworthy item. *Goldman v. Time, Inc.*, 336 F. Supp. 133 (N.D. Cal. 1971). See also Justice Douglas' comment that once an article is published, a presumption arises that the subject is worthy of public interest. *Gertz*, 418 U.S. at 329-30 n.6. (Douglas, J., dissenting).

102. 418 U.S. at 430.

103. *Speiser v. Randall*, 357 U.S. 513, 526 (1958); See also *NAACP v. Button*, 371 U.S. 415, 433 (1963).

104. 418 U.S. at 342.

105. *Id.* at 343.

106. *Id.* at 344.

107. *Id.* at 344-45, quoting *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964).

108. 418 U.S. at 345.

of the press,¹⁰⁹ *Rosenbloom* was officially rejected as putting the state and federal courts in the difficult position of deciding what issues are of adequately general or public interest to claim the first amendment privilege.¹¹⁰

Justice Brennan argues vigorously in dissent that the "actual malice" standard established in *New York Times* represents the allowable first amendment accommodation to the protection of individual reputations. He contends persuasively that the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,"¹¹¹ which the first amendment was designed to protect, does not vary according to whether an actor in the newsworthy event is a "public" or "private" individual.¹¹² Denying any appreciable difference in media access between most "public" and "private" individuals, he argues that coverage depends on the newsworthiness of the event,¹¹³ and that retractions and counterarguments never merit the same attention as the story in the first instance.¹¹⁴ Therefore, one class of persons is no more vulnerable to defamation damage than the other. Finally, "private" individuals are no more deserving than "public" individuals of protection by reason of the voluntariness of their prominence, since that factor is similarly unrelated to first amendment values.¹¹⁵

The crucial conceptual difference between the *Rosenbloom* and *Gertz* approaches is reflected in Justice Brennan's emphasis on the newsworthy event and Justice Powell's emphasis on the libel victim. The former would shield the private issues in everyone's life,¹¹⁶ while the latter would protect "private" individuals regardless of the issue.¹¹⁷ Since it is information about public affairs which goes to the essence of self-

109. Id. at 346. See Constitutional Law: Freedom of the Press, 1972/73 Ann. Survey Am. L. 185, 194. But see *Rosenbloom*, 403 U.S. at 57 (Black, J., dissenting); *Curtis Publishing Co.*, 388 U.S. at 172 (Black, J., dissenting); *Gertz*, 418 U.S. at 357-58 (Douglas, J., dissenting), quoting *New York Times*, 376 U.S. at 295 (Black, J., concurring).

110. 418 U.S. at 346.

111. Id. at 362 (Brennan, J., dissenting), quoting *New York Times*, 376 U.S. at 270 (emphasis Justice Brennan's).

112. 418 U.S. at 363, quoting *Rosenbloom*, 403 U.S. at 46.

113. 418 U.S. at 363-64.

114. Id. As Professor Kalven notes, the need for a law of libel arises from the fact that the truth never catches up with a lie. Kalven, *The Reasonable Man and the First Amendment*: Hill, Butts, and Walker, 1967 S. Ct. Rev. 267, 300. Although Justice Powell recognized this argument, he found that the inadequacy of rebuttal standing alone does not render it an irrelevant consideration. 418 U.S. at 344 n.9.

115. 418 U.S. at 365.

116. Id. at 364, quoting *Rosenbloom*, 403 U.S. at 43. Note Justice Brennan's comment that some aspects of the lives of even public figures fall outside the area of public concern, citing *Griswold v. Connecticut*, 381 U.S. 479 (1965). *Rosenbloom*, 403 U.S. at 48.

117. 418 U.S. at 345.

government,¹¹⁸ the *Rosenbloom* standard more effectively serves the interests secured by the first amendment.¹¹⁹ The distinction between issues of public and private concern appropriately safeguards both the people's "right to know" and the individual's "right to privacy."

Finally, Justice Brennan responded to the criticism that the *Rosenbloom* standard would force ad hoc determinations of what constitutes issues of "public concern" with a reminder of the traditional judicial function.¹²⁰ Not only are courts the intended arbiters of such disputes,¹²¹ but there is less danger of press self-censorship in forcing publishers to anticipate the "uncertain contours of the 'general or public interest' concept,"¹²² than in allowing state legislatures to impose liability for negligent falsehood.¹²³

Although "public figure" seems no more amenable to untroubled judicial construction than "matters of public or general concern," the Court's attempted clarification of the former is instructive. Justice Powell specified alternative bases upon which the characterization of one as a "public figure" might rest. The first type "achieve[s] such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts";¹²⁴ the second "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues."¹²⁵ While both

118. *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

119. *Rosenbloom*, 403 U.S. at 41, 44 (Brennan, J.). See *The Supreme Court, 1970 Term*, 85 Harv. L. Rev. 3, 224 (1971).

Gertz departs from the rationale of *New York Times* (see text accompanying note 111 supra) and risks inhibiting arguably protected speech on issues of public concern. The proposition that a publication discussing public affairs which is made without "actual malice" is constitutionally protected was supported by Chief Justice Burger and Justices Black, Blackmun and Brennan in *Rosenbloom*, 403 U.S. at 44, 57. Justice Douglas, who took no part in *Rosenbloom*, affirmed that proposition in *Gertz*, 418 U.S. at 355-60 (Douglas, J., dissenting).

Although Justice Blackmun found it illogical to extend first amendment protection to public officials and figures, but not to the discussion of public issues, he concurred because he thought that removal of presumed and punitive damages would give the media adequate "breathing space" and that a definitive majority ruling was needed in the libel area to dispel uncertainty. *Id.* at 353-54 (Blackmun, J., concurring).

120. 418 U.S. at 369. Note also the possibility of a similar difficulty in the courts' efforts to decide the allowable kinds of damages under the *Gertz* standard. See *Rosenbloom*, 403 U.S. at 53; Note, *The Expanding Constitutional Protection for the News Media from Liability for Defamation: Predictability and the New Synthesis*, 70 Mich. L. Rev. 1547, 1578 (1972).

