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"It is often said that 'a picture is worth a thousand words.' Unfortunately, Mr. Boggs' works are often worth a thousand dollars."[1]

INTRODUCTION

J.S.G. Boggs, a Pittsburgh artist and Fellow of Art and Ethics at Carnegie Mellon University, makes money the old-fashioned way: he draws it. Over the past ten years, Boggs has gained acclaim and notoriety both for his realistic drawings of money and for his use of the drawings as barter in various transactions.

Boggs' work consists not only of graphic renditions of the currency, but also contains an element of performance art.[2] First, Boggs painstakingly draws pictures of U.S. currency which vary slightly from the actual bill and have printing on only one side. The side without printing bears a single green thumbprint.[3] Then Boggs seeks to "spend" his work by offering his drawings in exchange for everything from motorcycles to art supplies to stays in luxurious hotels.[4] Boggs explains to merchants that his drawings are not real currency, but rather his artwork which he seeks to trade. The merchants then decide whether to trade their goods and services for Boggs' art. Lest they think Boggs does not take the transaction seriously, he always asks for change, "real" money, when the item purchased costs less than the denomination of the picture he traded.[5] For those merchants who accept Boggs' unconventional method of payment (approximately ten percent of those he approaches agree to the exchange),[6] the rewards can be substantial,

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1. Boggs v. Bowron, 842 F. Supp. 542, 562 (D.D.C. 1993).

2. Performance art is not an easy concept to explain and dictionary definitions often fall short. Basically, the performance artist concerns himself with getting the audience more directly involved in the performance. Performance art is typically very conceptual and usually intended to be performed only once. ROBERT ATKINS, ARTSPEAK 121-22 (Nancy Grubb ed., 1990).

3. Lawrence Wechsler, *Money Changes Everything*, THE NEW YORKER, Jan. 18, 1993, at 38, 38; *The MacNeil-Lehrer Newshour: The Art of Making Money* (PBS television broadcast, Oct. 22, 1990), *available in* LEXIS, Nexis Library, Script File [hereinafter *The Art of Making Money*]. Boggs has not, however, limited himself to U.S. currency. Boggs has drawn most European currencies as well, including a Swiss 100 franc note featuring his own portrait. J.S.G. Boggs, *Art Under Arrest*, ART & ANTIQUES, Oct. 1987, at 99, 99. In 1987, Boggs was arrested for drawing British currency and tried for counterfeiting. He was acquitted by a jury in England. Only two years later, an Australian court found Boggs not guilty of counterfeiting Australian currency. Wechsler, *supra*, at 38.

4. *The Art of Making Money*, *supra* note 3; MONEY MAN (Phillip Haas, Methodact Ltd. 1992) (copy on file with the *Indiana Law Journal*).

5. *Secret Service Seizes 'Cash' Made by Artist*, WASH. POST, Dec. 3, 1992, at D12.

6. Roxanne Roberts, *Funny-Money Artist Loses Court Case, Judge Says Secret Service Can Call Prints Counterfeit*, WASH. POST, Dec. 10, 1993, at B1, B13.

as Boggs' work has consistently gained value in the world of art collection.[7] Boggs insists that no one who has accepted his work as barter for goods or services has ever claimed to have been defrauded or has ever believed they were receiving actual currency.[8]

Boggs' own guarantee that he has defrauded no one has not eased the concerns of the U.S. Secret Service, who have become very interested in Boggs' work, probably less for its artistic merit and more because they suspect it is criminal. They allege that Boggs' work violates provisions of the U.S. counterfeiting law. The Secret Service first contacted Boggs in 1991 in Cheyenne, Wyoming after receiving reports that he had exchanged a drawing for merchandise in a local store. At that time, the U.S. Attorney in Wyoming decided not to charge Boggs with any offense, but retained the drawings which the Secret Service had seized. In December, 1992, the Secret Service conducted a search of Boggs' apartment and office, seizing over one hundred drawings and paintings.[9] As of this Note's completion, no prosecuting authority in the United States had brought charges against Boggs.

Although no charges were brought, the government did not return Boggs' seized work. Boggs initiated a civil suit in a Washington, D.C. federal district court seeking the return of his seized work as well as a declaratory judgment that particular statutory provisions of the federal counterfeiting law are unconstitutional.[10] The judge held that the Secret Service may keep the paintings as Boggs is not exempt from criminal liability under the challenged counterfeiting statutes.[11] Boggs' counsel has appealed the decision,[12] but in the meantime Boggs continues to draw pictures of money, and awaits the next move by the authorities.

The case of J.S.G. Boggs, while fascinating on its own merits, also illustrates the clash of the First Amendment and counterfeiting laws. The sections of the counterfeiting laws at issue here are 18 U.S.C. § 474(a) paragraph 6 and § 504(1)[13] which, taken together, require that depictions of currency be in black and white and within certain size limits, regardless of the intent of the person making the depiction.[14] Boggs' case is not the only example of the clash between First Amendment interests and counterfeiting, particularly when one considers the entire lifespan of these statutes. In fact, conflicts between art and counterfeit date back to at least 1886 when the Secret Service forbade painter William

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7. Wechsler, *supra* note 3, at 38. The documentary on Boggs, MONEY MAN, *supra* note 4, contains a scene in which a restauranteur reluctantly accepts Boggs' drawing in exchange for a meal consumed by Boggs and several friends. Shortly thereafter, the restaurant owner is approached by an art collector offering to purchase the bill for substantially more than its face value. The once reluctant restaurant owner declines the offer, deciding instead to hold on to the bill. *Id.*

8. Eva M. Rodriguez, *Federal Judge Sends Money-Making Artist to Drawing Board*, LEGAL TIMES, Dec. 13, 1993, at 21, 21.

9. *Secret Service Seizes 'Cash' Made by Artist*, *supra* note 5, at D12.

10. Boggs v. Bowron, 842 F. Supp. 542 (D.D.C. 1993). Precisely which statutes Boggs challenged and what those statutes prohibit are discussed *infra* part I.

11. *Boggs*, 842 F. Supp. at 562. For further discussion of the court's analysis in *Boggs v. Bowron*, *see infra* text accompanying notes 142-47.

12. Boggs has been represented pro bono by the New York office of Washington, D.C.-based Arnold and Porter, but Boggs plans to "pay" them back in his own bills, thus adding legal services to the list of items purchased with his work. Roberts, *supra* note 6, at B13; Rodriguez, *supra* note 8, at 21.

13. Since the repeated reference to these two sections of the statute is rather unwieldy, this Note will refer to them as "§ 474 and § 504" even though the entire sections are not under challenge.

14. 18 U.S.C. §§ 474(a) para. 6, 504(1)(i)-(iii) (1988 & Supp. V 1993).

Michael Harnett from continuing with his paintings of early American paper currency.[15] Political satirists have run afoul of these statutes, as the 1974 case of *Wagner v. Simon*[16] illustrates. In this case, the plaintiff had photographed a $20 bill,[17] replaced President Jackson's portrait with Nixon's, and altered it to look like a $30 bill as a critique of the Nixon administration.[18] A federal district court rejected the plaintiff's First Amendment challenge to the statutes which his work was held to have violated.[19] Journalists have also had problems with these statutes. The Supreme Court's only treatment of this issue involved the cover of an issue of *Sports Illustrated* magazine which offended the statutes by featuring a full color photograph of a basketball hoop stuffed with $100 bills.[20]

As these examples illustrate, the issue of First Amendment challenges to the counterfeiting laws transcends Boggs and potentially affects anyone utilizing realistic depictions of currency with no intent to defraud. The expression prohibited by these statutes is the type normally protected by the First Amendment. The image of money has tremendous symbolic value. It is not difficult to imagine how many different political ideas the image of currency can convey; for example, a critique of economic policies, an expression of dissatisfaction with the national debt, or a protest against the influence of lobbyists' contributions on political campaigns could all be expressed with images of money. For better or for worse, money is a central part of American politics and American life. As such, its image constitutes a rich symbol in the vocabulary of those seeking to express thoughts lying at the heart of the First Amendment's protection. The existence of weighty First Amendment interests dictates that the government interest be furthered with the least injury to First Amendment concerns.[21]

The government has an indisputably compelling interest in protecting its currency. The Constitution specifically confers the power "[t]o provide for the Punishment of counterfeiting the Securities and current Coin of the United States."[22] The First Amendment certainly should not protect those who make depictions of money with the intent to defraud people, no matter how artistic or political the sentiment of the producer. The free speech rights of those who create depictions of money with no intent to use them as genuine, however, deserve serious consideration. Sections 474 and 504 violate the First Amendment by imposing restrictions which depend on the expression's content and significantly impede artistic and political expression. The statutes do not narrowly or effectively further the government's interest. Part I of this Note will examine the statutes prohibiting the realistic depictions of currency. Part II traces the development of the Supreme Court's content-neutral/content-based distinction in free expression doctrine.

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15. BRUCE W. CHAMBERS, OLD MONEY: AMERICAN TROMPE L'OEIL IMAGES OF CURRENCY 22-23 (1988).

16. 412 F. Supp. 426 (W.D. Mo. 1974), *aff'd*, 534 F.2d 833 (8th Cir. 1976).

