

**1999 DRAFTING REQUEST**

**Bill**

Received: **10/15/98**

Received By: **olsenje**

Wanted: **As time permits**

Identical to LRB:

For: **Governor 266-1212**

By/Representing: **Stewart Simonson**

This file may be shown to any legislator: **NO**

Drafter: **olsenje**

May Contact:

Alt. Drafters:

Subject: **Criminal Law - miscellaneous**

Extra Copies: **RAC**

**Topic:**

Crimes affecting the flag; inciting a breach of peace by damaging the flag

**Instructions:**

See Attached

**Drafting History:**

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	olsenje 10/15/98			_____			
/1			haueca 10/15/98	_____	gretskl 10/15/98	lrb_docadmin 12/7/98	

FE Sent For:

*Not Needed*

<END>

**Olsen, Jefren**

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**From:** Larson, David  
**Sent:** Friday, December 04, 1998 3:37 PM  
**To:** Olsen, Jefren  
**Subject:** LRB-0594

Jefren -

Sen. Zien requests LRB-0594 (Flag Protection Bill) be jacketed for introduction (by request of Governor Thompson) -

Thanks -

Dave Larson

Jacket 0594  
for Senate &  
send to Sen Zien's  
office  

---

JEO

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1?	olsenje	1-Kmg 10/13	ck 10-15	ck 10-15			

FE Sent For:

<END>



TOMMY G. THOMPSON

Governor  
State of Wisconsin

0259  
0594

FACSIMILE COVER SHEET

TO: John Elsen

FROM: Stewart Simonson

DATE: \_\_\_\_\_ TIME: \_\_\_\_\_

RE: \_\_\_\_\_

NUMBER OF PAGES INCLUDING THIS TRANSMITTAL SHEET 2

IF PAGES ARE NOT ALL RECEIVED OR ILLEGIBLE, PLEASE CALL:

\_\_\_\_\_

MESSAGE:

Confidential



MEMORANDUM

To: Jefren Olsen, Esq.  
Legislative Reference Bureau

Date: September 17, 1998

From: Stewart Sixsmith  
Legal Counsel to the Governor

Subject: Drafting instructions for the Governor's flag initiative

As you and I discussed the other day, I would like to begin work on a bill draft that includes language substantially similar to the following:

Sec. 943.012, Stats., is amended to provide:

- (5) A flag belonging to another person, organization or government unit. For the purposes of this subsection, "flag" means the flag of the United States (see 4 USCA 1) or the flag of the State of Wisconsin (see sec. 1.08, Stats.) or any copy, picture, or representation of them.

*"Another" should include these*

Sec. 939.645, Stats., is amended and renumbered to provide:

- (1) If a person does all of the following, the penalties for the underlying crime are increased as provided in sub (3):
- (a) Commits a crime under chs. 939 to 948.
  - (b) Intentionally selects the person against whom the crime under par. (a) is committed or selects the property that is damaged or otherwise affected by the crime under par. (a) in whole or in part because of the actor's belief or perception regarding the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property, whether or not the actor's belief or perception was correct.

*New* (2) If a person does all of the following, the penalties for the underlying crime are increased as provided in sub (3):

- (a) Commits a crime under chs. 939 to 948, excluding secs. 943.012 (5) and 947. \_\_\_\_\_
- (b) Intentionally destroys, damages, mutilates, urinates upon, defecates upon, or expectorates ~~on~~ the flag. For the purposes of this subsection, "flag" means the

*nexus?*  
*cf. comment (1)*

*new flag following (b)*

*Selects prop. b/c it is the flag? ...  
Does actor described while committing (attempting to commit the crime)?*

**Memorandum to Jefren Olsen, Esq.**

**Page 2**

flag of the United States (see 4 USCA 1) or the flag of the State of Wisconsin (see sec. 1.08, Stats.) or any copy, picture, or representation of them.

(3) [penalty enhancements set forth in former subsection (2)]

---

Sec. 947, \_\_\_, Stats., is created to read:

Whoever destroys, damages, mutilates, urinates upon, defecates upon, or expectorates upon the flag with the primary purpose and intent of inciting or causing imminent violence or a breach of the peace in circumstances where the actor knows such conduct is reasonably likely to cause imminent violence or a breach of the peace is guilty of a class E felony. For the purposes of this subsection, "flag" means the flag of the United States (see 4 USCA 1) or the flag of the State of Wisconsin (see sec. 1.08, Stats.) or any copy, picture, or representation of them.

*intent only; see 939.23 (4)*

## Flag Protection Act of '89

"flag of the US" means any flag of the US, or any part thereof, made of any substance, of any size, in a form that is commonly displayed.

Q's:

Seal? Shield? Cf. Current 946.05

Flags only



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\*\*\* THIS DOCUMENT IS CURRENT THROUGH MARCH 17, 1998 \*\*\*

TITLE XXIX [29] CRIMES--PROCEDURE  
CHAPTER 2917: OFFENSES AGAINST THE PUBLIC PEACE  
[INCITING, RIOT, AND RELATED OFFENSES]

ORC Ann. 2917.01 (Anderson 1998)

§ 2917.01 Inciting to violence.

(A) No person shall knowingly engage in conduct designed to urge or incite another to commit any offense of violence, when either of the following apply:

(1) The conduct takes place under circumstances that create a clear and present danger that any offense of violence will be committed;

(2) The conduct proximately results in the commission of any offense of violence.

(B) Whoever violates this section is guilty of inciting to violence. If the offense of violence that the other person is being urged or incited to commit is a misdemeanor, inciting to violence is a misdemeanor of the first degree. If the offense of violence that the other person is being urged or incited to commit is a felony, inciting to violence is a felony of the third degree.