121. There now exists a sizeable body of libel cases which have turned on the determination of whether various events were matters of public concern. For a list of collected cases see Note, supra note 120, at 1560.

122. 418 U.S. at 369.

123. *Id.*

124. *Id.* at 351.

125. *Id.*

would be called upon to prove "actual malice" under *Rosenbloom*,¹²⁶ *Gertz* would require only the first type to meet this standard unflinchingly.¹²⁷ The duty of the second would be determined by "the nature and extent of an individual's participation in the particular controversy giving rise to the defamation."¹²⁸ Frequently, if an event is a matter of public concern, the individuals involved will qualify as public figures. The newsworthiness of the event is still critical to the *Gertz* analysis; it merely adds the condition that the individual have a sufficient relationship to the event to justify the damage to his reputation.

The importance of the distinction is nicely illustrated by the *Gertz* case itself. Elmer Gertz was held not to be a public figure because the defamation involved a criminal trial in which he had taken no part.¹²⁹ Had he "thrust himself into the vortex of [the] public issue,"¹³⁰ however, he might have achieved the status of a public figure. Future defendants may well stress the defamed individual's participation in the public issue or event in an effort to broaden the public figure test into a concept approaching a public issue analysis.

Publishers may take some comfort, however, in the major changes mandated by the *Gertz* Court in the degree of fault needed to establish liability, as well as the permissible measure of damages. Traditionally, libel was a tort of strict liability; after a writing was found libelous, damages were presumed.¹³¹ "Special" damages could also be proved,

126. 403 U.S. at 44, 55.

127. 418 U.S. at 342-43.

128. *Id.* at 352.

129. *Id.* Respondent also argued that Elmer Gertz was a public official, because several years prior to the defamation he had been appointed to, and served briefly on, a Chicago mayoral housing committee. Further he contended that Gertz was a "de facto public official" by virtue of his appearance at the coroner's inquest representing his "client's" family. In rejecting both contentions, the Court found that Gertz had not held remunerative government office at the time of the defamation, and cautioned that respondent's second argument would distort the public official category by sweeping in all lawyers under the *New York Times* rule as officers of the court. *Id.* at 351. Specifically, the Court emphasized the fact that Gertz "took no part in the criminal prosecution of Officer Nuccio," *id.* at 352, and therefore was not a public figure. This is especially interesting in light of the fact that the Supreme Court sanctioned the Seventh Circuit's rejection of a highly analogous argument made by Gertz in the court of appeals. *Id.* at 331-32 n.4. He contended that the defamatory charge against him concerned no issue of public concern because he had not participated in the criminal proceeding upon which the article focused. In rejecting this argument, the court warned against permitting the actual falsity of a statement to determine whether or not its publisher is entitled to the benefit of the *New York Times* rule. 471 F.2d at 806. Although Gertz's noninvolvement in the criminal proceeding shielded him from the status of a public figure, he was not allowed to plead it as separating him from any issue of public concern. Thus, a publisher's ultimate liability may well turn on a factual inaccuracy.

130. 418 U.S. at 352.

131. W. Prosser, *Torts* 762, 772-73 (4th ed. 1971).

and punitive damages were allowed.¹³² Justice Powell read the first amendment to hold that "private" individuals must demonstrate negligence before any liability will be imposed for libelous publications which make "substantial danger to reputation apparent."¹³³

Although this relaxation of a fault standard was intended to shield the press from the rigors of strict liability,¹³⁴ the "elusive"¹³⁵ nature of a negligence test arguably could saddle the press with the "intolerable burden" of guessing before publication whether a jury will find the publisher's steps reasonable.¹³⁶ Furthermore, the flexibility inherent in the concept of reasonable care carries the danger that a jury will use it to suppress those "vehement attacks" deserving of constitutional protection, a danger Justice Brennan thinks far greater than jurors suppressing opinion through the imposition of presumed and punitive damages.¹³⁷ Finally, the burden of proof for a negligence standard might well be that of a preponderance of the evidence, in contrast to the clear and convincing showing required by the *New York Times*.¹³⁸ A preponderance standard suggests that an erroneous verdict in either party's favor would be equally serious.¹³⁹ In fact, an error in favor of the libel plaintiff has traditionally been viewed with more alarm.¹⁴⁰

Justice White, in dissent, attacked the negligence standard from a totally different perspective, decrying the need to prove negligence as an additional burden on libeled plaintiffs attempting to vindicate themselves.¹⁴¹

Limiting recovery to actual damages, the *Gertz* Court disallowed an award of presumed and punitive damages by any private defamation plaintiff who establishes liability under a less rigorous standard than proof of actual malice.¹⁴² Justice Powell felt that an award of presumed damages in excess of actual injury would magnify any possibly inhibitory effect on the media, while an award of punitive damages would

132. *Id.* at 760-62.

133. 418 U.S. at 347-48.

134. *Id.* at 348.

135. *Id.* at 366 (Brennan, J., dissenting), quoting *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967).

136. *Id.* at 360, 366 (Douglas & Brennan, JJ., dissenting). Professor Kalven suggests that there is no place in the first amendment world for the "reasonably prudent man." Kalven, *supra* note 114, at 303. But see *Curtis Publishing Co.*, 388 U.S. at 158-59, wherein the Court held that a factor such as the necessity for rapid dissemination of news could be considered in determining the reasonable care standard.

137. 418 U.S. at 367.

138. 376 U.S. at 285-86.

139. *In re Winship*, 397 U.S. 358, 371 (1970) (Harlan, J., concurring).

140. *Rosenbloom*, 403 U.S. at 50.

141. 418 U.S. at 375-76.