17. *Id.* at 433-34. The court's opinion mistakenly described the currency as a $50 bill instead of a $20 bill. This was corrected in the Amended Judgment following the opinion. *Id.* at 434.

18. *Id.* at 428.

19. *Id.* at 433.

20. Regan v. Time, Inc., 468 U.S. 641, 646 (1984). The cover story dealt with a point-shaving scheme on the Boston College basketball team in which several players were paid to alter the outcome of several games. The Court's opinion upholding the statutes in *Regan v. Time, Inc.* is discussed *infra* part III.A.

21. *See, e.g.*, Schneider v. State, 308 U.S. 147, 161 (1939) (emphasizing that freedom of speech and press are "fundamental personal rights" which require courts to carefully "weigh the circumstances and to appraise the substantiality" of regulations restricting speech).

22. U.S. CONST. art. I, § 8, cl. 6.

Part III demonstrates that § 474 and § 504 are invalid content-based restrictions on expression. Finally, Part IV argues that § 474 and § 504 fail even under more relaxed content-neutral scrutiny.

I. THE STATUTES

Taken together, paragraph six of § 474(a) and § 504(1) prohibit all depictions of currency except those in black and white and within certain size limitations.[23] Statutes similar to § 474 and § 504 have long existed in the United States. However, the modern version of the statutes differs from its historical counterpart in important ways. Also, § 474 and § 504 must be construed within a larger scheme of anticounterfeiting laws.

A. History of the Statutes

While criminal sanctions for counterfeiting have been around as long as money itself,[24] American laws prohibiting prints, photographs, or impressions of currency without reference to their use as counterfeit date back to the years surrounding the American Civil War,[25] although known cases of counterfeiting occurred well before that time. One of the earliest known instances of counterfeiting in America occurred in 1647 when a group of Native Americans passed off counterfeit wampum, a currency composed of beads made out of shells, on an unwitting colonist.[26] Despite the recorded existence of counterfeiting about two hundred years before, the precursors of § 474 did not come into existence until the crisis of the Civil War and the Greenback Era. The introduction of the first paper currency not directly backed by gold and the declining prevalence of state banks made the Civil War era a watershed in the financial structure of the country.[27] With the entire financial system in tumult, it is not surprising that counterfeiting would become a major concern at roughly the same time. The years surrounding the Civil War have been called the Greenback Era, after the nickname of the paper notes issued to finance the war.[28] Congress first authorized the issuance of legal tender paper money in 1862 due to the extreme shortage of precious metals during the war. By the end of the war, the government had issued $450 million in Greenbacks.[29]

Issuing Greenbacks not only caused inflation and anxiety about what would happen when they were redeemed,[30] but Greenbacks also created new opportunities for counterfeiters. As opposed to bank notes from various states, the Greenbacks were uniform so that the source of the counterfeiting was much more difficult to discern,

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23. 18 U.S.C. §§ 474(a) para. 6, 504(1). The size restriction dictates that a depiction must be smaller than three-fourths or larger than one and one-half the actual size of the bill. *Id.* § 504(1)(I)(ii).

24. *See generally* LYNN GLASER, COUNTERFEITING IN AMERICA 1-9 (1968) (calling counterfeiting "the second oldest profession" and tracing counterfeiting and its punishment back to the invention of coined money in 700 B.C.).

25. Regan v. Time, Inc., 468 U.S. 641, 643 (1984).

26. GLASER, *supra* note 24, at 11.

27. *See* IRWIN UNGER, THE GREENBACK ERA 3 (1964) ("[T]he Civil War, initiating sweeping financial change, made the problems of money and banking of extraordinary national concern.").

28. *Id.* at 14-15.

29. *Id.* at 15.

30. *Id.* at 15-16.

making counterfeiters harder to catch.[31] Salmon P. Chase, the Secretary of the Treasury at that time, understood the necessity of keeping a tight rein on the number of Greenbacks issued so as to keep inflation from crippling the country.[32]

Counterfeiters presented a particularly grave threat to the nation's economy, given the well-grounded fear that the issuance of too many Greenbacks would spur serious inflation,[33] and given how crucial the Greenbacks were to the Union's war effort.[34] Thus, when new Greenbacks, which the government had not issued, began appearing, the Treasury Department decided that, rather than leave anticounterfeiting efforts to state and local governments, it had to combat counterfeiting itself. In 1864, the federal government created the Secret Service to do just that.[35]

By 1864, Congress had enacted a law prohibiting all impressions, prints, and photographs in the likeness of U. S. currency.[36] The broad prohibition was in response to the dire financial circumstances faced by the nation at that time. The law's effect on those legitimately using images of currency probably caused no one any great concern.[37] In fact, historical evidence suggests that the Secret Service had no qualms at all about enforcing the prohibition against those engaged in artistic expression.[38] The 1864 enactment would eventually become § 474, undergoing only a few changes and amendments since the Civil War era,[39] despite the fact that the exigencies of that time have long ceased to exist. The exceptions to § 474, embodied in § 504, originated in 1923 with no substantial amendment until 1992.[40]

B. The Modern Statutes

Section 474(a), entitled "Plates or stones for counterfeiting obligations or securities," contains six paragraphs each prohibiting a different activity related to producing depictions or likenesses of currency. The first four paragraphs prohibit the use, production, sale, or possession of any "plate, stone or other thing"[41] which can be used

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31. GLASER, *supra* note 24, at 103.

32. *Id.* at 102.

33. UNGER, *supra* note 27, at 15-16.

34. GLASER, *supra* note 24, at 105.

35. *Id.* at 105-07.

36. Act of June 30, 1864, ch. 172, § 11, 13 Stat. 218, 221-22 (current version at 18 U.S.C. § 474 (Supp. V 1993)).

37. *See* Regan v. Time, Inc., 468 U.S. 641, 694-95 (Stevens, J., concurring and dissenting) ("The post-Civil War Congress that enacted § 474 presumed that anyone printing or photographing likenesses of the currency was up to no good. The use of images of currency for legitimate communicative purposes was probably too esoteric to be deemed significant or realistic in the 19th century . . . ."). Historical evidence calls into question whether such communicative purposes really were too esoteric. Artists of the era frequently depicted the Greenback, usually in a tongue-in-cheek manner. *See* CHAMBERS, *supra* note 15, at 20-21. Also, political discourse about money has deep roots in this country: "Since the seventeenth century, financial questions have often been the distinctive form social conflict has taken in America. . . . [D]ifferences over currency and the related subject of banking have expressed basic American social and political antagonisms." UNGER, *supra* note 27, at 3. Given the artistic movement of *trompe l'oeil* money painters, see *infra* notes 177-91 and accompanying text, and the highly politicized Greenback Era, perhaps Justice Stevens underestimated the ability of 19th-century Americans to appreciate the communicative use of images of currency.

38. *See generally* CHAMBERS, *supra* note 15 (providing an overview of 19th-century painters who depicted money and describing the Secret Service investigations of them).

39. *Regan*, 468 U.S. at 644 n.1.

40. 18 U.S.C. § 504.

41. 18 U.S.C. § 474(a) para. 1-4.

for printing "any obligation or other security of the United States."[42] The fifth paragraph prohibits possession of obligations or other securities "after the similitude of any obligation or other security issued under the authority of the United States, [made] with intent to sell or otherwise use the same."[43] The sixth paragraph raises the First Amendment issue. It provides that a person commits a Class C felony if he or she:

> prints, photographs or in any other manner makes or executes any engraving, photograph, print or impression in the likeness of any such obligation or other security, or any part thereof, or sells any such engraving, photograph, print, or impression, except to the United States, or brings into the United States, any such engraving, photograph, print or impression, except by direction of some proper officer of the United States . . . .[44]

Read by itself, paragraph six of § 474(a) appears to prohibit all portrayals of currency without any requirement that the producer intend to use them as genuine, nor any requirement that the engraving, photograph, print, or impression run the risk of fraudulent use by someone else.

It is imperative to read § 474 in the context of 18 U.S.C. § 504, which narrows the apparently broad prohibition of § 474. Section 504 begins with a general statement that the printing and publishing of illustrations of obligations and other securities is permitted,[45] seemingly contradicting paragraph six of § 474(a). However, two crucial limitations follow immediately thereafter: first, the illustrations must be in black and white; second, the illustrations must be less than three-fourths or greater than one and one-half the size of the actual object being illustrated.[46] Like § 474, § 504 contains no intent requirement.

Section 504 contains two provisions which grant the Department of the Treasury authority to write regulations that carve out exceptions to the prohibitions outlined in § 504. Section 504(1) allows the Secretary of the Treasury to determine appropriate occasions to permit color illustrations of currency.[47] Section 504(2) gives the Department of the Treasury the same power to grant exceptions to the ban on reproducing illustrations of currency through electronic means.[48]

This grant of authority raises the question of whether administrators have been given too much discretion to limit expression. The Supreme Court has held that government administrators may not have too much discretion in administering laws which restrict

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42. *Id.* § 474(a) para. 1. "[O]bligation and other security" is defined to include the following:

> bonds, certificates of indebtedness, national bank currency, Federal Reserve notes, Federal Reserve bank notes, coupons, United States notes, Treasury notes, gold certificates, silver certificates, fractional notes, certificates of deposit, bills, checks, or drafts for money, drawn by or upon authorized officers of the United States, stamps and other representatives of value . . . .