HISTORY: 134 v H 511 (Eff 1-1-74); 146 v S 2. Eff 7-1-96.

Not analogous to former RC § 2917.01 (RS § 6900; S&C 432, 457, 457a; 29 v 144; 57 v 47; 70 v 155; GC §§ 12823, 12824; 102 v 129; Bureau of Code Revision, 10-1-53), repealed 134 v H 511, § 2, eff 1-1-74.

The effective date is set by section 6 of SB 2.

NOTES:

COMMITTEE COMMENT TO H 511

This section provides a proscription against abuse of the right of free speech and expression by consciously, and under explosive circumstances, spurring others to violence. Although the section is the offspring of the crime of inciting to riot, it is not limited to that alone, but includes inciting one person or many to any offense of violence, including riot.

The state has inherent authority to protect itself and its citizens from violence, and to this end may limit speech and expression which preaches it, provided there is an obvious and imminent danger that such conduct will actually result in the evil which the state has the right to prevent. *Schenck v. United States*, 249 U.S. 47, 63 L.Ed. 470, 39 S.Ct. 247 (1919); *Dennis v. United States*, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (1951). This section specifically includes a "clear and present danger" test. Thus, advocating mob violence in an academic speech to a phlegmatic audience is unlikely to move listeners to take

to the streets, and is not a violation of this section no matter how ill-judged the speaker's remarks may otherwise seem. On the other hand, advocating violent action to a tense audience in an already riot-torn area could well re-light the fuse, and may therefore be a violation of this section even though no violence actually results.

Regardless of the apparent atmosphere in which an inciter's conduct takes place, if his speech or actions are designed to move others to violence and actually do so, he is guilty of an offense under this section. In this respect, it is sufficient if he advocates some kind of violence and some kind of violence is committed as a result. If his conduct ultimately impels his listeners to commit arson, he cannot plead that his conduct only urged action amounting to simple riot. Conversely, if he urges arson, he cannot subsequently plead that the only incident which resulted was the "trashing" of a few parked cars. The former Ohio law on inciting only prohibited inciting to first degree riot. One of the phenomena of mob dynamics, however, is that assemblies which begin as merely disorderly frequently degenerate into Donnybrook Fairs. Agitators could use this phenomenon to their advantage, and escape accountability for their actions by carefully advocating a lesser species of violence, knowing that the odds ultimately favored more serious results.

While an offender may be guilty of a violation of this section even though no violence actually results from his conduct, it should be noted that if violence does result he is guilty not only of an offense under this section but also of complicity in the resulting crime, under section 2923.03 of the Revised Code.

Inciting to violence is a felony of the third degree.

#### CROSS-REFERENCES TO RELATED SECTIONS

Penalties, RC § 2929.11 et seq.

Certain offenders disqualified from day-care or preschool activities, RC §§ 3301.54, 5104.09.

Knowingly defined, RC § 2901.22.

Standards for community-based corrections programs, RC § 5149.31.

#### -COMPARATIVE LEGISLATION

-Inciting to violence:

-18 USC § 2101

CA--Penal Code § 404.6

FL--Stat Ann § 870.01

IL--Comp Stat Ann ch 720 § 5/25-1

IN--Code § 35-45-1-1

KY--Rev Stat Ann § 525.040

MI--Comp Laws Ann § 752.542

NY--Penal Law § 240.08

PA--CSA tit 18 § 5501

#### FORMS

Inciting to violence. 4 OJI 517.01

#### RESEARCH AIDS

Inciting to violence:

O-Jur3d: Crim L § 3746, 3747

Am-Jur2d: Mobs § 4

C.J.S.: Riot § 2-4

ALR

"Choice of evils," necessity, duress, or similar defense to state or local criminal charges based on acts of public protest. 3 ALR5th 521.

NOTES APPLICABLE TO ENTIRE SUB-CHAPTER? COMMITTEE COMMENT TO H 511

Chapter 2917. deals with those crimes whose adverse effects are usually felt by large segments of the public, or which affect an important public interest.

Included in the chapter are modernized counterparts to offenses in the traditional hierarchy of breaches of the peace: disorderly conduct; unlawful assembly; riot; and inciting. A measure is provided detailing the limits of force which may be used to suppress riot.

Also included are a number of sections aimed at special situations. Former prohibitions against disturbing meetings and misconduct at emergencies are retained. An expanded offense of telephone harassment is included. A new offense of inducing panic is provided, which is somewhat analogous to but broader than former bomb threat statutes. Modified versions of former false alarm and false report sections are also provided.

#### CASE NOTES AND OAG

1. (1993) Burning the American flag as a means of expressing dissent is an act protected under the first amendment and cannot be the basis for a conviction of inciting violence: State v. Lessin, 67 OS3d 487, 620 NE2d 72.

#### [CONSTRUING FORMER ANALOGOUS RC § 2923.13]

1. (1969) The Ohio criminal syndicalism act, which, by its own words and as applied, purported to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action, and which failed to distinguish mere advocacy from incitement to imminent lawless action, violates the First and Fourteenth Amendments: Brandenburg v. Ohio, 395 US 444, 23 LEd2d 430, 89 Sct 1827, 48 Oo2d 320.

2. (1932) Criminal syndicalism statutes are within the authority of legislature in valid exercise of police power, and do not contravene Art. I, § 11, of Ohio Constitution: State v. Kassay, 126 OS 177, 184 NE 521.