142. *Id.* at 349.

contain the same danger, in addition to being irrelevant to the state's interest in compensating loss of reputation.¹⁴³

Although not defined, "actual injury" was deemed to include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.¹⁴⁴ Not unmindful of the dangers of juries' discretion, Justice Powell noted that they might attempt to "punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact."¹⁴⁵

The principal opponents of this standard took very different approaches in dissent. Justice White faulted the "actual injury" requirement because damage to reputation is difficult to prove, thereby jeopardizing the chance that a libeled individual will be adequately compensated.¹⁴⁶ After all, concluded the Justice, punitive damages and the first amendment have coexisted for almost two hundred years.¹⁴⁷ Justice Brennan, on the other hand, thought the broad-ranging examples of "actual injury" would give the jury a "formidable weapon" for punishing expression of unpopular views.¹⁴⁸ He reiterated his persuasive opinion in *Rosenbloom* that it is the very possibility of having to engage in litigation, rather than the size and frequency of awards, which results in media self-censorship.¹⁴⁹

Gertz provides a definitive answer to the constitutional question equivocally resolved in *Rosenbloom*. The first amendment does not require that a private individual show actual malice before he may recover for damage to his reputation arising from a libelous publication of general or public interest.¹⁵⁰ The decision reveals a Court badly fragmented over whether the threat of suits by private individuals claiming to have been libeled while the press was discussing a matter of public concern will take away the "breathing space" necessary for first amendment expression to flourish.¹⁵¹

143. *Id.*

144. *Id.* at 350.

145. *Id.* at 349.

146. *Id.* at 394.

147. *Id.* at 398.

148. *Id.* at 367.

149. *Id.* at 367-68, quoting *Rosenbloom*, 403 U.S. at 52-53.

150. 418 U.S. at 345-46.

151. Justice White contended that today's vigorous press, concentrated in a few powerful hands, would not be easily intimidated by the threat of suits, citing the absence of any data tending to show press self-censorship. *Id.* at 390 (White, J., dissenting). Justice Blackmun felt that the slight practical effect which *Gertz* might have on journalists would be offset by the removal of presumed and punitive damages. *Id.* at 354 (Blackmun, J., concurring). On the other hand, Justices Douglas and Brennan dissented vigorously that *Gertz* would certainly lead to press self-censorship, *id.* at 360, 366 (Douglas & Brennan, JJ., dissenting), a result which Chief Justice Burger also found conceivable. *Id.* at 355 (Burger, C.J., dissenting).

While *Rosenbloom* would more adequately have protected the first amendment freedoms discussed in *New York Times*,¹⁵² the "public concern" standard there articulated might virtually have eliminated the law of libel.¹⁵³ *Gertz*, on the other hand, is not without press safeguards: negligence must be proved;¹⁵⁴ the potentially defamatory nature of the statement must be apparent;¹⁵⁵ and only actual damages may be recovered.¹⁵⁶ Unfortunately, these protections may not be adequate compensation for effectively entrusting the scope of a publisher's first amendment privilege to the discretion of a jury.

III

DUE PROCESS: CRIMINAL JURISDICTION BY KIDNAPPING

Until the Court of Appeals for the Second Circuit decided *United States v. Toscanino*,¹⁵⁷ it was virtually undisputed that law enforcement officials could forcibly abduct a criminal defendant and take him into a particular jurisdiction without jeopardizing the validity of a subsequent conviction against him.¹⁵⁸ In a seeming rejection of established Supreme Court doctrine,¹⁵⁹ the court of appeals held that if the defendant could substantiate his allegations of kidnapping and torture, due process would require a court to decline jurisdiction "where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights."¹⁶⁰ Furthermore, in a surprising extension of constitutional rights, the court found an alien entitled to invoke the protection of the fourth amendment¹⁶¹

152. See notes 116-19 *supra* and accompanying text.

153. But see *Rosenbloom*, 403 U.S. at 49, where the plurality disavowed any desire to eliminate the law of libel.

154. See note 92 *supra* and accompanying text.

155. 418 U.S. at 348. The Court limited its holding by noting that different considerations would be involved "if a State purported to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential." *Id.*

156. *Id.* at 349. Presumed and punitive damages may still be recovered if the publisher acts with "actual malice." *Id.*

157. 500 F.2d 267 (2d Cir. 1974).

158. See, e.g., *Chandler v. United States*, 171 F.2d 921, 933-36 (1st Cir. 1948), cert. denied, 336 U.S. 918 (1949); *Hobson v. Crouse*, 332 F.2d 561 (10th Cir. 1964).

159. In both *Ker v. Illinois*, 119 U.S. 436 (1886), and *Frisbie v. Collins*, 342 U.S. 519 (1952), the Court had held that such forcible abductions neither affected the court's jurisdiction, 119 U.S. at 444; 342 U.S. at 522, nor deprived the defendant of any constitutional rights, 119 U.S. at 440; 342 U.S. at 522.

160. 500 F.2d at 275.

161. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated U.S. Const. amend. IV.

even outside the territorial jurisdiction of the United States.¹⁶² Eight months later, the Second Circuit reassessed its previous position and held, in *United States ex rel. Lujan v. Gengler*,¹⁶³ that in the absence of any allegations of physical abuse, such abductions do not violate a defendant's right to due process. Thus, law enforcement officials may still kidnap a criminal defendant, take him into a particular jurisdiction, and obtain a valid conviction against him, so long as they do not abuse him physically.

Toscanino was a citizen of Italy living in Uruguay. At his trial, he alleged that he had been kidnapped in Uruguay by paid agents of the United States Government, removed to Brazil and eventually taken to Brasilia. There, he claimed to have been tortured for seventeen days by his captors and interrogated by a member of the United States Department of Justice. Finally, he was allegedly drugged and placed in a plane bound for New York; he was arrested on board the airplane in the United States.¹⁶⁴ Although Toscanino challenged the validity of the proceedings,¹⁶⁵ the district court found his allegations irrelevant to its jurisdictional power.¹⁶⁶

Toscanino also moved at trial¹⁶⁷ to compel the prosecution to affirm or deny that he had been illegally wiretapped in Uruguay. Upon the prosecutor's representations that no electronic surveillance had been employed, the trial court ruled that a hearing on the issue was unnecessary.¹⁶⁸ Toscanino appealed his subsequent conviction for conspiring to import heroin.¹⁶⁹

The Due Process Analysis.—The decision in *Toscanino* rested pri-

162. 500 F.2d at 280.

163. No. 74-2084 (2d Cir. Jan. 8, 1975), cert. denied, 43 U.S.L.W. 3636 (U.S. June 3, 1975).

164. 500 F.2d at 269-70.