Id. § 8 (1988). Given the expansive definition of "obligations or other securities," the remainder of this Note will refer to them collectively as "currency," acknowledging that the definition includes all of these other items as well.

43. *Id.* § 474(a) para. 5.

44. *Id.* § 474(a) para. 6.

45. *Id.* § 504(1).

46. *Id.* § 504(1)(i)-(ii). The remainder of this Note will refer to these two provisions of § 504 as the "color and size restrictions."

47. *Id.* § 504(1)(D)(iii).

48. *Id.* § 504(2) (providing that the Secretary of the Treasury establish regulations to permit "*legitimate* use of such electronic methods" so that "businesses, hobbyists, press or others shall not be unduly restricted" (emphasis added)).

expression. There must be specific standards or criteria for how the law should be administered.[49] The language in § 504(1) seems particularly susceptible to abuse since it is so general: "The Secretary of the Treasury shall prescribe regulations to permit color illustrations of such currency of the United States as the Secretary determines may be appropriate for such purposes."[50] The potential for uncabined administrative discretion adds a further potential constitutional infirmity to these statutes.

In June, 1995, the Secret Service, a subdivision of the Treasury Department, issued proposed rules dealing with color illustrations of United States currency under the authority granted to it in § 504. The proposed rules allow color illustrations of currency, within the size limits specified in § 504, if the following condition is met: "The term 'non-negotiable' must be placed on any illustration in clearly legible, bold, black, block letters, being a minimum of one quarter inch high, and prominently and conspicuously placed across the center portion of any illustration, covering at least one third of the linear length of the illustration."[51] While this proposed rule represents an improvement from a complete ban on color depictions, it still presents significant First Amendment problems.[52]

Despite carrying criminal penalties, neither § 474 nor § 504 contains an intent requirement. The concept that a crime requires scienter, or mens rea, is an idea "deeply entrenched" in American criminal law.[53] The Supreme Court strongly expressed that notion in the 1952 case of *Morisette v. United States*.[54] The Court reversed Morisette's conviction for converting government property because it found that the defendant reasonably believed that the government had abandoned the material, although in fact it had not.[55] Justice Jackson wrote:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in the freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.[56]

Justice Jackson also discussed intent elements in statutes, arguing that although Congress had not written an intent requirement into the statute under which Morisette was convicted, an intent requirement for this type of offense is inherent when not explicitly provided.[57]

Numerous defendants charged with violations of § 474 have argued that an intent requirement should be imputed to § 474. Federal courts, however, have consistently

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49. *See, e.g.*, Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 754 (1988) (striking down a local ordinance which required a permit for the placement of newspaper racks on public property where one of the possible reasons to deny a permit was "other terms and conditions deemed necessary and reasonable by the Mayor"); Lovell v. Griffin, 303 U.S. 444, 451-52 (1938) (reversing conviction of a Jehovah's Witness for distributing religious literature in public without a permit because the city ordinance authorizing the city manager to issue permits contained no specific criteria).

50. 18 U.S.C. § 504(1)(D)(iii).

51. 60 Fed. Reg. 32,929-30 (1995) (to be codified at 31 C.F.R. pt. 411) (proposed June 26, 1995).

52. *See infra* part III.B.

53. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 10.01 (1987).

54. 342 U.S. 246 (1952).

55. *Id.* at 247-48.

56. *Id.* at 250 (footnote omitted).

57. *Id.* at 261-62.

rejected such claims.[58] Each of the cases dealing with § 474's intent requirement have upheld the 1954 case of *Webb v. United States*, which held that Congress intended by enacting § 474 to allow no impressions of the currency whatsoever, regardless of their purpose. The court in *Webb* held:

> [T]he mere making of an impression in the likeness of an obligation or security issued by the United States is a violation of the statute without proof of unlawful intent. . . . Consequently, in such a case, there being no need of proof of unlawful intent, there is no need of proof that such impressions were calculated to deceive.[59]

While the Supreme Court has never specifically decided the issue of § 474's intent requirements, the lower federal courts have been consistent in following the strict liability holding of *Webb*. The absence of an intent requirement, apart from any inquiry into whether § 474 and § 504 are content-based, presents a First Amendment problem of its own. A strict liability statute likely would chill artistic or political depictions of currency never intended for use as counterfeit.[60]

C. The Counterfeiting Statutes in General

Sections 474 and 504 exist in the context of other laws criminalizing counterfeiting activity. Section 471 prohibits making, forging, counterfeiting, or altering any obligation or other security with the intent to defraud.[61] Section 471 appears to overlap significantly with paragraph six of § 474(a) which also prohibits making any depiction in the likeness of currency but lacks the element of intent to defraud.[62] Section 473 prohibits buying, selling, exchanging, transferring, receiving, or delivering the counterfeit obligations "with the intent that the same be passed, published, or used as true and genuine."[63] Other provisions of the counterfeiting law prohibit possessing, making, and using counterfeits of foreign currencies with an intent to defraud.[64]

One other section of the counterfeiting laws merits brief First Amendment discussion. Section 475 prohibits use of the image of currency for any business or advertising purpose.[65] Business and commercial use of currency's image shares some common issues

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58. United States v. Kenny, 5 F.3d 214, 217 (7th Cir. 1993); United States v. Green, 962 F.2d 938, 943 (9th Cir. 1992); Webb v. United States, 216 F.2d 151, 152 (6th Cir. 1954); Wholesale Vendors of Texas, Inc. v. United States, 361 F. Supp. 1045, 1047-48 (N.D. Tex. 1973).

59. *Webb*, 216 F.2d at 152.

60. Indeed, there is some indication that this is more than a theoretical possibility. J.S.G. Boggs contends that the possibility of prosecution or other Secret Service activity has kept the artist's cooperative to which he belongs from accepting his work and has repelled potential buyers. Boggs v. Bowron, 842 F. Supp. 542, 548 (D.D.C. 1993).

61. 18 U.S.C. § 471 (1988).

62. *Id.* § 474(a) para. 6.

63. *Id.* § 473 (1988).

64. *Id.* §§ 478-483 (1988).

65. The statute provides that whoever commits the following acts commits a felony:

> Whoever designs, engraves, prints, makes, or executes, or utters, issues, distributes, circulates, or uses any business or professional card, notice, placard, circular, handbill, or advertisement in the likeness or similitude of any obligation or security of the United States . . . or writes, prints, or otherwise impresses upon or attaches to any such instruments, obligation or security, or any coin of the United States, any business or professional card, notice, or advertisement, or any notice, or advertisement, or any notice or advertisement whatever.

Id. § 475 (1988). As with § 474 and § 504, § 475 contains no intent requirement, probably because in this context the clear intent would be to advertise and thus not to pass as counterfeit.

with the cases involving commercial use of the flag[66] and the promotional use of the Olympic symbols.[67] Neither of these cases, however, resolve all of the First Amendment issues presented by § 475.[68] A ban on depictions of money for business and commercial purposes deprives the commercial speaker of a universal and powerful symbol; consequently, the government should ensure that its regulation of such speech is as narrow as possible. Although a constitutional challenge to § 475 has never been reported, the First Amendment advocate has credible arguments to make.[69]

II. CONTENT STATUS DOCTRINE AND THE FIRST AMENDMENT

The distinction between content-neutral and content-based regulations of speech has been called "[p]erhaps the most intriguing feature of contemporary first amendment doctrine."[70] This distinction carries major consequences for the type of constitutional scrutiny applied to a restriction by a reviewing court.[71] In order to understand § 474 and § 504's content status and, accordingly, the scrutiny to be applied, an analysis of the Supreme Court's content status doctrine is necessary.

The wellspring of the Supreme Court's First Amendment content analysis is *United States v. O'Brien*.[72] O'Brien was convicted for violating the Universal Military Training and Service Act when he burned his draft card on the steps of a Boston courthouse.[73] In *O'Brien*, the Court laid out its four-part test for determining whether restrictions on so-called "symbolic speech" are constitutional.[74] A governmental regulation is permissible:

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66. Halter v. Nebraska, 205 U.S. 34 (1907) (upholding a state prohibition against using representations of the United States flag for advertising merchandise).

67. San Francisco Arts & Athletics, Inc. v. United States Olympic Comm'n, 483 U.S. 522 (1987) (holding that the United States Olympic Committee had been granted exclusive use of the word "Olympic").

68. The Supreme Court's flag burning decisions in Texas v. Johnson, 491 U.S. 397 (1989) (holding that the state's interest in preserving the flag as a national symbol does not justify defendant's criminal conviction for burning the American flag), and United States v. Eichman, 496 U.S. 310 (1990) (holding that prosecution for burning a flag in violation of the Flag Protection Act is inconsistent with the First Amendment), substantially weaken the holding in *Halter* which relied heavily on the legitimacy of the government's interest in protecting the sanctity of the flag against commercial degradation. *Halter*, 205 U.S. at 43. If the Supreme Court has rejected legislation purporting to protect against the degradation of the flag, the Court likely would also reject any argument that § 475 serves to protect against the degradation of the image of the currency.