## C.R.S. 18-11-204 (1997)

Specific intent required. A violation of this section occurs only when the surrounding circumstances manifest the exercise of the intellect in such a manner that inferences may be drawn therefrom that the acts or conduct were done with the specific intent of casting contempt on the flag. There is no violation of this section where the proscribed acts are the result of thoughtlessness, inadvertence, accident, or the like. *People v. Vaughan*, 183 Colo. 40, 514 P.2d 1318 (1973).

Symbolic speech protected. Conduct, which consisted of wearing a pair of blue jeans on the seat of which a portion of the American flag had been sewn, manifested an expressive intent and a communicative content such as to be considered "symbolic speech" and consequently was protected "speech" under the first amendment. *People v. Vaughan*, 183 Colo. 40, 514 P.2d 1318 (1973).

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COLORADO REVISED STATUTES

\*\*\* THIS SECTION IS CURRENT THROUGH THE 1997 SUPPLEMENT (1997 SESSIONS) \*\*\*

TITLE 18. CRIMINAL CODE  
ARTICLE 11. OFFENSES INVOLVING DISLOYALTY  
PART 2. ANARCHY - SEDITION

C.R.S. 18-11-204 (1997)

18-11-204. Mutilation - contempt of flag - penalty

(1) It is unlawful for any person to mutilate, deface, defile, trample upon, burn, cut, or tear any flag in public:

(a) With intent to cast contempt or ridicule upon the flag; or

(b) With intent to outrage the sensibilities of persons liable to observe or discover the action or its results; or

(c) With intent to cause a breach of the peace or incitement to riot; or

(d) Under such circumstances that it may cause a breach of the peace or incitement to riot.

(2) "Flag", as used in this section, means any flag, ensign, banner, standard, colors, or replica or representation thereof which is an official or commonly recognized symbol of the United States of America or the state of Colorado.

(3) Any person violating the provisions of this section commits a class 3 misdemeanor.

Source: L. 71: R & RE, p. 480, 1. C.R.S. 1963: 40-11-204.

C.J.S. See 36A C.J.S., Flags, 1, 2.

Law reviews. For note, "Comment: Constitutional Law -- Symbolic Speech -- Colorado Flag Desecration Statute", see 48 Den. L. J. 451 (1971). For article, "The Flag-Burning Episode: An Essay on the Constitution", see 61 U. Colo. L. Rev. 39 (1990).

Subsection (1)(a) unconstitutional. Provision of this section making it unlawful to mutilate, deface, and defile a flag of the United States with intent to cast contempt thereupon is unconstitutional upon its face because the interests it seeks to promote are contrary to the fundamental values protected by the first amendment. *People v. Vaughan*, 183 Colo. 40, 514 P.2d 1318 (1973).

Statute was not designed to proscribe mutilating or misusing flag per se. *People v. Vaughan*, 183 Colo. 40, 514 P.2d 1318 (1973).

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\*\*\* THIS SECTION IS CURRENT THROUGH THE 1997 SUPPLEMENT  
\*\*\* (1997 REGULAR SESSION) \*\*\*

ARTICLE 27. CRIMES AND PUNISHMENTS  
I CRIMES AND PUNISHMENTS  
DESECRATION OF THE NATIONAL OR STATE FLAG

Md. Ann. Code art. 27, § 83 (1997)

§ 83. Mutilation, defacing, etc

A person may not intentionally mutilate, deface, destroy, burn, trample upon, or otherwise use a flag:

(1) In a manner intended to incite or produce an imminent breach of the peace; and

(2) Under circumstances likely to incite or produce an imminent breach of the peace.

HISTORY: 1990, chs. 420, 422.

MARYLAND LAW REVIEW. --For comment discussing flag desecration statutes and the right to free speech, see 30 Md. L. Rev. 332 (1970).

CONSTITUTIONALITY. --Unlike the federal Flag Protection Act (18 U.S.C. § 700), this section is a breach of the peace statute, and as such, it seeks to regulate nonspeech activities and is justified by a sufficiently important governmental interest unrelated to the suppression of free expression, and even if it were aimed at expression, it would pass muster under the First Amendment because it expressly proscribes only unlawful conduct not protected by the Constitution, specifically, flag destruction intended to incite imminent lawless action and likely to produce that action. 75 Op. Att'y Gen. -- (November 14, 1990).

FORMER VERSION OF THIS SECTION COULD NOT BE CONSTITUTIONALLY APPLIED TO CURTAIL FREEDOM OF EXPRESSION AS SUCH. Korn v. Elkins, 317 F. Supp. 138 (D. Md. 1970).

UNIVERSITY OFFICIALS CANNOT APPLY SECTION TO PROHIBIT PUBLICATION OF STUDENT MAGAZINE. --Former version of this section could not be applied by officials of the University of Maryland to prohibit publication of issues of a student magazine which pictured a burning flag on the cover and to prohibit publication of future issues containing the same type of material. Korn v. Elkins, 317 F. Supp. 138 (D. Md. 1970).

USER NOTE: For more generally applicable notes, see notes under the first section of each heading.

NY Penal → 145.80 Crim Mischief  
Annot 15?

240.20

TENAI 39-5-843,847  
Code  
Ann



State of Wisconsin  
1999 - 2000 LEGISLATURE

LRB-0259/P1

JEO: *kmj*

*D-Note* *Men*  
*10/5 pm.*

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

1

*Sen. Cat*  
AN ACT *...*; relating to: crimes affecting certain flags and providing penalties.