165. *Id.* at 268.

166. *Id.* at 271.

167. See *id.* at 270-71. This motion is authorized by 18 U.S.C. § 3504 (1970), which provides:

- (a) In any trial, hearing, or other proceeding in or before any court . . . of the United States—
 - (1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act . . . the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act; . . .
- (b) As used in this section "unlawful act" means any act the use of any electronic, mechanical, or other device . . . in violation of the Constitution or laws of the United States

168. See 500 F.2d at 271.

169. *Id.* at 268-69.

marily on due process grounds.¹⁷⁰ The court noted¹⁷¹ that the Supreme Court's interpretation of due process had expanded since the leading "abduction" decision of *Frisbie v. Collins*.¹⁷² Due process, previously satisfied by fair procedure at trial,¹⁷³ had come to mean that in a criminal prosecution the government should not be allowed to utilize the products of its own deliberate, illegal conduct.

As seen by the Court, the liberalizing trend had its genesis in *Rochin v. California*.¹⁷⁴ In that case, police had pumped the stomach of the defendant to recover two morphine capsules which he had swallowed when the police broke into his home without a warrant.¹⁷⁵ In reversing Rochin's conviction,¹⁷⁶ the Court barred the government from utilizing the products of its illegal action,¹⁷⁷ and recognized that "the requirements of the due process clause inescapably impose upon this Court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction]."¹⁷⁸ It should be noted, however, that the Court was willing to find such a violation only where the government's conduct "shock[ed] the conscience."¹⁷⁹ The Second Circuit found the Court's expanded approach to due process in the context of criminal procedure further illustrated by *Mapp v. Ohio*,¹⁸⁰ *Miranda v. Arizona*,¹⁸¹ *Wong Sun v. United States*¹⁸² and, most recently, *United States v. Russell*.¹⁸³

170. *Id.* at 272-75. The requirement of due process in actions by the United States Government is derived from the following language in the fifth amendment to the Constitution: "[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

171. 500 F.2d at 271-72.

172. 342 U.S. 519 (1952).

173. *Id.* at 522.

174. 342 U.S. 165 (1952).

175. *Id.* at 166.

176. *Id.* at 174.

177. The lower court had found, on the record, that the arresting officers had acted illegally. *Id.* at 166-67.

178. *Id.* at 169.

179. *Id.* at 172.

180. 367 U.S. 643 (1961). In this case, the Court relied upon the due process clause of the fourteenth amendment to exclude illegally seized evidence in state prosecutions. *Id.* at 655-57.

181. 384 U.S. 436 (1966). Relying upon the due process guarantee of the fifth amendment, the Supreme Court required the exclusion of any statements made by a criminal defendant while in police custody unless specific, extensive precautions had been taken to protect the defendant's right against self-incrimination. *Id.* at 467-79, 491-99.

182. 371 U.S. 471 (1963). In this case, the Court held inadmissible statements made by the defendant at the time of his illegal arrest, *id.* at 484-87, as well as drugs seized from a third person as the result of such statements, *id.* at 487-88.

183. 411 U.S. 423 (1973). The defendant herein raised an entrapment defense, since a federal agent had supplied him with a scarce noncontraband substance

Although these cases clearly establish an "expanded" view of due process which looks beyond the events of the trial, the Second Circuit's reliance on *Rochin* is troublesome. *Rochin* was decided *before Frisbie*.¹⁸⁴ If *Rochin* signalled a developing due process trend, it should have been applied to *Frisbie*. In fact, neither the briefs of the parties,¹⁸⁵ nor the opinion of the court, mentioned the *Rochin* doctrine. Although the Court assumed that the alleged kidnapping was a violation of federal law,¹⁸⁶ it merely recited that due process is satisfied by fair procedure at trial.¹⁸⁷ Some commentators¹⁸⁸ have suggested that the Court was reluctant to use what was then a new doctrine to overturn both its own precedent and similar decisions by many state courts.¹⁸⁹ Ultimately, it seems that *Frisbie* was incorrectly decided. Not only had the Court previously looked beyond the trial to find violations of due process,¹⁹⁰ but the blackjacking in *Frisbie* should have satisfied the "shocks the conscience" standard articulated in *Rochin*.¹⁹¹

Accordingly, in deciding *Lujan*, the Second Circuit adhered to the principle that due process considerations go beyond the events of trial; *Toscanino* was distinguished on its facts. *Lujan* alleged that he had been lured from his native Argentina into Bolivia, where he had been taken into custody by the Bolivian police acting as paid agents of the United States. At no time did the police formally charge him, or did the United States request his extradition. After being held for a few days, he was put on an airplane bound for New York, where he was arrested by federal agents acting pursuant to a warrant on charges of conspiring to import heroin. Although there were no allegations of beatings or

necessary to manufacture the contraband drug upon which his conviction rested. Although the Supreme Court did not find a violation of due process, it did say that it might "some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking the judicial processes to obtain a conviction." *Id.* at 431-32.

184. Although the Court notes this sequence, it does not seem to consider it a problem. 500 F.2d at 273.

185. 1951 U.S. Briefs Docket No. 331.

186. 342 U.S. at 522-23.

187. *Id.* at 522.

188. Scott, *Criminal Jurisdiction of a State over a Defendant Based upon Presence Secured by Force or Fraud*, 37 *Minn. L. Rev.* 91, 99 (1953); Allen, *Due Process and State Criminal Procedures: Another Look*, 48 *Nw. U.L. Rev.* 16, 27 (1953).

189. See, e.g., *State v. Brewster*, 7 *Vt.* 117 (1835); *Ex parte Barker*, 87 *Ala.* 4, 6 *So.* 7 (1889).

190. In both *Brown v. Mississippi*, 297 U.S. 278 (1936), and *Watts v. Indiana*, 338 U.S. 49 (1949), the Supreme Court examined the circumstances surrounding pretrial confessions and reversed on due process grounds the convictions upon which they were based.