San Francisco Arts & Athletics is distinguishable, also. In that case, the use of the Olympic symbols by an organization (unrelated to the actual Olympics) sponsoring a gay olympics implicated trademark concerns since the Olympic symbols resemble a trademark of the United States Olympic Commission. It is much harder to argue that the dollar is some sort of trademark of the United States.

69. The greatest obstacle for the First Amendment advocate would be the Supreme Court's holding that commercial speech does not merit full-fledged First Amendment protection. *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557 (1980).

70. Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 189 (1983).

71. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2, at 791-92 (2d ed. 1988); *see also* John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1484 (1975) (describing the critical "switching function" served by the inquiry into whether the government interest is related to the suppression of free expression).

72. 391 U.S. 367 (1968).

73. *Id.* at 369-70.

74. The analysis presented in *O'Brien* applies to more than just symbolic speech cases, although that is how the Court classified the expression in *O'Brien*. Ely, *supra* note 71, at 1484.

> if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental 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.[75]

This four-part test has become known as the second track of the *O'Brien* analysis, and it is applied to regulations considered content-neutral. Content-based regulations command a more demanding analytical approach often called categorization.[76]

A. Classifying as Content-Based or Content-Neutral

Frequently, a statute or regulation does not fit easily within either the content-neutral category nor the content-based category,[77] but some general guidelines shed light on this classification. When the government regulation is designed to avert harm flowing from the message, such a regulation is content-based.[78] A content-based regulation targets a harm unique to the communicative aspect of an activity, *not* harm resulting from an activity regardless of its message. Content-neutral regulations, on the other hand, aim at the noncommunicative impact of the expressive activity.[79] The harm flows not from the message, but from the act of communicating itself.[80]

Some laws might be facially content-neutral, but are applied based on communicative impact. The problem of facial neutrality but nonneutral application arose in two recent Supreme Court cases which reached two different results. In *United States v. Eichman*,[81] the Court struck down the federal Flag Protection Act passed by Congress in response to an earlier ruling of the Court holding laws against flag burning unconstitutional.[82] The government argued that the Flag Protection Act was content-neutral and distinguishable from the content-based law previously struck down. The difference, said the government, was that the new law prohibited flag-burning not because of the message nor because of the audience's likely response, but rather it prohibited flag-burning to protect the physical integrity of the flag so that it may remain a unified national symbol.[83] The Court rejected this distinction: "Although the Flag Protection Act contains no explicit content-based limitation on the scope of the prohibited conduct, it is nevertheless clear that the Government's asserted *interest* is . . . concerned with the content of such

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75. *O'Brien*, 391 U.S. at 377.

76. Ely, *supra* note 71, at 1484.

77. This Note will refer to the content-based/content-neutral distinction as the regulation's "content status" for the remainder of the Note.

78. Ely, *supra* note 71, at 1497.

79. TRIBE, *supra* note 71, § 12-2, at 790; Stone, *supra* note 70, at 208.

80. In his treatise, Professor Tribe uses the following hypothetical ordinances to compare and contrast content-based and content-neutral laws: "A misdemeanor to affix on a government building any sign expressing opposition to former governors of Georgia," and "[a] misdemeanor to affix on a government building any object not readily removable." TRIBE, *supra* note 71, § 12-3, at 797-98. The former illustrates a content-based ordinance and the latter a content-neutral ordinance.

81. 496 U.S. 310 (1990).

82. Texas v. Johnson, 491 U.S. 397 (1989).

83. *Eichman*, 496 U.S. at 315.

expression."[84] Whether a communicative act involving the flag interferes with the flag's role as a unified national symbol has much to do with what message the act conveys.[85]

In *Barnes v. Glen Theatre*,[86] a nightclub owner and nude dancers sought to strike down Indiana's public nudity statute, arguing that although content-neutral on its face, it was actually applied based on content. Specifically, they argued that the law targeted the message of eroticism conveyed by nude barroom dancing.[87] The Court rejected this argument and identified the very fact of nudity as the harm, not any message of eroticism.[88] But if the fact of being nude is the harm to be averted, then all nude performances would be equally harmful, not just nude dancing in bars.[89] The comparison of the *Eichman* and *Barnes* cases demonstrates that the content status determination can be quite slippery and malleable, despite its primary importance in deciding the fate of the regulation.

B. Content-Neutral Regulations

1. Existence of a First Amendment Interest

With content-neutral regulations, courts must first confirm that a First Amendment interest exists, and then apply a case-by-case balancing test. The Court in *O'Brien* recognized the possibility that some conduct, although perhaps intended to express an idea, may not in fact invoke a First Amendment interest.[90] The Court grappled with this issue again in *Spence v. Washington*,[91] in which it developed a test for determining when conduct should be considered expression. If conduct is to be considered expression, not only must the speaker intend to communicate an idea through his or her conduct, but the action must also be understood by observers to be expression.[92]

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84. *Id.* (emphasis in original).

85. *Id.* at 316.

86. 501 U.S. 560 (1991).

87. *Id.* at 570.

88. *Id.* at 571. The Court's reasoning in *Barnes* bears some resemblance to the reasoning rejected by the Court in *Eichman*. The government in *Eichman* argued that the *fact* that it was the flag being burned was the harm, making the law content-neutral.

89. Ironically, the state in *Barnes* conceded that the public nudity law would probably not be applied to other nude performances such as plays, operas, or ballets. This significantly undercuts the idea that the *fact* of being nude is the evil to be averted. *Id.* at 590 (White, J., dissenting).

90. *O'Brien*, 391 U.S. at 376.

91. 418 U.S. 405 (1974).

92. *Id.* at 409-10. The Court here acknowledges that the context of the speaker's action goes a long way towards observers understanding the action as communicative; that is, the display of a flag adorned with a taped-on peace symbol in the midst of the Cambodian invasion and the events at Kent State was meaningful to observers in a way that it might not be meaningful if displayed today. *Id.* at 410 (describing the facts of *Spence*). However, it is not clear from the *Spence* opinion how precisely the observer must understand the message's content. It does not specify whether simply recognizing that an act is communicating an idea, any idea, is enough. It seems plausible that if someone displayed a flag with a peace symbol taped on it today it would still be recognized as communicating an idea, even if the specifics of the idea are not as readily perceived as they would have been in 1970. Furthermore, it would not be fair to extend First Amendment protection only to those speakers communicating a message simple enough to be understood by an average observer. "Novel or intricate messages are at least initially apt not to be fully understood. One need only think of modern art to realize that we often consider something expressive without knowing what its exact message is." Laurie Magid, Note, *First Amendment Protection for Ambiguous Conduct*, 84 COLUM. L. REV. 467, 486 (1984). Thus, the *Spence* test would be more speech protective if it required an observer only to perceive that the speaker is communicating some idea, even if the

The issue of whether conduct is also expression has arisen in other contexts as well. In the case of *Clark v. Community for Creative Non-Violence*, demonstrators against homelessness challenged a National Park Service rule which prevented the demonstrators from sleeping during their protest on the National Mall.[93] The Court skirted the issue of whether the sleeping constituted expression by accepting, without deciding, the lower court's conclusion that such sleeping was indeed expressive activity.[94] The Court should not have skirted the issue because this case nicely presents the expressive/nonexpressive dilemma.[95] This case presents a close call primarily because sleeping has a prevalent noncommunicative purpose (*i.e.*, to get rest). Also, the demonstrators may have been sleeping in the park merely for convenience and not to communicate anything. As a result, both prongs of the *Spence* test may prove problematic since the demonstrators may not have intended to communicate at all. Even if they did intend to communicate, sleeping at the demonstration site might reasonably be construed by observers as getting rest there instead of elsewhere.[96] On the other hand, sleeping outdoors makes a great deal of symbolic sense as a means of protesting homelessness. The closeness of the symbolic "fit" between sleeping outdoors and demonstrating against homelessness makes it more likely that observers would understand it as communication. The *Clark* case illustrates the potential difficulty with even this threshold issue.

2. The Ad Hoc Balancing Test

Having established that a First Amendment interest exists, courts apply an ad hoc balancing test which weighs the competing governmental and First Amendment interests. One side of the metaphorical scale weighs the government's interest, and then adjusts it by how efficiently the challenged regulation advances that interest.[97] The other side of the scales weighs the First Amendment interest, and adjusts it by the degree to which the regulation impedes that interest.[98] The greater the abridgment of the First Amendment interest, the more rigorously the government must prove its interest's substantiality and the regulation's advancement of it.[99]

Dramatically different levels of scrutiny coexist under the rubric of the content-neutral balancing test, making the First Amendment test quite subjective.[100] Perhaps the best

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observer may not understand or be able to verbalize it.

93. 468 U.S. 288 (1984).

94. *Id.* at 293. The decision was not easy for the lower court. The Court of Appeals for the District of Columbia Circuit, sitting en banc, held the sleeping to be communicative activity by only the slimmest majority. Community for Creative Non-Violence v. Watt, 703 F.2d 586, 592-94 (D.C. Cir.) (en banc), *rev'd*, 468 U.S. 288 (1983).

95. *See Clark*, 468 U.S. at 301-02 (Marshall, J., dissenting). In his dissenting opinion, Justice Marshall argues not that the court of appeals decided improperly that the activity was expressive, but rather that the Supreme Court should have examined the issue for itself because merely to assume the activity at issue constitutes expression "denatures [the demonstrators'] asserted right and thus makes all too easy identification of a Government interest sufficient to warrant its abridgment." *Id.* at 302.