*Analysis by the Legislative Reference Bureau*

This bill creates penalties relating to crimes involving the damaging or destruction of a ~~United States~~ flag, a flag of the state of Wisconsin (state flag) or a picture, copy or representation of one of these flags. Specifically, the bill does the following:

***Damaging or destroying a flag with intent to cause violence or a breach of the peace***

Current law prohibits a person from intentionally and publicly mutilating, defiling or casting contempt upon the flag, which is defined to include the ~~United States~~ flag, the ~~United States~~ shield, the ~~United States~~ coat of arms, the Wisconsin state flag or a copy, picture or representation of any of these things. However, this law was held to be unconstitutional by the Wisconsin Supreme Court in *State v. Janssen*, 218 Wis. 2d 362 (1998).

This bill prohibits a person from destroying, damaging or mutilating a ~~United States~~ or state flag, or urinating, defecating or expectorating upon a ~~United States~~ or state flag, with the intent to cause imminent violence or a breach of the peace in circumstances in which the actor knows that his or her conduct is likely to cause violence or a breach of the peace. A person who violates this prohibition before December 31, 1999, may be fined not more than \$10,000 or imprisoned for not more than 2 years or both. If a person violates the prohibition on or after December 31, 1999, he or she may be fined not more than \$10,000 or imprisoned for not more than 5 years or both.

*Five* *two*



***Criminal damage to or placing graffiti on a flag***

Current law generally prohibits a person from intentionally destroying or damaging the property of another person without that other person's consent. Current law also provides a specific penalty for intentionally damaging, marking, drawing or writing on or etching into property such as a church, synagogue or other structure or place used for religious worship or another religious purpose, a cemetery, mortuary or other place used for burial or memorializing the dead, or an educational facility or community center associated with a group of persons of a particular race, religion, color, disability, sexual orientation, national origin or ancestry or by an institution of any such group. The penalty for damaging, marking, drawing or writing on or etching into such property is a fine of not more than \$10,000 or imprisonment for not more than 2 years or both, if the offense occurs before December 31, 1999, or a fine of not more than \$10,000 or imprisonment for not more than 5 years or both, if the offence occurs on or after December 31, 1999.

This bill prohibits a person from intentionally damaging, marking, drawing or writing on or etching into a ~~United States~~ or state flag that belongs to another, without the owner's consent and with knowledge of the character of the property. A person who violates this prohibition before December 31, 1999, may be fined not more than \$10,000 or imprisoned for not more than 2 years or both. If a person violates the prohibition on or after December 31, 1999, he or she may be fined not more than \$10,000 or imprisoned for not more than 5 years or both.

***Penalty enhancer for crimes involving damage to or destruction of a flag***

Current law provides for enhanced penalties for "hate crimes". A person may be subject to the "hate crimes" penalty enhancer if the person commits a crime and intentionally selects the person against whom the crime is committed or selects the property that is damaged or otherwise affected by the crime in whole or in part because of the actor's belief or perception regarding the race, religion, color, disability, sexual orientation, national origin or ancestry of the victim of the crime. Under the "hate crimes" penalty enhancer, the penalties for the crime committed by the person are increased as follows:

1. If the person committed a misdemeanor punishable by a maximum fine of \$1,000 or less and a maximum term of imprisonment of 90 or fewer days, the maximum fine is increased to \$10,000 and the maximum term of imprisonment is increased to one year.
2. If the person committed a misdemeanor punishable by a maximum fine of \$10,000 and a maximum term of imprisonment of 6 months, the maximum fine remains the same, the maximum term of imprisonment is increased to two years and the status of the crime is changed to a felony.
3. If the person committed a felony, the maximum fine is increased by not more than \$5,000 and the maximum term of imprisonment is increased by not more than 5 years.

This bill creates a penalty enhancer that may be applied to a person who, while committing a crime, intentionally destroys, damages or mutilates a ~~United States~~ or state flag or intentionally urinates, defecates or expectorates upon a ~~United States~~

Five

two

Five

Five

nine

or state flag. The penalty increases for the crime are the same as those provided under the "hate crimes" penalty enhancer.

*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

1 SECTION 1. 895.75 (title) of the statutes is amended to read:

2 895.75 (title) **Physical injury, emotional distress, loss or damage**  
3 **suffered by members of certain groups or owners of certain property.**

History: 1987 a. 348.

\*\*\*\*NOTE: This title change is necessary to take into account the expanded coverage of ss. 939.645 and ~~943.19~~ <sup>943.012</sup>, stats., as affected by this draft. Is it your intent to allow suits under s. 895.75, stats., for damage to or destruction of a flag?

4 SECTION 2. 938.34 (14d) (title) of the statutes is amended to read:

5 938.34 (14d) (title) **HATE VIOLATIONS; VIOLATIONS INVOLVING A ~~UNITED STATES~~ OR**  
6 **STATE FLAG.**

History: 1995 a. 77, 352, 440, 448; 1997 a. 27, 35, 36, 84, 130, 164, 183, 205; s. 13.93 (2) (c).

\*\*\*\*NOTE: This title change is necessary to take into account the expanded coverage of s. 939.645, stats., as affected by this draft. Is it your intent to provide for special juvenile delinquency dispositions under s. 938.34 (14d), stats., for damage to or destruction of a flag?

7 SECTION 3. 938.34 (14d) (d) of the statutes is amended to read:

8 938.34 (14d) (d) That the juvenile participate in an educational program under  
9 sub. (7n) that includes sensitivity training or training in diversity, if the violation  
10 was committed under circumstances specified in s. 939.645 (1) (b).

History: 1995 a. 77, 352, 440, 448; 1997 a. 27, 35, 36, 84, 130, 164, 183, 205; s. 13.93 (2) (c).

\*\*\*\*NOTE: Because this paragraph does not seem to apply to violations involving a flag, the draft explicitly limits the paragraph's applicability to violations other than violations involving a flag. Is that okay?

