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Constitutional Law - Void for Vagueness - Political Demonstration

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Therefore, it is submitted the two approaches cannot be deemed consistent unless the risk fragmentation analysis is in part a guise for the determining of scope of liability problems on more than a simple application of its elements. The court may utilize a *Thorton* approach or simply affirm a jury determination on a strong factual pattern in a case involving "unforseeable consequences". However, this serves as a bypass to the sometimes difficult question of where do we cut off negligence. A considered evaluation of numerous factors, including those mentioned above, applied through a general class of harms, would increase judicial integrity and certainty when facing this type of problem. The alternative of risk fragmentation leaves us simply with the statement that this hazard is unforeseeable.

The use of risk fragmentation is consistent with Pennsylvania's approach to this type of problem, but if the court utilizes it to foreclose liability simply on the basis of foreseeability, then it must be presumed that any accident resulting from highly unusual circumstances presents a very difficult problem to the plaintiff. If correctly applied the process will result in a finding of no liability in the majority of such cases. Therefore, the rational in *Metts* must be understood for exactly what it is—a seemingly innocent process whereby potential liability may be effectively foreclosed at a very early stage in the negligence formula. It also provides a vehicle, or a guise, for resolving the difficult scope of liability problem on less than the full consideration of factors necessary, and at a minimum, may block the resolution of other issues which might more rationally dispose of the case.

J. Stephen Kreglow

CONSTITUTIONAL LAW—VOID FOR VAGUENESS—POLITICAL DEMONSTRATION—In reversing a conviction based on the desecration of an American flag, the Supreme Court of Pennsylvania has held the term "political demonstration" be given a broad interpretation.

Commonwealth v. Haugh, 439 Pa. 212, 266 A.2d 657 (1970).

Appellant-defendant Haugh was convicted in the Philadelphia Common Pleas Criminal Court of violating the Pennsylvania flag desecration statute which makes it a misdemeanor to publicly desecrate or

defile any flag of the United States except while participating in any patriotic or *political demonstration.*[1] The judgment was affirmed by the Superior Court of Pennsylvania,[2] but reversed by the Pennsylvania Supreme Court and the defendant discharged.

Haugh, while participating in a rally at Pennsylvania State University, protesting U.S. involvement in Vietnam, was arrested while carrying a United States flag on which were printed the words "Make Love Not War" and "The New American Revolutionaries." The basis of appeal was the constitutionality of the Act of June 24, 1939 and its alleged abridgement of the First Amendment right of free speech. The court, however, did not reach that question but instead held that defendant was acting in a political demonstration and was excepted from conviction under the Act. The holding thus rejected the lower court's proposal that the word "political" pertains only "to the exercise of the functions vested in those charged with the conduct of government and relates to the management of governmental affairs."[3] It instead, adopted the dissenting opinion of the superior court holding that the term "political demonstration" cannot be so narrowly construed.[4]

The courts have had the difficult task of determining the judicial significance of demonstrations and how such acts may fit into the scheme of constitutionally protected rights of both the demonstrators and non-demonstrators. The legislators of Pennsylvania have seen fit to exempt from prosecution those who desecrate or defile the American flag while exercising their right of symbolic free speech during a political demonstration. However, they have failed to designate what that term includes. In his dissenting opinion, Judge Hoffman, of the Superior Court of Pennsylvania, relies on a definition of the word "political" noted in the case of *State ex rel. Maley v. Civic Action Committee.*[5] That court defined the word as follows: "Of or pertaining to the exercise of the rights or privileges or the influence by which the individuals

1. Act of June 24, 1939, P.L. 872, *as amended,* PURDON'S PA. STAT. ANN. tit. 18, § 4211 (Supp. 1970). The Act provides in part: "Whoever, in any manner, places . . . any word . . . upon any flag of the United States . . . or publicly casts contempt either by word of acts upon, any such flag . . . is guilty of a misdemeanor . . . This section does not apply to any patriotic or political demonstration or decorations."

2. 215 Pa. Super. 160, 256 A.2d 874 (1969).

3. *Id.* at 165-166.

4. *Id.* at 166. Judge Hoffman dissents: "Any common sense definition of political demonstration must include demonstration by the people in support of political action which they favor. This would include action by political parties, by veteran's groups, by welfare and civil rights groups, by police and fire and fraternal organizations as well as groups opposing American foreign policy."

5. 238 Iowa 85, 28 N.W.2d 467 (1947).

of a state seek to determine or control its public policy; having to do with the organization or action of individuals, parties or interests that seek to control the appointment or action of those who manage the affairs of a state."[6] A narrower interpretation of "political activities" was espoused in *Lockheed Aircraft Corporation v. Superior Court of Los Angeles County*[7] which involved a section of the California Labor Code[8] prohibiting employers from regulating the political activities of employees. The court stated that the words politics and political imply orderly conduct of government and not revolution. The *Lockheed* definition of "political" however, does not concern itself with the generic nature of the term "political activities" but only with its relevance in regard to control and direction by employers.