96. *See* Magid, *supra* note 92, at 484.

97. Courts "consider[] . . . 'the substantiality of the government interests' served by the restriction, and 'whether those interests could be served by means that would be less intrusive on activity protected by the First Amendment.'" Stone, *supra* note 70, at 190 (quoting Schad v. Borough of Mount Ephraim, 452 U.S. 61, 70 (1981)).

98. TRIBE, *supra* note 71, § 12-23, at 979.

99. Stone, *supra* note 70, at 190.

100. *Id.*

example of how deferential content-neutral scrutiny can be is *Clark v. Community for Creative Non-Violence*, discussed in the preceding section. The majority opinion not only accepted as substantial the Park Service's interest in limiting wear and tear on park land, it also accepted the more tenuous proposition that the ban on sleeping effectively advanced this interest.[101] The Park Service had already granted the demonstrators permission to hold an around-the-clock demonstration and to erect tents to create "symbolic tent cities."[102] Evidently, it was permissible to sit, lie down, and even feign sleeping inside these tents as part of the demonstration. Because sleeping would damage park property no more than the actions already permitted by the Park Service, its regulation was poorly tailored to serving its stated interest.[103] The Court simply did not address this apparent inconsistency, but instead deferred to the park officials:

> We do not believe . . . that either *United States v. O'Brien* or the time, place, or manner decisions assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained.[104]

Deferring completely to the Park Service's judgment that prohibiting the physical act of sleeping makes a meaningful contribution to preserving park property reveals how weak content-neutral scrutiny can be.[105]

Not all cases get such deferential scrutiny. In *Schneider v. State*,[106] the Court struck down various municipal ordinances which sought to ban distribution of literature in streets and other public places.[107] Instead of deferring to government officials, the Court applied the balancing test forcefully. The Court recognized and accounted for the serious abridgment which the time-honored practice of leafletting would suffer under these ordinances, stating:

> We are of the opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it. Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press.[108]

The *Schneider* case illustrates the rigorous end of the balancing spectrum, and provides a reminder that content-neutral analysis need not automatically be toothless merely because the regulation is content-neutral.

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101. 468 U.S. 288, 299 (1984).
102. *Id.* at 291-92.
103. *Id.* at 312 (Marshall, J., dissenting).
104. *Id.* at 299.
105. *Id.* at 308 (Marshall, J., dissenting).
106. 308 U.S. 147 (1939). *Schneider* obviously pre-dates *O'Brien*, but the test applied to time, place, and manner restrictions is basically the same as that which would become known as the second track of *O'Brien*.
107. *Id.* at 160.
108. *Id.* at 162.

C. The Content-Based Track

Courts apply an entirely different type of scrutiny to those regulations deemed to be content-based. For a content-based regulation to survive, the speech it regulates must fit into an unprotected category.[109] The categorization approach does not forgo balancing altogether, but rather the balancing is performed at such a level of abstraction that the facts of any particular case cannot sway the evaluation.

Tinker v. Des Moines School District[110] and *Cohen v. California*[111] represent fairly typical cases of content-based analysis. In *Tinker*, several schoolchildren were expelled from school for wearing black armbands to protest the Vietnam War. The Court found that the student's conduct fit into none of the unprotected speech categories;[112] thus, the Court invalidated the regulation without any balancing of the competing interests in that case.[113] In *Cohen*, the defendant was prosecuted under a breach of the peace statute for wearing a jacket bearing the words "Fuck the Draft" while in a courthouse. The Court found that this conduct belonged to no unprotected category of speech, and declined to create a new category for offensive language.[114] The Supreme Court reversed the conviction without balancing the particular interests involved. Comparing *Tinker* and *Cohen* to cases on the content-neutral track, it becomes clear that courts are much less deferential or willing to speculate about the government's interest in cases with content-based laws.

III. THE CONTENT STATUS OF § 474 AND § 504

The basic outline of the Supreme Court's content status doctrine offers some guidance in classifying § 474 and § 504, the task to which this Note now turns.

A. Cases Addressing the Content Status of § 474 and § 504

In 1974, a federal district court faced the clash of political expression and § 474 in *Wagner v. Simon*.[115] Described briefly in the Introduction to this Note,[116] the plaintiff, an art student, sought a declaratory judgment that § 474 was unconstitutional.[117] The plaintiff photographed a $20 bill and altered it to look like a $30 bill with President

109. TRIBE, *supra* note 71, § 12-2, at 791-92; Ely, *supra* note 71, at 1484.

110. 393 U.S. 503 (1969).

111. 403 U.S. 15 (1971).

112. The unprotected categories include incitement, Brandenburg v. Ohio, 395 U.S. 444 (1969); defamation with actual malice, New York Times v. Sullivan, 376 U.S. 254 (1964); obscenity, Roth v. United States, 354 U.S. 476 (1957); and fighting words, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

113. *Tinker*, 393 U.S. at 514. The Court did recognize that school officials have some extra latitude in restricting student speech in the interest of order in the school, but even this latitude does not upset the strong preference for protecting speech. *Id.*

114. *Cohen*, 403 U.S. at 24, 26.

115. 412 F. Supp. 426 (W.D. Mo. 1974), *aff'd*, 534 F.2d 833 (8th Cir. 1976).

116. *See supra* text accompanying notes 16-19.

117. *Wagner*, 412 F. Supp. at 428.

Nixon's portrait replacing that of President Jackson.[118] The plaintiff's constitutional arguments were that § 474 is overbroad and, alternatively, that § 474 is unconstitutionally vague as applied to him.[119] The court rejected both of these arguments. While not explicitly analyzing the content status of § 474, the court applied the content-neutral analysis, concluding that § 474 "is an appropriately narrow means of protecting a substantial government interest."[120] While the brief trial court opinion did not provide much doctrinal analysis, *Wagner v. Simon* did form a framework for further analysis by federal courts.

The Supreme Court's one and only pronouncement on the constitutionality of § 474 and § 504 is the 1984 case of *Regan v. Time, Inc.*[121] The front cover of the February 16, 1981, issue of *Sports Illustrated* magazine sparked the controversy leading to this case. The cover featured a color photograph of $100 bills pouring into a basketball hoop.[122] The cover story recounted of a point-shaving scheme involving members of the Boston College basketball team. The Secret Service, which had informed Time, Inc. on several occasions that its photographs violated these statutes, told Time, Inc.'s legal department that it would seize all the material used in producing the February 16, 1981, cover. Time, Inc. then initiated this action seeking a declaratory judgment that § 474 and § 504 were unconstitutional.[123]

Before the 1992 amendments, § 504 contained much more specific language about how the permitted illustrations could be used. The statute allowed illustrations of currency for "philatelic, numismatic, educational, historical, or newsworthy purposes in articles, books, journals, newspapers or albums."[124] These two restrictions on depictions of currency were called the "purpose" and "publication" requirements. In addition to the purpose and publication requirements, the color and size restrictions applied.[125] Because the decision in *Regan* was governed by the pre-1992 version of § 504, a portion of the Court's analysis in this case is unique to the old version of the statute. Much of the analysis, however, remains relevant to the statutes as they currently stand.

The Court's opinions in *Regan* are badly splintered with a majority opinion on only one issue and various pluralities on others. A majority of five Justices held § 504's purpose requirement unconstitutional.[126] The Court found the purpose requirement to be a content-based restriction on speech since "the newsworthiness or educational value of a photograph cannot help but be based on the content of the photograph and the message it delivers."[127] Applying the content-based track of scrutiny, the majority, without any explicit balancing, concluded that the purpose requirement was unconstitutional.[128] A

118. *Id.*
119. *Id.* at 431.
120. *Id.* at 432.
121. 468 U.S. 641 (1984).
122. *Regan*, 468 U.S. at 646.
123. *Id.*
124. 18 U.S.C. § 504(1) (1988) (current version at 18 U.S.C. § 504(1) (Supp. V 1993)).
125. *Id.*
126. Justices Brennan, White, Marshall, Blackman, and Powell joined the holding.
127. *Regan*, 468 U.S. at 648.
128. *Id.* at 649.

plurality[129] held that, although § 504's purpose requirement was unconstitutional, it was severable and thus the section as a whole could stand.[130] Justices Brennan and Marshall joined in finding the purpose requirement unconstitutional, but argued that the entire section must fall since the purpose requirement was necessary to the statutory scheme.[131] Justice Stevens, acting as the swing vote, wrote a separate opinion rejecting the reasoning of both sides and arguing that the statutes could have been interpreted to avoid the constitutional issue.[132]

The second major issue[133] the Court confronted in *Regan* was the validity of § 504's color and size restrictions. Basically, the allegiances remained the same. In Justice White's plurality opinion, he distinguished the color and size restrictions from the purpose requirement by classifying the color and size restrictions as content-neutral.[134] The plurality applied the content-neutral track quite leniently, with scrutiny more similar to *Clark* than to *Schneider*,[135] and held that the increased deterrence of counterfeiting outweighs any expressive interest involved in realistic depictions of currency.[136] In his separate opinion, Justice Stevens also upheld the color and size restrictions. He argued that little expressive value is gained by lifting the color and size restrictions, whereas keeping them in place gives the government "one weapon in an arsenal designed to deprive would-be counterfeiters and defrauders of the tools of deception."[137]

Since Justices Brennan and Marshall believed that the unconstitutional purpose requirement invalidated the entire section, they purported not to make any judgment on the constitutionality of the color and size restrictions. But Brennan critiqued the plurality's reasoning on this issue, although ostensibly not deciding it.[138] First, Justice Brennan argued that the reason proffered by the government, and accepted by Justice White, as the justification for the color restriction was not the true reason behind it. White seemed to rely on a statement made by a Treasury Department official that the large number of negatives required to make a color photograph makes it too easy for counterfeiters to obtain one of the negatives.[139] Justice Brennan, on the other hand,

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129. Chief Justice Burger and Justices White, Rehnquist, and O'Connor constituted the plurality.