11 SECTION 4. 939.645 (1m) of the statutes is created to read:

12 939.645 (1m) (a) In this subsection, "flag" has the meaning given in s. 947.07

13 (1).

14 (b) If a person does all of the following, the penalties for the underlying crime  
15 are increased as provided in sub. (2):

- 1           1. Commits a crime under chs. 939 to 948.
- 2           2. While committing the crime under subd. 1., intentionally destroys, damages
- 3 or mutilates a flag or intentionally urinates, defecates or expectorates upon a flag.

\*\*\*\*NOTE: Because the definition of “flag” includes copies, pictures and representations of a flag (see proposed s. 947.07 (1) (c)), a person could be subject to this penalty enhancer if he or she (for example) burns down another’s house knowing that there is a picture of the flag in the house, even though the person’s motivation in setting fire to the house is not to destroy the flag. Is that your intent, or should the enhancer be limited to cases in which the defendant has the specific intent to damage or destroy a flag as part of the commission of the underlying offense?

4           **SECTION 5.** 939.645 (2) (a) of the statutes is amended to read:

5           939.645 (2) (a) If the crime committed under sub. (1) or (1m) is ordinarily a

6 misdemeanor other than a Class A misdemeanor, the revised maximum fine is

7 \$10,000 and the revised maximum period of imprisonment is one year in the county

8 jail.

History: 1987 a. 348; 1991 a. 291.

9           **SECTION 6.** 939.645 (2) (b) of the statutes is amended to read:

10          939.645 (2) (b) If the crime committed under sub. (1) or (1m) is ordinarily a

11 Class A misdemeanor, the penalty increase under this section changes the status of

12 the crime to a felony and the revised maximum fine is \$10,000 and the revised

13 maximum period of imprisonment is 2 years.

History: 1987 a. 348; 1991 a. 291.

14          **SECTION 7.** 939.645 (2) (c) of the statutes is amended to read:

15          939.645 (2) (c) If the crime committed under sub. (1) or (1m) is a felony, the

16 maximum fine prescribed by law for the crime may be increased by not more than

17 \$5,000 and the maximum period of imprisonment prescribed by law for the crime

18 may be increased by not more than 5 years.

History: 1987 a. 348; 1991 a. 291.

19          **SECTION 8.** 939.645 (3) of the statutes is amended to read:

1           939.645 (3) This section provides for the enhancement of the penalties  
2 applicable for the underlying crime. The court shall direct that the trier of fact find  
3 a special verdict as to all of the issues specified in sub. (1) or (1m), whichever is  
4 applicable.

History: 1987 a. 348; 1991 a. 291.

5           **SECTION 9.** 939.645 (4) of the statutes is renumbered 939.645 (4) (a) and  
6 amended to read:

7           939.645 (4) (a) ~~This section~~ Subsection (1) does not apply to any crime if proof  
8 of race, religion, color, disability, sexual orientation, national origin or ancestry or  
9 proof of any person's perception or belief regarding another's race, religion, color,  
10 disability, sexual orientation, national origin or ancestry is required for a conviction  
11 for that crime.

History: 1987 a. 348; 1991 a. 291.

12           **SECTION 10.** 939.645 (4) (b) of the statutes is created to read:

13           939.645 (4) (b) Subsection (1m) does not apply to any crime specified in s.  
14 943.012 (5) or 947.07.

\*\*\*\*NOTE: Instead of referring only to specific statutes, this new paragraph could be rewritten to make a general statement that the enhancer in proposed s. 939.645 (1m) does not apply to any crime in which destruction, etc., of a flag is required for conviction for that crime. Compare current s. 939.645 (4), stats. This approach would obviate the need to amend the paragraph if new flag-related crimes are created in the future.

15           **SECTION 11.** 943.012 (5) of the statutes is created to read:

16           943.012 (5) A flag, as defined in s. 947.07 (1).

\*\*\*\*NOTE: Section 943.012, stats., is referred to in the definition of racketeering activity in s. 946.82 (4), stats. Thus, damage to a flag could be considered an act that is counted toward a "pattern of racketeering activity" that would subject the person to the civil and criminal penalties under ss. 946.80 to 946.88, stats. Is that your intent?

17           **SECTION 12.** 947.07 of the statutes is created to read:

18           **947.07 Causing violence or breach of the peace by damaging or**  
19 **destroying certain flags. (1)** In this section, "flag" means any of the following:

- 1 (a) A flag of the United States consisting of 13 horizontal stripes, alternately  
2 colored red and white, and a union of any number of white stars on a blue field.

\*\*\*\*NOTE: This is based on 4 USC ~~section~~<sup>e</sup> 1 and 2. It may however be too specific. For instance, a flag with 12 horizontal stripes would not be covered, nor would a flag with colors other than those listed. However, some of these "nonflag" examples might be covered if they are considered to be "representations" of the U.S. flag. Should the draft follow s. 946.05 (2), stats., and simply define "flag" to be "a ~~United States~~ flag, a Wisconsin state flag or a representation, copy or picture of a ~~United States~~ flag or Wisconsin state flag"? (For instance, a similar Colorado statute defines "flag" as "any flag, ensign, banner, standard [or] colors, or replica or representation thereof[,] which is an official or commonly recognized symbol of the United States or the state of Colorado.")

- 3 (b) A Wisconsin state flag under s. 1.08 (1) or any flag that may be used as a  
4 state flag under s. 1.08 (2).

- 5 (c) Any copy, picture or representation of a flag specified in par. (a) or (b).