191. *Collins v. Frisbie*, 189 F.2d 464, 465 (6th Cir. 1951).

torture,¹⁹² he appealed from an order dismissing his petition for habeas corpus.¹⁹³ The Second Circuit held that in the absence of any allegations of torture, a "mere" kidnapping was not sufficiently shocking to constitute a violation of due process.¹⁹⁴

The Second Circuit's use of the "shocks the conscience" standard to measure due process violations is questionable. Although the *Rochin* court required egregious government misconduct before it would sustain a due process violation, subsequent opinions have looked only to whether a specific provision of the Bill of Rights has been violated.¹⁹⁵ The outrageous circumstances of Toscanino's abduction enabled the Second Circuit to avoid a direct holding on this issue. However, the *Toscanino* court did suggest that "[due process] has been extended to bar the government from realizing directly the fruits of its own deliberate and unnecessary lawlessness in bringing the accused to trial."¹⁹⁶ According to this concept of due process,¹⁹⁷ the circumstances of Lujan's kidnapping should have been held to invalidate his conviction as well, even in the absence of physical abuse.¹⁹⁸

This analysis can be criticized in light of a recent Supreme Court holding which indicates that extensive government involvement in illegal activity may not, by itself, violate the defendant's due process rights.¹⁹⁹ Further distinguishing *Toscanino* from the Supreme Court de-

192. No. 74-2084 at 1198-1200.

193. *Id.* at 1197.

194. *Id.* at 1204-05.

195. The *Rochin* standard was not used in imposing the *Mapp* or *Wong Sun* aspects of the exclusionary rule on the states. See notes 180 and 182 *supra*. Nor has the Court resorted to this standard in applying other constitutional protections against the states through the due process clause, as *Miranda* demonstrates. See note 181 *supra*. See also *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

196. 500 F.2d at 272, citing, *inter alia*, *Mapp*, *Wong Sun*, and *Miranda*.

197. This "due process" seems more consistent with the phrase as used in the *Magna Carta*, where it means "by the law of the land." 391 U.S. at 169 (Black, J., concurring).

198. The kidnapping laws of two countries were violated. No. 74-2084 at 1205; 500 F.2d at 276. See also the Federal Kidnapping Act, 18 U.S.C. § 1201, as amended by Act of Oct. 24, 1972, 86 Stat. 1072. The agents involved could have been extradited for kidnapping. See *Collier v. Vaccaro*, 51 F.2d 17 (4th Cir. 1931); *Villareal v. Hammond*, 74 F.2d 503 (5th Cir. 1934). The provisions of at least two treaties of the United States were breached. See notes 229-30 *infra* and accompanying text. The seizures violated international law. O'Higgins, *Unlawful Seizure and Irregular Extradition*, 36 *Brit. Y.B. Int'l L.* 279, 280 (1960). But see No. 74-2084 at 1205-09 (Kaufman, C.J.). The normal and legal mode of obtaining jurisdiction over defendants in other states is through an extradition treaty or reciprocity. *Garcia-Mora*, *Criminal Jurisdiction of a State over Fugitives Brought from a Foreign Country by Force or Fraud: A Comparative Study*, 32 *Ind. L.J.* 427 (1957).

199. Although the Court found the agent's conduct in *Russell* not to be illegal, 411 U.S. at 430, it was certainly substantial involvement in the crime, probably

cisions upon which the Second Circuit relied is the fact that the cited authorities all involve the violation of specific constitutional guarantees.²⁰⁰ However, the policy of denying the prosecution the fruits of its own illegal conduct has long been urged as the better view;²⁰¹ it would both deter the government from breaking its own laws²⁰² and preserve the court's integrity.²⁰³ The Second Circuit seemed to embrace such a view in *Toscanino*.

Nevertheless, *Lujan* betrays a markedly different posture. Although the Second Circuit disclaimed approval of such illegal government behavior²⁰⁴ and expressed its belief that "the likelihood of numerous violations is not real,"²⁰⁵ the realities of international criminal pro-

enough to have constituted aiding and abetting had the agent been a private citizen. See 18 U.S.C. § 2 (1970); *Direct Sales Co. v. United States*, 319 U.S. 703 (1943); *Backun v. United States*, 112 F.2d 635, 637 (4th Cir. 1940).

Nor was the more plainly illegal conduct of the government agents in *United States v. McGrath*, 468 F.2d 1027 (7th Cir. 1972), vacated and remanded for further consideration, 412 U.S. 936 (1973), sufficient to warrant reversal on remand, 494 F.2d 562 (7th Cir. 1974), under the *Russell* standards. In *McGrath*, government agents infiltrated a counterfeit money ring to the point where they were supervising the printing and distributing of the bills. *Id.* at 1028. But see *United States v. Oquendo*, 490 F.2d 161 (5th Cir. 1974), wherein the Fifth Circuit held, despite *Russell*, that government agents supplying contraband to a defendant constitutes entrapment. *Id.* at 163-64.

200. Specifically, these guarantees are either the fourth amendment right against search and seizure (*Rochin*, *Mapp*, *Wong Sun*) or the fifth amendment right against self-incrimination (*Miranda*). Since *Rochin* the courts have asked if conduct "shocks the conscience" where the due process clause is being given independent content, as in *Russell* and *Lujan*, and have "den[ie]d] the fruits of illegal actions" where a specific constitutional prohibition is involved. Although the Second Circuit held that *Toscanino* was protected by the fourth amendment, this conclusion is questioned at notes 209-21 *infra* and accompanying text. The application of this double standard leads to such arguably inequitable results as excluding probative evidence in a murder trial because of an insufficient warrant (see, e.g., *Coolidge v. New Hampshire*, 403 U.S. 443 (1971)), while allowing the government to violate kidnapping laws and treaties in its efforts to obtain custody over a defendant.