130. *Regan*, 468 U.S. at 653.

131. *Id.* at 664-68 (Brennan, J., concurring and dissenting).

132. *Id.* at 697-704 (Stevens, J., concurring and dissenting).

133. The Court also dealt with Time, Inc.'s claims of vagueness and overbreadth with regard to the publication requirement. The plurality, and Justice Stevens in a separate opinion, rejected both claims. The vagueness claim failed because it was merely an academic question for Time, Inc., whose magazines all clearly fall within the publications requirement. *Regan*, 468 U.S. at 649-50. The overbreadth claim failed because the requirement of substantial overbreadth was not satisfied. *Id.* at 650-52. Such a brief discussion of these issues is not intended to indicate that they were unimportant to the Court's analysis, but that for purposes of this Note the content-related analysis is more relevant.

134. *Id.* at 655-56.

135. *See supra* text accompanying notes 100-08.

136. *Regan*, 468 U.S. at 657.

137. *Id.* at 704 (Stevens, J., concurring and dissenting). As will be discussed later, the application of § 474 and § 504 is not limited to would-be counterfeiters since the statutes contain no intent requirement and the previous courts have held that no intent requirement should be inferred. So in addition to would-be counterfeiters (who would also be subject to prosecution under § 471), this particular weapon in the arsenal is also used against those desiring to use the image of currency with no intent to counterfeit at all.

138. *Id.* at 688 n.27 (Brennan, J., concurring and dissenting).

139. *Id.* at 657 (plurality opinion). Color film is developed from a multi-layered negative, with each layer supplying one of the necessary colors. Thus, each color photograph produces at least three times as many negatives as a black-and-white photograph. INTERNATIONAL CTR. OF PHOTOGRAPHY, ENCYCLOPEDIA OF PHOTOGRAPHY 112-13 (1984).

contended that the concern about color negatives was an after-the-fact justification for the government's desire to stop all accurate depictions of currency.[140] Second, even if one accepted the government's justification, Brennan still faulted the government for not narrowly tailoring its regulation. Counterfeiters could find better, easier ways to produce their wares without the complicated process of using color negatives.[141] Brennan's criticism of the Court's reasoning on this issue highlights the problems with the narrowness and effectiveness of § 504.

The splintered remains of the opinions in *Regan v. Time, Inc.* leave essentially this: (1) a no longer existing provision of § 504 struck down as unconstitutional, but the statute saved; (2) five Justices (two of whom, Burger and White, no longer serve on the Court) holding that the color and size restrictions are constitutionally permissible under *O'Brien*'s second track; (3) two Justices (Powell and Blackmun, who have since retired) failing to address the color and size issue at all; and (4) two more Justices (Brennan and Marshall, who are also no longer on the Court) ostensibly not deciding the color and size issue, but leveling substantial criticism at the plurality's reasoning. Due to the disjointed reasoning in *Regan v. Time, Inc.* and the change in the Court's composition since that time, the Court could plausibly reconsider its treatment of this issue.

The issue of these statutes' constitutionality surfaced in federal court again in 1993 when J.S.G. Boggs brought his suit for declaratory relief and for the return of his work seized by the Secret Service.[142] The district court, after establishing that Boggs' activity implicates First Amendment concerns,[143] turned to the issue of whether § 474 and § 504 are content-neutral or content-based. The district court, following the Supreme Court's lead in *Regan v. Time, Inc.*, held that the color and size restrictions of § 504 are content-neutral. The Court reasoned: "Mr. Boggs' work may be somewhat affected when it does not appear to be actual currency. However, this limitation is not based on content or the message it delivers. It is a mechanical restriction, requiring no inquiry or evaluation into 'the nature of the message being imparted.'"[144] The court also rejected Boggs' argument that the government showed no real nexus between the statute and the government's professed interest, particularly since paragraph six of § 474 contains no intent requirement. Boggs argued that the government could use other sections of the counterfeiting laws, such as those targeting people actually intending to counterfeit, to further its interest.[145] Ultimately, the court concluded that while Boggs' work effectively presents valid commentary about the value of money and trust in political institutions, § 474 and § 504 are constitutionally permissible tools for the government to use to combat counterfeiting.[146] The district judge denied Boggs' request for declaratory

140. *Regan*, 468 U.S. at 688 n.27 (Brennan, J., concurring and dissenting).

141. *Id.*

142. Boggs v. Bowron, 842 F. Supp. 542 (D.D.C. 1993). The facts of this case and the story of Boggs himself were already discussed, *supra* text accompanying notes 1-14, but the district court's legal analysis becomes relevant in this section.

143. *Boggs*, 842 F. Supp. at 551.

144. *Id.* at 555 n.31 (quoting *Regan*, 468 U.S. at 656).

145. *Boggs*, 842 F. Supp. at 556.

146. *Id.* at 562.

judgment and allowed the Secret Service to retain Boggs' paintings.[147] Boggs has appealed this decision, so there might be a new federal court ruling in the near future.

B. Sections 474 and 504 as Content-Based Regulations of Speech

Despite courts' consistent position that these statutes are content-neutral, a closer look at the statutes' purpose and function supports the conclusion that they are actually content-based. Sections 474 and 504 only prohibit expression containing the image of currency. The harm which the statutes seek to avert flows from the content, not from any noncommunicative aspects of the expression. Violating § 474 and § 504 literally depends on content: only realistic pictures of money are prohibited.

A depiction, for instance, of the Presidential seal in full color and actual size would be of no concern under these statutes. Assuming no copyright violations, artists may legally depict a variety of government symbols in painstakingly realistic detail. Only realistic depictions of money run afoul of the law.

Imagine, for example, how differently Boggs would be treated if he painted something other than money. If he painted landscapes or portraits that he bartered for goods and services, the Secret Service would quickly lose interest. However, because his pictures depict money, they are the subject of regulation and the concern of the Secret Service. The content of Boggs' expression, not the time, place, or manner of his expression, attracts the Secret Service's attention.

These examples illustrate that the government's purpose in enacting the statutes is not to prevent improper use of government symbols nor to prevent bartering art work. The regulations seek to avert some harm arising from the fact that the expression contains realistic images of currency, making them content-based regulations.[148]

Furthermore, the policy reasons underlying First Amendment doctrine argue for these regulations being classified as content-based. By restricting depictions of currency, the government favors one idea over another: The government says that political, social, economic, or artistic commentary expressed with realistic depictions of currency is not acceptable, but other commentary is. By restricting access to such a powerful image as money, the government substantially restricts the ability of a speaker to convey the ideas she or he wishes to express. Restricting access to certain ideas hinders the free flow of information in the "marketplace of ideas," and thus also hinders listeners' ability to make informed decisions about the ideas being censored.[149]

Simply favoring one method of expression over another, however, does not automatically qualify the regulation as content-based. For example, there might be ideas best expressed by spray paint on the wall of the Lincoln Memorial or by a loudspeaker in the middle of the night in a residential neighborhood. Considering the competing

147. *Id.* at 562-63.

148. Ely, *supra* note 71, at 1497-98.

149. For a general overview of various theories of the First Amendment, see JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.6 (4th ed. 1991).

interests at stake in these hypotheticals, the government could rightly disfavor ideas expressed in these ways vis-à-vis ideas not expressed in these ways.

Realistic depictions of currency, however, differ significantly from the Lincoln Memorial and loudspeaker hypotheticals. Realistic depictions of currency have a particular content in and of themselves, and they express an idea when used communicatively. A particular *mode* of expression, even if important to the overall message being expressed, does not have its own content or express its own idea. Currency depictions would be analogous to these two hypotheticals if they were regulated because they appear on canvas, or because they are displayed in a certain place at a certain time. That is not the case, however, because § 474 and § 504 regulate the image, not the mode of expression.

The potential of the government preventing ideas from being heard is exactly what motivates the hostility to content-based restrictions. The asserted interest in preventing counterfeiting does not automatically overcome the fact that these statutes do so in a way that discriminates against speech based on content. By censoring expression containing depictions of currency, the government favors one view over another and violates one of the central tenets of the First Amendment, that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[150]

Once deemed content-based, a regulation has little chance of constitutional survival. As discussed previously, regulations subjecting speech to a content-based restriction must fall into an unprotected category to be upheld.[151] Communicative depictions of currency do not belong to any category of unprotected speech. One such unprotected category is incitement. Even if realistic currency depictions inspired would-be criminals to take up counterfeiting, that likely would not qualify as unprotected incitement.[152]

Two other unprotected categories of speech—obscenity and defamation with actual malice—seem to have little to do with depictions of currency. It is, perhaps, conceivable that an obscene or defamatory expression might also contain a realistic depiction of currency. In such a case, however, the aspect of the expression regulated is the obscene or defamatory message, not the fact that it depicts currency.