- 6 (2) Whoever destroys, damages or mutilates a flag, or urinates, defecates or  
7 expectorates upon a flag, with the intent to cause imminent violence or a breach of  
8 the peace under circumstances in which the actor knows that his or her conduct is  
9 likely to cause violence or a breach of the peace is guilty of a Class E felony.

10 **SECTION 13. Initial applicability.**

- 11 (1) This act first applies to offenses occurring on the effective date of this  
12 subsection.

13

(END)

**DRAFTER'S NOTE  
FROM THE  
LEGISLATIVE REFERENCE BUREAU**

LRB-0259/P1dn

JEO:y:....



Stewart Simonson:

Please review this draft carefully to make sure that it does what you want it to do. I have inserted some four-star notes (\*\*\*\*NOTE:) into the draft to raise issues that you may want to consider when reviewing the draft.

Also, note that s. 939.645, stats., is referred to in s. 48.57 (3p) (g) 2., stats., which relates to kinship care providers. By expanding s. 939.645, stats., this draft will disqualify a person from being a kinship care provider if he or she is convicted of a crime during the commission of which a flag is destroyed or damaged. If that is not your intent, s. 48.57 (3p) (g) 2., stats., will have to be amended.

Please let me know if you have any questions or changes.

Jefren E. Olsen  
Legislative Attorney  
266-8906

**DRAFTER'S NOTE  
FROM THE  
LEGISLATIVE REFERENCE BUREAU**

LRB-0259/P1dn  
JEO:kmg:ijs

October 5, 1998

Stewart Simonson:

Please review this draft carefully to make sure that it does what you want it to do. I have inserted some four-star notes (\*\*\*\*NOTE:) into the draft to raise issues that you may want to consider when reviewing the draft.

Also, note that s. 939.645, stats., is referred to in s. 48.57 (3p) (g) 2., stats., which relates to kinship care providers. By expanding s. 939.645, stats., this draft will disqualify a person from being a kinship care provider if he or she is convicted of a crime during the commission of which a flag is destroyed or damaged. If that is not your intent, s. 48.57 (3p) (g) 2., stats., will have to be amended.

Please let me know if you have any questions or changes.

Jefren E. Olsen  
Legislative Attorney  
266-8906



**TOMMY G. THOMPSON**

**Governor  
State of Wisconsin**

**FACSIMILE COVER SHEET**

TO: John Olson, Esq

FROM: S. Simonson

DATE: \_\_\_\_\_ TIME: \_\_\_\_\_

RE: \_\_\_\_\_

NUMBER OF PAGES INCLUDING THIS TRANSMITTAL SHEET 2

IF PAGES ARE NOT ALL RECEIVED OR ILLEGIBLE, PLEASE CALL:

MESSAGE:

Confidential





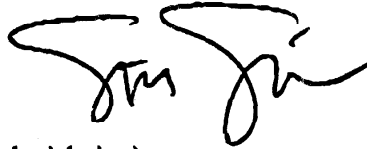
# STATE OF WISCONSIN OFFICE OF THE GOVERNOR

## MEMORANDUM

To: Jefren Olsen, Esq.  
Legislative Reference Bureau

Date: October 11, 1998

From: ~~\_\_\_\_\_~~  
Stewart Simonson  
Legal Counsel to the Governor



Subject: Responses to four-star notes (flag legislation)

The following are my responses to the four-star notes contained in the preliminary draft of the flag legislation:

- Note 1.: Yes, it is my intent to allow suits under s. 895.75, Stats.
- Note 2.: Yes, it is my intent to provide for special juvenile delinquency dispositions under s. 938.34 (14d), Stats.
- Note 3.: It seems to me that s. 938.34 (14d) (d), Stats., might be amended to allow for appropriate educational programming on the history and significance of the flag to our Nation in general and to members of the armed forces and veterans in specific. I would like to discuss this note with you.
- Note 4.: I think that proposed s. 939.645 (1m), Stats., is fine the way it is drafted.
- Note 5.: If you think that a general statement concerning the applicability of the enhancer is the preferred route, then I have no objection.
- Note 6.: As I indicated on the telephone, I like the Colorado definition of flag, but I am concerned that it might be too vague. What do you think? I want to proceed on the very safest course to avoid constitutional trouble. I would like to discuss this note with you.

*Sh  
but don't  
refer to  
(7d) specifically*

*Leave as is, minus ref to "13" stripes*

Please contact me once you have had an opportunity to review my responses. If possible, I would like to finalize this bill draft by Friday, October 16, 1998. I can be reached at 6-6672.

*Also: 946.82 x-ref is okay*





State of Wisconsin  
1999 - 2000 LEGISLATURE

05947  
LRB-025971

JEO:kmg:ijs

redraft  
make  
per

Weds 10/14 afternoon

~~PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION~~

regenerate

1 AN ACT <sup>regenerate</sup> to renumber and amend 939.645 (4); to amend 895.75 (title), 938.34  
2 (14d) (title), 938.34 (14d) (d), 939.645 (2) (a), 939.645 (2) (b), 939.645 (2) (c) and  
3 939.645 (3); and to create 939.645 (1m), 939.645 (4) (b), 943.012 (5) and 947.07  
4 of the statutes; relating to: crimes affecting certain flags and providing  
5 penalties.

---

***Analysis by the Legislative Reference Bureau***

This bill creates penalties relating to crimes involving the damaging or destruction of a U.S. flag, a flag of the state of Wisconsin (state flag) or a picture, copy or representation of one of these flags. Specifically, the bill does the following:

***Damaging or destroying a flag with intent to cause violence or a breach of the peace***

Current law prohibits a person from intentionally and publicly mutilating, defiling or casting contempt upon the flag, which is defined to include the U.S. flag, the U.S. shield, the U.S. coat of arms, the Wisconsin state flag or a copy, picture or representation of any of these things. However, this law was held to be unconstitutional by the Wisconsin Supreme Court in *State v. Janssen*, 218 Wis. 2d 362 (1998).