201. The admonition of Justice Brandeis in *Olmstead v. United States*, 277 U.S. 438 (1928), cited by the Second Circuit in *Toscanino*, 500 F.2d at 274, is particularly apt here:

In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously If the government becomes a lawbreaker, it breeds contempt for law to declare . . . that the government may commit crimes in order to secure the conviction of a private criminal would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

277 U.S. at 485 (Brandeis, J., dissenting).

202. See, e.g., *Elkins v. United States*, 364 U.S. 206, 217 (1960); *Mapp*, 367 U.S. at 648.

203. See, e.g., *Elkins*, 364 U.S. at 222; *Terry v. Ohio*, 392 U.S. 1, 12-13 (1968).

204. No. 74-2084 at 1205.

205. *Id.* at 1209 n.9.

cedures belie the court's protests.²⁰⁶ Thus, after flirting briefly with a sensible due process doctrine,²⁰⁷ the Second Circuit returned to the nearly unanimous opinion of other American courts that such abductions, by themselves, do not constitute violations of due process of law.²⁰⁸

The Fourth Amendment Aspect.—The Second Circuit characterized the government as “[h]aving unlawfully seized the defendant in violation of the Fourth Amendment.”²⁰⁹ Had Toscanino been a United States citizen kidnapped from one state to another, it seems clear that such treatment would have violated his fourth amendment rights.²¹⁰ The court cited no authority even suggesting that aliens have fourth amendment rights outside the United States, until it reached the issue of wiretapping.²¹¹

The trial court had denied Toscanino's motion to compel the government to affirm or deny his allegation of illegal wiretapping in Uruguay.²¹² Although the Second Circuit found the federal wiretapping statute²¹³ inapplicable outside the United States,²¹⁴ it noted that the law under which Toscanino had made his request defined “unlawful

206. The statement of the court should be compared to the reaction *Lujan* evoked from the federal authorities, “who said the decision would make it less difficult for them to conduct their program to combat narcotics smuggling.” N.Y. Times, Jan. 9, 1975, at 26, col. 1. At least one commentator noted that such abductions are quicker and less costly than formal extradition. Evans, *Acquisition of Custody over the International Fugitive Offender—Alternatives to Extradition: A Survey of United States Practice*, 40 Brit. Y.B. Int'l L. 77, 94-95 (1964). The Chilean citizen who claimed that he was forcibly abducted by Chilean officers acting at the direction of a United States agent undoubtedly disagrees with the Second Circuit. A United States attorney admitted that they had held the wrong man, but disclaimed the abduction. N.Y. Times, Sept. 28, 1974, at 1, col. 8.

207. See Judge Anderson's concurrence in *Lujan*:

The discussion in the majority opinion in *Toscanino* of the due process issue . . . read[s], in my opinion, as if the kidnapping . . . standing alone, would be sufficient to deprive the district court of jurisdiction.

No. 74-2084 at 1210. (Anderson, J., concurring).

208. State court precedents include *State v. Brewster*, 7 Vt. 117 (1835); *Ex parte Barker*, 87 Ala. 4, 6 So. 7 (1889). Two recent cases are of particular note. In *United States v. Cotten*, 471 F.2d 744 (9th Cir.), cert. denied, 411 U.S. 936 (1973), a due process argument very similar to that which prevailed in *Toscanino* was rejected. *Id.* at 747-48. The court felt bound by *Ker and Frisbie*. Thus, the *Toscanino* court's attempt to distinguish this case on treaty grounds, 500 F.2d at 279, is inapt. In *United States v. Herrera*, 504 F.2d 859 (5th Cir. 1974), the Fifth Circuit deferred to *Ker and Frisbie*, and suggested that *Toscanino* was a product of its unusual facts. *Id.* at 860.

209. 500 F.2d at 275.

210. *Henry v. United States*, 361 U.S. 98, 100-01 (1959); *Giordenello v. United States*, 357 U.S. 480, 485-88 (1958).

211. 500 F.2d at 268.

212. See note 167 *supra*.

213. 18 U.S.C. § 2510 (1970).

214. 500 F.2d at 279.

act" in part as "any act . . . in violation of the Constitution."²¹⁵ Therefore, the court held that Toscanino was protected by the fourth amendment while in Uruguay, that the alleged wiretap was unreasonable, and that his rights had been violated thereby.²¹⁶

The court cited no direct precedent for the proposition that an alien has fourth amendment rights outside the territorial jurisdiction of the United States. Rather, it noted that United States citizens abroad,²¹⁷ as well as aliens within the territorial jurisdiction of the United States,²¹⁸ enjoy the protection of the fourth amendment, and refused to distinguish Toscanino's situation.²¹⁹ The court has essentially defined the "people" whose "rights" the fourth amendment protects as everyone in the world.²²⁰ The court does attempt to limit its holding to the rights of a defendant in a criminal proceeding. However, the import of its language is unclear,²²¹ and the refusal of the *Lujan* court even to consider the fourth amendment aspect of *Toscanino* further obscures its meaning.

Ker and Frisbie Distinguished.—The court's efforts to distinguish *Toscanino* from *Ker* and *Frisbie* met with mixed success. The first distinction it pursued was based on the power of the federal courts to supervise the administration of federal criminal justice.²²² *Ker* and *Frisbie*

215. 18 U.S.C. § 3504(b). For the text of this provision, see note 167 supra.

216. 500 F.2d at 280-81.

217. *Id.* at 280, citing *Reid v. Covert*, 354 U.S. 1 (1957); *Best v. United States*, 184 F.2d 131 (1st Cir.), cert. denied, 340 U.S. 939 (1950).

218. 500 F.2d at 280, citing *Au Yi Lau v. United States Immigration and Naturalization Serv.*, 445 F.2d 217 (D.C. Cir.), cert. denied, 404 U.S. 864 (1971).

219. No sound basis is offered in support of a different rule with respect to aliens who are victims of unconstitutional action abroad, at least where the government seeks to exploit the fruits of its unlawful conduct in a criminal proceeding against the alien in the United States.
500 F.2d at 280.

220. For an indication that such a broad reading is unwarranted, see *Johnson v. Eisentrager*, 339 U.S. 763 (1950). Note also that the leading decisions granting constitutional rights to aliens limit such protections to aliens within the territorial limits of the United States. See, e.g., *Wong Wing v. United States*, 163 U.S. 228, 238 (1896); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886); *Coyler v. Skeffington*, 265 F. 17, 24 (D. Mass. 1920). But see *In re Yamashita*, 327 U.S. 1, 26 (1946) (Murphy, J., dissenting). The cases which the court does cite in support of its broad interpretation of the fourth amendment similarly exclude aliens residing outside the territorial United States. *Reid v. Covert*, 354 U.S. at 5; *United States v. Pink*, 315 U.S. 203, 210-11, 228 (1942); *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 486-87, 489 (1931); *Balzac v. Porto Rico*, 258 U.S. 298, 309 (1922); *Au Yi Lau v. United States Immigration and Naturalization Serv.*, 445 F.2d at 223; *Best v. United States*, 184 F.2d at 138.