It is also very difficult to conceive how fighting words—the final unprotected category—could possibly involve realistic depictions of currency. The fighting words doctrine, to the extent it is still viable at all, focuses on face-to-face verbal expression.[153] Depictions of currency are very unlikely to take such a form.

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150. Police Dep't of the City of Chicago v. Mosley, 408 U.S. 92, 95 (1972) (citations omitted).

151. *See supra* part II.C.

152. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969). *Brandenburg* requires much more direct incitement than depictions of currency could realistically provide. Even if a picture of currency also featured the caption "Go Counterfeit Now!" it would fall short of the direct incitement requirements of *Brandenburg*.

153. *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). Although *Chaplinsky* has never been explicitly overruled, the Supreme Court has not sustained a conviction under the fighting words doctrine since *Chaplinsky*. GERALD GUNTHER, CONSTITUTIONAL LAW 1073 (12th ed. 1991). In a more modern case, the Supreme Court struck down a breach of the peace conviction because the law, which provided that it was unlawful "without provocation, [to] use to or of another . . . opprobrious words or abusive language, tending to cause a breach of the peace," contained language broader than the narrow fighting words exception. Gooding v. Wilson, 405 U.S. 518, 519 (1972). The statute at issue in *Gooding*, however, very closely resembles that at issue in *Chaplinsky* ("No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name . . . ."), which strongly suggests that *Chaplinsky* essentially has been overruled.

Accepting § 474 and § 504 as content-based regulations of speech necessitates their invalidation under the First Amendment. Both § 474 and § 504 only regulate depictions because they contain a realistic image of currency. The statutes aim at the communicative impact of the realistic depictions of currency. Sections 474 and 504 fit into no recognized unprotected category of speech and should be held unconstitutional.[154]

IV. THE AD HOC BALANCING TEST AND § 474 AND § 504

Courts have consistently held both § 474 and § 504 to be content-neutral.[155] Even under the more lenient First Amendment scrutiny applied to content-neutral regulations of speech,[156] § 474 and § 504 fail because the government's true interest is insubstantial and the means chosen to serve that interest are not effective. In addition, carefully examining the government's interest and the means chosen to serve it strengthens the argument that the statutes are content-based rather than content-neutral.

A. The Government's Interest

There is more than one way to define the government's interest in these statutes. How specifically the interest is defined affects how narrowly tailored or effective various regulations appear to be in serving that interest. On the most specific level, Congress' interest in passing these statutes was "to tolerate no manipulation in the making of impressions of government obligations or securities, whether the copies or impressions might be good or bad, and regardless of the purpose for which they might be made."[157] Defined as an interest in allowing no impressions of the currency for any reason, the statutes serve that interest well. Accepting this version of the government's interest, a complete prohibition of pictures of currency would serve the interest even better.

More troublesome is what underlies the government's interest and whether the interest is substantial, or even legitimate. The government's interest is essentially a concern about anything that looks too much like money, regardless of the intent of its creator or its potential for fraudulent use. Describing the government's interest this way focuses less on maintaining the integrity of currency as buying power or as a store of value, and more on maintaining control over the currency's image. Whether the government has a substantial interest in monopolizing the image of currency is much more questionable than its constitutionally mandated duty to punish counterfeiting. Also, inquiring into the government's interest at all inescapably leads to the conclusion that § 474 and § 504 are

154. Any argument that a new category should be created in order to uphold this content-based regulation should be quickly rejected by any reviewing court. The Supreme Court has declined to acknowledge new unprotected categories even for expression that can be quite offensive and hurtful. *See* Cohen v. California, 403 U.S. 15 (1971); Tinker v. Des Moines Sch. Dist., 393 U.S. 503 (1969). An unprotected category entirely for depictions of currency would seriously dilute content-based analysis.

155. Regan v. Time, Inc., 468 U.S. 641 (1984); Boggs v. Bowron, 842 F. Supp. 542 (D.D.C. 1993); Wagner v. Simon, 412 F. Supp. 426 (W.D. Mo. 1974), *aff'd*, 534 F.2d 833 (8th Cir. 1976).

156. *See supra* part II.B.

157. Webb v. United States, 216 F.2d 151, 152 (6th Cir. 1954).

indeed content-based. The government's interest, defined broadly or narrowly, focuses entirely on content, on the fact that there is a picture of money.

An interest in preventing and punishing counterfeiting differs from an interest in banning everything that looks too much like money. As J.S.G. Boggs fruitlessly riddled Scotland Yard upon his arrest for counterfeiting in England: "What if I gave you a painting of a horse? Would you put a saddle on it?"[158] A picture is something other than the thing which it depicts, a point which Belgian painter Rene Magritte elegantly makes in his famous painting *The Treachery of Images*. The painting shows a picture of a pipe and bears the words "This is not a pipe."[159] Of course it is not a pipe, it is a picture of a pipe. This important distinction is disregarded when the government's interest in preventing counterfeiting is construed as an interest in forbidding all accurate depictions of currency regardless of intent. An accurate depiction of money is not money, and without the intent to pass it as genuine it is not counterfeit money either. Thus, prohibiting all items looking too much like money does not narrowly serve an interest in eradicating counterfeit money. Sections 474 and 504 do a good job of eradicating anything that looks too much like money, but it is not clear why that interest is substantial.[160] It is a mistake to conflate the interest in preventing and punishing counterfeiting with the interest in banning accurate depictions of money. Separate justification apart from the prevention of counterfeiting should be required of the latter interest. It is not the same as nor necessary to the prevention and punishment of counterfeiting.

The government's concern with maintaining control over the currency's likeness does not necessarily bespeak an illiberal desire for government control of what people paint, draw, or photograph. As discussed in the next section, any system of money, at least paper money, depends on the ability of people to trust the government issuing the currency.[161] Disastrous consequences would follow if fake currency became so common that people could no longer trust currency as a means of exchange. Since the government undeniably has a compelling interest in averting the collapse of the monetary system, the government's concern about artistic expression involving currency is to some extent justified.

The way to maintain trust in the currency, however, is to prevent and punish actual counterfeiters and to implement monetary policies which ensure a sound currency, not merely to maintain control over money's likeness. The United States Treasury Department recently unveiled new, redesigned $100 bills which will go into circulation

158. Boggs, *supra* note 3, at 99.

159. SARAH WHITFIELD, MAGRITTE cat. 67 (1992). It is perhaps telling, however, that Magritte felt reluctant to display this painting out of fear that "it might be used as a pretext to lock me up in a madhouse." *Id.* As the Author choosing to use this example, perhaps I run the same risk.

160. The government could justifiably be concerned about the misuse of these depictions by people other than the creator. However, people attempting to use the depictions fraudulently would be subject to punishment under § 473, which punishes using counterfeit currency with intent to defraud, regardless of who actually created the item. Furthermore few communicative depictions of currency would actually be mistaken for authentic money. *See supra* notes 172-76 and accompanying text. Consequently, the would-be counterfeiter may not be very successful in passing off the depictions as real.

161. S. HERBERT FRANKEL, MONEY: TWO PHILOSOPHIES 38 (1977).

in early 1996.[162] The new bills have been redesigned to thwart reproduction with computer scanners and color photocopiers. The new security features include an embedded thread, a watermark portrait of Ben Franklin, green ink that appears gold when held at an angle, and a pattern on the bill which will stand out only when it has been photocopied.[163] Counterfeiting abroad, not counterfeiting in the United States, prompted the redesign: almost three times as many counterfeit bills were seized abroad as were seized domestically in 1993.[164] Counterfeit $100 bills have almost become the rule in foreign countries rather than the exception.[165] The redesigned bill represents the sort of policies and strategies that directly attack the counterfeiting problem. These reforms serve the government's interest far more effectively and narrowly than § 474 and § 504. Restricting the speech of those seeking to express ideas about money is not a constitutionally permissible way of maintaining trust in the nation's currency.

An alternative way of framing the government's interest in § 474 and § 504 is a more general concern with punishing and preventing counterfeiting. Article I of the Constitution specifically grants that power[166] and given the undisputed importance of a sound and uncontaminated currency, this interest is certainly compelling.

At the time these statutes originated in the late 19th century and the early part of this century, the interest in punishing counterfeiting was even more pressing than it is now. In 1864, when the Secret Service came into existence, nearly fifty percent of all currency in circulation was counterfeit.[167] Compared to a crisis of that magnitude, modern levels of counterfeiting seem quite small. But counterfeiting remains a significant problem, with U.S. currency being the most frequently counterfeited in the world.[168] In 1993, $44 million was seized domestically in counterfeit bills.[169] No matter what the precise numbers, the government's interest in preventing and punishing counterfeiting is compelling.