This bill prohibits a person from destroying, damaging or mutilating a U.S. or state flag, or urinating, defecating or expectorating upon a U.S. or state flag, with the intent to cause imminent violence or a breach of the peace in circumstances in

which the actor knows that his or her conduct is likely to cause violence or a breach of the peace. A person who violates this prohibition before December 31, 1999, may be fined not more than \$10,000 or imprisoned for not more than two years or both. If a person violates the prohibition on or after December 31, 1999, he or she may be fined not more than \$10,000 or imprisoned for not more than five years or both.

***Criminal damage to or placing graffiti on a flag***

Current law generally prohibits a person from intentionally destroying or damaging the property of another person without that other person's consent. Current law also provides a specific penalty for intentionally damaging, marking, drawing or writing on or etching into property such as a church, synagogue or other structure or place used for religious worship or another religious purpose, a cemetery, mortuary or other place used for burial or memorializing the dead, or an educational facility or community center associated with a group of persons of a particular race, religion, color, disability, sexual orientation, national origin or ancestry or by an institution of any such group. The penalty for damaging, marking, drawing or writing on or etching into such property is a fine of not more than \$10,000 or imprisonment for not more than two years or both, if the offense occurs before December 31, 1999, or a fine of not more than \$10,000 or imprisonment for not more than five years or both, if the offense occurs on or after December 31, 1999.

This bill prohibits a person from intentionally damaging, marking, drawing or writing on or etching into a U.S. or state flag that belongs to another <sup>person</sup> without the owner's consent and with knowledge of the character of the property. A person who violates this prohibition before December 31, 1999, may be fined not more than \$10,000 or imprisoned for not more than two years or both. If a person violates the prohibition on or after December 31, 1999, he or she may be fined not more than \$10,000 or imprisoned for not more than five years or both.

***Penalty enhancer for crimes involving damage to or destruction of a flag***

Current law provides for enhanced penalties for "hate crimes". A person may be subject to the "hate crimes" penalty enhancer if the person commits a crime and intentionally selects the person against whom the crime is committed or selects the property that is damaged or otherwise affected by the crime in whole or in part because of the actor's belief or perception regarding the race, religion, color, disability, sexual orientation, national origin or ancestry of the victim of the crime. Under the "hate crimes" penalty enhancer, the penalties for the crime committed by the person are increased as follows:

1. If the person committed a misdemeanor punishable by a maximum fine of \$1,000 or less and a maximum term of imprisonment of 90 or fewer days, the maximum fine is increased to \$10,000 and the maximum term of imprisonment is increased to one year.

2. If the person committed a misdemeanor punishable by a maximum fine of \$10,000 and a maximum term of imprisonment of nine months, the maximum fine remains the same, the maximum term of imprisonment is increased to two years and the status of the crime is changed to a felony.

3. If the person committed a felony, the maximum fine is increased by not more than \$5,000 and the maximum term of imprisonment is increased by not more than five years.

This bill creates a penalty enhancer that may be applied to a person who, while committing a crime, intentionally destroys, damages or mutilates a U.S. or state flag or intentionally urinates, defecates or expectorates upon a U.S. or state flag. The penalty increases for the crime are the same as those provided under the "hate crimes" penalty enhancer.

*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

1 SECTION 1. 895.75 (title) of the statutes is amended to read:

2 **895.75 (title) Physical injury, emotional distress, loss or damage**  
3 **suffered by members of certain groups or owners of certain property.**

→ ~~\*\*\*NOTE: This title change is necessary to take into account the expanded coverage of ss. 939.645 and 945.012, stats., as affected by this draft. Is it your intent to allow suits under s. 895.75, stats., for damage to or destruction of a flag?~~

4 SECTION 2. 938.34 (14d) (title) of the statutes is amended to read:

5

938.34 (14d) (title) HATE VIOLATIONS: VIOLATIONS INVOLVING A U.S. OR STATE FLAG.

→ ~~\*\*\*NOTE: This title change is necessary to take into account the expanded coverage of s. 939.645, stats., as affected by this draft. Is it your intent to provide for special juvenile delinquency dispositions under s. 938.34 (14d), stats., for damage to or destruction of a flag?~~

6 SECTION 3. 938.34 (14d) (d) of the statutes is amended to read:

7 938.34 (14d) (d) That the juvenile participate in an educational program under  
8 sub. (7n) that includes sensitivity training or training in diversity, if the violation  
9 was committed under circumstances specified in s. 939.645 (1) (b).

INS  
3-9

→ ~~\*\*\*NOTE: Because this paragraph does not seem to apply to violations involving a flag, the draft explicitly limits the paragraph's applicability to violations other than violations involving a flag. Is that okay?~~

10 SECTION 4. 939.645 (1m) of the statutes is created to read:

11 939.645 (1m) (a) In this subsection, "flag" has the meaning given in s. 947.07

12 (1).

1 (b) If a person does all of the following, the penalties for the underlying crime  
2 are increased as provided in sub. (2):

3 1. Commits a crime under chs. 939 to 948.

4 2. While committing the crime under subd. 1., intentionally destroys, damages  
5 or mutilates a flag or intentionally urinates, defecates or expectorates upon a flag.

\*\*\*\*NOTE: Because the definition of "flag" includes copies, pictures and representations of a flag (see proposed s. 947.07 (1) (c)), a person could be subject to this penalty enhancer if he or she (for example) burns down another's house knowing that there is a picture of the flag in the house, even though the person's motivation in setting fire to the house is not to destroy the flag. Is that your intent, or should the enhancer be limited to cases in which the defendant has the specific intent to damage or destroy a flag as part of the commission of the underlying offense?