221. It is unclear whether the fourth amendment rights of aliens exist only for the narrow purposes involved in *Toscanino*, or whether the court intended to articulate a broader right which may eventually give rise to other remedies. See, e.g., *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

222. 500 F.2d at 276.

are state court cases, whereas *Toscanino* and *Lujan* proceeded in a federal district court and involved federal law enforcement procedures.²²³ The court argued, therefore, that the supervisory power could be exercised to decline jurisdiction in a case where government agents broke laws to obtain the presence of the defendant.²²⁴ Had the court decided the case on this ground alone, it could have avoided any problems attendant upon a due process or fourth amendment analysis.²²⁵

The court's second attempted distinction analogizes *Toscanino's* abduction to the seizure of a ship outside the territorial limits of the United States.²²⁶ Where the government lacks power to seize by virtue of a self-imposed limitation, the federal courts lack jurisdiction over the dispute.²²⁷ Unfortunately, not only is the analogy flawed by the clear and recognized distinction between admiralty jurisdiction and criminal law,²²⁸ but the court's reliance on the charters of the United Nations²²⁹ and the Organization of American States²³⁰ as constituting such a limi-

223. Thus, these cases, unlike *Ker* and *Frisbie*, fall within the doctrine of *McNabb v. United States*, 318 U.S. 332 (1943) that

judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence.

Id. at 340.

224. 500 F.2d at 276. The supervisory power spoken of in *McNabb* has been invoked to enjoin a federal agent from testifying about illegally seized evidence in a state court, *Rea v. United States*, 350 U.S. 214, 217 (1956), and to dismiss an indictment that should have been based on better evidence, *United States v. Estepa*, 471 F.2d 1132 (2d Cir. 1972). Thus, it seems clear that the courts could decline jurisdiction to prevent their implication in illegal activity.

225. In fact, the Supreme Court stated that the administrative standards, which are the federal judiciary's duty to establish, are not satisfied by the traditional safeguards of due process. 318 U.S. at 340.

226. 500 F.2d 277-79.

227. Were the cases actually comparable, the abduction would have fallen under the rule of *Cook v. United States*, 288 U.S. 102 (1933). *Cook* involved a libel action by the United States Government against a British ship. *Id.* at 108. Because the United States had imposed a territorial limitation on its own authority by a treaty with Great Britain, the Supreme Court reasoned that it lacked the power to seize the ship and its courts lacked the jurisdiction to adjudicate the dispute. *Id.* at 121-22.

228. The federal courts have exclusive jurisdiction over suits in admiralty. U.S. Const. art. III, § 2. See also 28 U.S.C. § 1333 (1970); *The Ira M. Hedges*, 218 U.S. 264, 270 (1910). It has long been a rule in admiralty that one cannot gain jurisdiction over a ship by seizing it outside the territorial limits of the court's jurisdiction and subsequently taking it inside those limits. *The Patricia M. Behan*, 299 F. 1019 (E.D.N.Y. 1924). Both *Ker* and *Frisbie*, as well as their progeny, clearly indicate that no such rule exists for criminal jurisdiction. See note 189 *supra*.

229. Charter of the United Nations, June 26, 1945. 59 Stat. 1031, T.S. No. 993. The court found that the government's conduct had violated Article 2, paragraph 4 of the United Nations Charter. 500 F.2d at 277.

230. Charter of the Organization of American States, April 30, 1948, [ratified 1951] 2 U.S.T. 2394, T.I.A.S. 2361, 119 U.N.T.S. 3. The court found that the government's conduct had violated Article 17 of the charter of the Organization of American States. 500 F.2d at 277.

tation is misplaced. It is questionable whether the provisions of either charter could be construed as self-executing,²³¹ a necessary condition before they may provide the basis for adjudicating the rights of individuals.²³²

However, in *Lujan*, the Second Circuit did not reject the idea that a criminal defendant abducted into the jurisdiction might seek the protection of these treaties. Noting that *Lujan* had not alleged that either Bolivia or Argentina had objected to his abduction, it invoked the rule of international law that failure to object to a violation of sovereignty cures the violation.²³³ Thus, the court found no violation of international

231. In *Sei Fujii v. State*, 38 Cal. 2d 718, 242 P.2d 617 (1952), a resident alien alleged that the California alien land law had been invalidated by the United Nations Charter. Although the court struck down the law on other grounds, *id.* at 725-38, 242 P.2d at 622-30, it did hold that those particular provisions of the United Nations Charter were not self-executing, and therefore could not operate to void a local law. *Id.* at 721-25, 242 P.2d at 620-22. In so doing it reiterated the general rule that

[i]n order for a treaty provision to be operative without the aid of implementing legislation and to have the force and effect of a statute, it must appear that the framers of the treaty intended to prescribe a rule that, standing alone, would be enforceable in the courts.

Id. at 722, 242 P.2d at 620. See also *Head Money Cases*, 112 U.S. 580, 598-99 (1884); *Camacho v. Rogers*, 199 F. Supp. 155, 158 (S.D.N.Y. 1961).

It is similarly questionable whether the members of the Organization of American States intended to create rights enforceable by private individuals, since later articles provide that "[a] special treaty will establish adequate procedures for the pacific settlement of disputes." Charter of the Organization of American States, *supra* note 230, Chapter 3, Article 23.

Those treaties which have been held to be self-executing specify the nature and extent of the rights granted therein. The *Cook* court found the involved treaty self-executing. 288 U.S. at 118-19. It reads in relevant part:

Article II. (1) His Britannic Majesty agrees that he will raise no objection to the boarding of private vessels under the British flag outside the limits of territorial waters by the authorities of the United States . . . for the purpose of ascertaining whether the vessel or those on board are endeavoring to import . . . alcoholic beverages into the United States . . .