The word "demonstration" was interpreted by the Supreme Court of Georgia in the case of *Herndon v. State*,[9] when it upheld a refusal by the lower court to charge the jury that there was a wide difference between "demonstration" and "insurrection." The appellant in *Herndon* contended unsuccessfully that a "demonstration" is "the public exhibition of one's sympathy towards a social or political movement;" "insurrection" is "resistance with force against the lawful authority of the state. . . ."[10] Webster defines the word "demonstration" as "a public display of group feelings (as approval, sympathy, or antagonism) especially toward a person, cause or action of public interest."[11]

A landmark case in the area of flag desecration was *Street v. New York*.[12] Street, after hearing of the rumored death of civil rights leader James Meredith by sniper in Mississippi, carried a 48 star American flag to a near by intersection, lit it with a match, and dropped it on the pavement. Street was soon arrested and charged with violating a New York flag desecration statute.[13] The United States Supreme Court reversed and remanded a conviction holding that words alone could not be enough to sustain a conviction. The Court stated that a violation both by words and actions without indicating which was the basis for conviction was unacceptable.[14] In a dissenting opinion, Justice Fortas

6. *Id.* at 471.
7. 28 Cal.2d 481, 171 P.2d 21,24 (1946).
8. WEST'S CAL. LABOR CODE § 1101 (West 1955).
9. 178 Ga. 832, 174 S.E. 597 (1934).
10. *Id.* at 608.
11. WEBSTER'S NEW INTERNATIONAL DICTIONARY 600 (3rd ed. 1961).
12. 394 U.S. 576 (1969).
13. NEW YORK GEN. BUS. LAW § 136, par.d (McKinney 1968) makes it a misdemeanor: ". . . publicly [to] multilate, deface, defile or defy, trample upon, cast contempt upon either by words or act [any flag of the United States]."
14. *Thomas v. Collins*, 323 U.S. 516 at 528-529 (1945).

found that the act of burning an American flag on a crowded street could not be excused simply because it was done for political reasons. "Protest," stated the Justice, "does not exonerate lawlessness."[15] The Court, Mr. Chief Justice Warren pointed out, did not concern itself with the constitutionality of a statute forbidding desecration of an American flag in protest. Nor was the nature and extent of a demonstration, political or otherwise, determined.[16]

The line of precedent which attempts to define "political demonstration" is at best nebulous and far from conclusive. It would seem, as was contended by the appellee in *Haugh*, that if a broad definition[17] of the term "political demonstration" were accepted, the scope of activities falling within this category would be limitless. Justice Roberts, speaking for the court, touches on the problem by stating: "If the demonstration involved here was not 'political', it would then become extremely difficult to say what demonstrations are, or are not, political. The line between demonstrations at which appellant's conduct could be punished, and demonstrations at which it could not, would be so vague and uncertain as to be a matter for guess work."[18] It is submitted that the majority opinion has not clarified where this "line" must be drawn but has only broadened the area of permissible demonstrations. Here, by way of dictum, the court has avoided the most relevant issue—whether or not the term "political demonstration" as used in the Act of 1939 is too vague for application.

The United States Supreme Court has consistently used the "Void for Vagueness Doctrine" to strike down penal statutes which use broad and uncertain terminology.[19] In *Stromberg v. California*[20] a female of the Young Communist League instructed children to salute a red flag at a summer camp in which she was employed. She was convicted of violating section 403(a) of the Penal Code of California which prohibited the display of the red flag "as a sign or symbol or emblem of opposition to organized government. . . ."[21] The Court held the statute void for being vague and indefinite in that it could punish those who would peacefully protest the government by legal means and within

15. 394 U.S. 576, 617 (1969).
16. *Id.* at 594-605.
17. See note 4.
18. 439 Pa. 212, 266 A.2d 657, 659 (1970).
19. *See generally* Collings, *Unconstitutional Uncertainty—An Appraisal*, 40 CORNELL L. REV. 195 (1955). *Cf.* Amsterdam, *The Void-For-Vagueness Doctrine In The Supreme Court*, 109 U. PENN. L. REV. 67 (1960).
20. 283 U.S. 359 (1931).
21. *Id.* at 533.

constitutional limitations. The similarity between the terms "opposition to organized government . . ." and "political demonstration" is too obvious to ignore.

In *Herndon v. Lowry*[22] the United States Supreme Court held unconstitutional and void for vagueness section 56 of the Penal Code of Georgia which punished any attempt to incite others to join in "any combined resistance to the lawful authority of the state."[23] The Court declared the statute to be too uncertain. It did not furnish a sufficiently ascertainable standard of guilt. The broad terms struck down by the Court seem closely akin to the phrase "political demonstration."

The case of *Connally v. Grand Construction Co.*[24] developed the test used most commonly today in determining whether a statute is or is not void for vagueness. It stated: "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process."[25]

It is submitted that the court in *Haugh v. Commonwealth,* in its attempt to avoid the vagueness doctrine, has left Pennsylvania with a statute virtually unmanageable in its broad scope. It has the effect of making the legislative act a dead letter since all a defendant need do in the future is indicate that his actions were politically motivated. It is not contended that the actions of appellant Haugh were not political in nature. However, the court has failed to give the slightest guideline as to how this statute may be interpreted in subsequent cases. In effect, it has tossed back to the lower courts an issue equally as nebulous as before, which still requires "that men of common intelligence guess at it and differ as to its application." As precedent seems to indicate, such a statute, qualified in broad, uncertain terms must be held void for vagueness.

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22. 301 U.S. 242 (1937).
23. *Id.* at 246.
24. 269 U.S. 385 (1926).
25. *Id.* at 391.