6 **SECTION 5.** 939.645 (2) (a) of the statutes is amended to read:

7 939.645 (2) (a) If the crime committed under sub. (1) or (1m) is ordinarily a  
8 misdemeanor other than a Class A misdemeanor, the revised maximum fine is  
9 \$10,000 and the revised maximum period of imprisonment is one year in the county  
10 jail.

11 **SECTION 6.** 939.645 (2) (b) of the statutes is amended to read:

12 939.645 (2) (b) If the crime committed under sub. (1) or (1m) is ordinarily a  
13 Class A misdemeanor, the penalty increase under this section changes the status of  
14 the crime to a felony and the revised maximum fine is \$10,000 and the revised  
15 maximum period of imprisonment is 2 years.

16 **SECTION 7.** 939.645 (2) (c) of the statutes is amended to read:

17 939.645 (2) (c) If the crime committed under sub. (1) or (1m) is a felony, the  
18 maximum fine prescribed by law for the crime may be increased by not more than  
19 \$5,000 and the maximum period of imprisonment prescribed by law for the crime  
20 may be increased by not more than 5 years.

21 **SECTION 8.** 939.645 (3) of the statutes is amended to read:

1 939.645 (3) This section provides for the enhancement of the penalties  
2 applicable for the underlying crime. The court shall direct that the trier of fact find  
3 a special verdict as to all of the issues specified in sub. (1) or (1m), whichever is  
4 applicable.

5 SECTION 9. 939.645 (4) of the statutes is renumbered 939.645 (4) (a) and  
6 amended to read:

7 939.645 (4) (a) ~~This section~~ Subsection (1) does not apply to any crime if proof  
8 of race, religion, color, disability, sexual orientation, national origin or ancestry or  
9 proof of any person's perception or belief regarding another's race, religion, color,  
10 disability, sexual orientation, national origin or ancestry is required for a conviction  
11 for that crime.

12 SECTION 10. 939.645 (4) (b) of the statutes is created to read:

IPS  
S-13

(13) 939.645 (4) (b) Subsection (1m) does not apply to any crime ~~specified in s.~~

(14) ~~943.012 (5) or 947.07~~

\*\*\*NOTE: Instead of referring only to specific statutes, this new paragraph could be rewritten to make a general statement that the enhancer in proposed s. 939.645 (1m) does not apply to any crime in which destruction, etc., of a flag is required for conviction for that crime. Compare current s. 939.645 (4), stats. This approach would obviate the need to amend the paragraph if new flag-related crimes are created in the future.

15 SECTION 11. 943.012 (5) of the statutes is created to read:

16 943.012 (5) A flag, as defined in s. 947.07 (1).

\*\*\*NOTE: Section 943.012, stats., is referred to in the definition of racketeering activity in s. 946.82 (4), stats. Thus, ~~damage to a flag could be considered an act that is counted toward a "pattern of racketeering activity" that would subject the person to the civil and criminal penalties under ss. 946.80 to 946.88, stats. Is that your intent?~~

17 SECTION 12. 947.07 of the statutes is created to read:

18 947.07 **Causing violence or breach of the peace by damaging or**  
19 **destroying certain flags.** (1) In this section, "flag" means any of the following:

①

(a) A flag of the United States consisting of ~~12~~<sup>13</sup> horizontal stripes, alternately colored red and white, and a union of any number of white stars on a blue field.

→ **\*\*\*\*NOTE:** This is based on 4 USC 1 and 2. It may however be too specific. For instance, a flag with 12 horizontal stripes would not be covered, nor would a flag with colors other than those listed. However, some of these "nonflag" examples might be covered if they are considered to be "representations" of the U.S. flag. Should the draft follow s. 946.05 (2), stats., and simply define "flag" to be "a U.S. flag, a Wisconsin state flag or a representation, copy or picture of a U.S. flag or Wisconsin state flag"? (For instance, a similar Colorado statute defines "flag" as "any flag, ensign, banner, standard [or] colors, or replica or representation thereof[,] which is an official or commonly recognized symbol of the United States or the state of Colorado.")

(b) A Wisconsin state flag under s. 1.08 (1) or any flag that may be used as a state flag under s. 1.08 (2).

(c) Any copy, picture or representation of a flag specified in par. (a) or (b).

(2) Whoever destroys, damages or mutilates a flag, or urinates, defecates or expectorates upon a flag, with the intent to cause imminent violence or a breach of the peace under circumstances in which the actor knows that his or her conduct is likely to cause violence or a breach of the peace is guilty of a Class E felony.

**SECTION 13. Initial applicability.**

(1) This act first applies to offenses occurring on the effective date of this subsection.

(END)

1999-2000 DRAFTING INSERT  
FROM THE  
LEGISLATIVE REFERENCE BUREAU

LRB-0259/lins  
JEO:.....

1  
2  
3  
4  
5  
6  
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9

**INSERT 3-9:** ✓

**SECTION 1.** 938.34 (14d) (e) of the statutes is created to read:

938.34 (14d) (e) That the juvenile participate in an educational program that teaches the history of the ~~United States~~ flag and the Wisconsin state flag and the significance of those flags to the nation and the state, if the violation was committed under circumstances specified in s. 939.645 (1m) (b) 2.

**INSERT 5-13:** ✓

(no 9)

if proof of destruction or mutilation of a flag, damage to a flag or urination, defecation or expectoration upon a flag is required for a conviction for that crime.