...

(3) The rights conferred by this article shall not be exercised at a greater distance from the coast of the United States . . . than can be traversed in one hour by the vessel . . .

Convention with Great Britain on the Prevention of Smuggling of Intoxicating Liquors, Jan. 23, 1924, 43 Stat. 1761, T.S. No. 685.

See also *Clark v. Allen*, 331 U.S. 503 (1947) (treaty concerning right of aliens to hold land held self-executing); *United States ex rel. Martinez-Angosto v. Mason*, 232 F. Supp. 102 (S.D.N.Y. 1964), *rev'd* on other grounds, 344 F.2d 673 (2d Cir. 1965) (treaty setting forth procedures for dealing with deserting seamen held self-executing); *Nielsen v. Johnson*, 279 U.S. 47 (1929) (treaty concerning the kinds of taxes to be levied upon aliens held self-executing).

232. *E.g.*, *Cook*, 288 U.S. at 118-19.

233. No. 74-2084 at 1205-09, citing, *inter alia*, H. Kelsen, *Principles of International Law* 234 (Tucker ed. 1966), and the opinion in the *Eichman* case, reported at 6 M. Whiteman, *Digest of International Law* 1110 (1968).

law, and refused to decide whether the existence of one might have changed the outcome.²³⁴

The Second Circuit found the cruelties to which Toscanino was subjected to have defeated the jurisdiction of the federal district court.²³⁵ Although this may provide an adequate and defensible legal remedy, it leaves Toscanino with some practical problems. If he is returned to a *status quo ante*, as the court suggests,²³⁶ he is at least spared immediate rearrest by American authorities. However, it seems likely that the Uruguayan authorities, who were allegedly implicated in the plot from its inception,²³⁷ will rearrest Toscanino and either take measures of their own or turn him over to American authorities again.²³⁸ Perhaps with this possibility in mind, the *Lujan* court cautioned that the adoption of an exclusionary rule in these circumstances would "confer a total immunity to criminal prosecutions."²³⁹ While an argument might be made for such a rule on the clearly barbarous facts alleged in *Toscanino*, it does seem a high price to pay in situations where the police behavior is less brutal and the crime alleged more heinous.²⁴⁰

Taken together, *Toscanino* and *Lujan* establish the rule in the

234. No. 74-2084 at 1209.

235. This court characterized the action as an extension of the power of federal courts to decline jurisdiction in civil cases where the defendant's presence has been secured by force or fraud. 500 F.2d at 275. Such an analogy has been suggested by commentators. See Scott, Criminal Jurisdiction of a State over a Defendant Based upon Presence Secured by Force or Fraud, 37 Minn. L. Rev. 91, 104-05 (1953). Although evidence was simply excluded in *Mapp*, *Miranda*, and *Wong Sun*, that action would not have provided Toscanino a sufficient remedy. See 500 F.2d at 275. Since it was the defendant's presence that was made possible by the illegal government conduct, that presence should be "excluded" by declining jurisdiction.

236. 500 F.2d at 275.

237. *Id.* at 269. It should be noted, however, that the Uruguayan police who kidnapped Toscanino were acting *ultra vires* and that their government actually condemned the act. *Id.* at 269-70.

238. It is not clear that principles of double jeopardy would bar Toscanino's retrial. The usual rule in American jurisdictions is that a defendant may be retried where the first conviction was set aside due to error in the proceeding. *United States v. Tateo*, 377 U.S. 463, 465 (1964). Nor is retrial forbidden where a judge declares a mistrial because of a "jurisdictional" defect in the indictment. *Illinois v. Somerville*, 410 U.S. 458 (1973). But see *United States v. Jorn*, 400 U.S. 470 (1971).

The practical problem faced by Toscanino is even greater for a defendant who is kidnapped from one state to another. In such instances, the governor of each state is constitutionally required to deliver up fugitives from justice to the state with jurisdiction over the crime. U.S. Const. art. IV, § 2, codified at 18 U.S.C. § 3182 (1970). Although one might argue that someone released for lack of jurisdiction is not a fugitive, that position has been rendered irrelevant by the passage in many states of the Uniform Criminal Extradition Act. Scott, *supra* note 188, at 92 n.7.

239. No. 74-2084 at 1209 n.9.

240. So long as the court uses the "shocks the conscience" standard to identify due process violations, it need not confront this choice directly. See text accompanying note 194 *supra*.

Second Circuit that forcibly abducting and physically brutalizing a criminal defendant will violate his due process rights and divest the receiving jurisdiction of power to adjudicate the dispute.²⁴¹ Although *Toscanino* suggests that the proper standard for determining whether due process has been violated is the more liberal one which looks to the commission of unnecessary illegal acts by the government,²⁴² *Lujan* asks only whether the government's conduct "shocks the conscience."²⁴³ Fortunately, *Lujan* suggests that the more frequent occurrence of such kidnappings might be cause for reconsideration.²⁴⁴

ADDENDUM

As this article went to press, the Second Circuit affirmed a narcotics conviction in *United States v. Lira*, No. 74-2567 (2d Cir., April 14, 1975). Despite the defendant's allegations of torture and the Government's admission that it had requested the defendant's expulsion from Chile and was advised of his arrest and place of incarceration, the appellate court affirmed the lower court's finding of insufficient government involvement. Thus, *Toscanino* was distinguished. In a concurring opinion, Judge Oakes, noting that six more abduction cases were likely to come before the court, warned that repeated abductions would invite the use of the *McNabb* supervisory power to decline jurisdiction in such cases.²⁴⁵

241. It should be noted that the *Lujan* court specifically refused to decide whether the dismissal of the indictment would have been required had Lujan been able to allege and prove Bolivia's or Argentina's objection. No. 74-2084 at 1209.

242. See notes 196 and 207 *supra* and accompanying text.

243. See text accompanying note 194 *supra*.

244. No. 74-2084 at 1209 n.9.

245. See notes 223-24 and 204-06 *supra* and accompanying text.