By defining the government interest as prohibiting anything looking too much like money, restrictions on color and size fit perfectly. More difficult questions of fit arise when the government's interest is framed more broadly, for instance, as the punishment and prevention of counterfeiting. Once one sees the forest rather than just a tree, regulations which once fit perfectly may no longer look as effective or as narrow as they once did.

Sections 474 and 504 do not serve the government's interest narrowly and effectively when the interest is defined broadly as the punishment and prevention of counterfeiting. Other sections of Title 18 punish those actually counterfeiting money or intending to use

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162. *Will Ben's New Look Stop Counterfeits?*, N.Y. TIMES, Sept. 28, 1995, at C5.

163. Robert A. Rosenblatt, *New Currency Aims to Counter Counterfeiters*, L.A. TIMES, July 14, 1994, at A1.

164. Judith A. Gunther, *Making Money*, POPULAR SCI., Nov. 1994, at 70, 71.

165. There are numerous stories illustrating the prevalence of counterfeit dollars in some parts of the world. In 1993, kidnappers in Russia reportedly held students and teachers ransom for $10 million in U.S. $100 bills. The money was delivered to the kidnappers, but they would not release the hostages until they were provided with a machine to sort real $100 bills from counterfeits. Monika Guttman, *High-Tech Counterfeiting*, U.S. NEWS & WORLD REP., Dec. 5, 1994, at 72, 73. In the Middle East, counterfeit $100 bills are so prevalent that many merchants there demand $120 for $100 of merchandise to offset potential losses from counterfeiting. Rosenblatt, *supra* note 163, at A1.

166. U.S. CONST. art. I, § 8, cl. 6.

167. GLASER, *supra* note 24, at 107, 113.

168. Boggs v. Bowron, 842 F. Supp. 542, 556 n.32 (D.D.C. 1993).

169. Gunther, *supra* note 164, at 70.

counterfeit money as genuine. Those who make impressions of money with the intent to defraud, even if they never actually use them, violate § 471.[170] Those who actually use counterfeit money with the intent that it be accepted as true and genuine violate § 473.[171] Thus, the only activity uniquely prohibited by § 474 and § 504 is making realistic depictions of money with no intent to defraud or use as genuine. Without any intent requirement, these statutes do not further the goal of preventing and punishing counterfeiting. While the government should have many weapons against counterfeiting, it is not clear why it needs a weapon which does not hit the target; that is, why it needs § 474 when § 471 and § 473 already clearly encompass those intending to counterfeit.

Furthermore, much of the expressive activity falling within § 474 and § 504's scope would not present a great danger of being used fraudulently anyway. By being communicative, the depiction gives itself away as not being "real money." Counterfeiters only succeed in their fraudulent endeavors when others accept their work as unquestionably genuine. A one-sided bill with a green thumbprint on the back or an oversized $30 bill with Nixon's picture on it are not good candidates for acceptance as actual currency, and even less so is a painting of money on canvas or a photograph of money on a magazine cover. Of course, there are always those who would fall for the "proverbial wooden nickel,"[172] but most areas of the law recognize that individuals have some responsibility to look out for themselves. J.S.G. Boggs himself has rather uncharitably summed it up as follows: "[L]aw is supposed to be based on the standard of a reasonable person, not a moron in a hurry."[173] Most artistic or political depictions of currency would give themselves away as art work or as political statements and thus fail as successful counterfeits.[174]

Conversely, if the depiction lacks communicative characteristics, it is unlikely to be perceived as communicative. Under the test established in *Spence v. Washington*,[175] in order for activity to be protected by the First Amendment, the actor must intend to communicate *and* a reasonable observer must perceive the actor to be communicating. Something about the depiction must "give itself away" as not being just money or counterfeit money.[176] Precisely this need to be understood as communicative makes the depiction unlikely to be used fraudulently. If it were good enough to use fraudulently, it

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170. 18 U.S.C. § 471 (prohibiting the making of counterfeits, whether or not they are actually passed as currency).

171. *Id.* § 473 (prohibiting use of counterfeits, regardless of who produced them).

172. Regan v. Time, Inc., 468 U.S. 641, 702 n.6 (1984) (Stevens, J., concurring and dissenting).

173. J.S.G. Boggs, *Who Owns This?*, 68 CHI.-KENT L. REV. 889, 898 (1993).

174. Anecdotal historical evidence exists which indicates that the Secret Service has never been too selective about to whom it directs its attention. It is reported that in 1891 the Secret Service ordered a Philadelphia baker to desist from making cookies which looked like the Indian head cent. In 1924, the Secret Service seized a six-foot-long rug from a department store in Akron, Ohio because its design was that on the $1 bill. GLASER, *supra* note 24, at 112. Attempting to pass off a magazine cover as real currency looks like a sophisticated heist compared to the ludicrous image of defrauding someone with a cookie or a rug.

175. 418 U.S. 405 (1974).

176. Particularly with communicative activity that has a more common noncommunicative purpose, the context of the communication is crucial to its being perceived as communicative. These "contextual indicia" of communicative activity include time and locale of the conduct, current events, media attention, verbal or written explanation, and use of recognized symbols. Many examples of currency being used communicatively satisfied these contextual indicia, making the communicative nature clearer. Boggs offers a verbal explanation of his work; *Sports Illustrated* chose its magazine cover as the locale for its communicative conduct. Both of those indicia should tip off the reasonable observer that the speaker did not intend the depiction to be accepted as real. Magid, *supra* note 92, at 488-91.

would be hard for a reasonable observer to perceive it as communicative. Since the expression which § 474 and § 504 target is not likely to be used fraudulently, the statutes are not narrowly tailored relative to the goal of preventing and punishing counterfeiting.

In sum, when the interest is framed as preventing and punishing counterfeiting, it is not only substantial, but also compelling. The problem with § 474 and § 504 is at the means level because regulating depictions of money created by those with no intent to use the depictions fraudulently and, indeed, with only a small possibility of fraudulent use at all, does not meaningfully advance the interest in preventing counterfeiting.

B. The First Amendment Interest

The countervailing side of the balancing test requires an assessment of the First Amendment interests at stake. The First Amendment interests can be divided for analytical purposes into two parts: first, the artistic and symbolic power of money; and second, the sociopolitical meaning of money.

To illustrate the First Amendment value of images of currency in artistic endeavors, this Note briefly reviews a specific movement in art history in which currency figured prominently. Representations of currency have a long history in American art; they are "peculiarly American, as is their irreverent and at times provocative tone."[177] The most prominent and cohesive set of money painters in American history worked during the last half of the 19th century, beginning with painter William Michael Harnett. These painters employed a particular style of still life called *trompe l'oeil*.[178] Money represented a natural subject for these painters since they painted during the period immediately following the Civil War, known as the "Greenback Era," when currency was one of the most hotly-debated political issues of the day.[179] Not only did money occupy the political agenda, but the social milieu of the time elevated money and the pursuit of it to a very high level, leading this to be called the "Gilded Age."[180]

Harnett's work prompted a series of *trompe l'oeil* money painters to come after him. Harnett did not paint very many money paintings himself, however, because he was temporarily detained by the Secret Service and ordered not to paint any more pictures of money.[181] John Haberle picked up Harnett's legacy of money painting, but did so with a much sharper political and social bite. Haberle was also renown for his exceedingly high level of skill at *trompe l'oeil*, often fooling even the most discerning of art

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177. Edward J. Nygren, *The Almighty Dollar: Money as a Theme in American Painting*, 23 WINTERTHUR PORTFOLIO 129, 129 (1988).

178. *Trompe l'oeil* is a French term meaning "deception of the eye." *Trompe l'oeil* painting is characterized by a very high level of realism that fools the viewer into believing the objects in the painting are real rather than painted. ATKINS, *supra* note 2, at 140.

179. Nygren, *supra* note 177, at 129.

180. *Id.* at 130. The term "Gilded Age" is actually the title of a book by Mark Twain and Charles Dudley Warner in which the main character, Beriah Sellers, is a tireless promoter and advocate of so-called "easy money," money not backed by gold or silver, to finance his developments in the American West. UNGER, *supra* note 27, at 45. Other literature of the era reflected much the same concern with money and social status as is found in the paintings of the *trompe l'oeil* money painters, such as William Dean Howells' *The Rise of Silas Lapham* and Theodore Dreiser's *Sister Carrie*. Nygren, *supra* note 177, at 130, 136.

181. CHAMBERS, *supra* note 15, at 23.

connoisseurs.[182] Such skill not only caught the attention of the art world, but of the Secret Service as well. The Secret Service did not arrest Haberle, but visited his studio and told him to stop painting depictions of money. Unlike his more obedient elder, Haberle continued painting money even after the Secret Service's warning.[183] In fact, Haberle's work after the Secret Service's visit veritably flaunted the potential counterfeiting problems supposedly presented by his paintings. In his paintings *Can You Break a Five?* and *U.S.A.*, Haberle painted pictures of currency featuring the actual warning against counterfeiting, which was at that time printed on the bills depicted in the painting.[184]

Roughly the same time as Haberle was painting, Alfred Meurer was also painting *trompe l'oeil* images of currency, but to less critical acclaim and notoriety. Like Harnett and Haberle, Meurer attracted the attention of the Secret Service. The Secret Service ultimately confiscated his painting entitled *My Passport* which featured pictures of $5 and $20 bills.[185] Meurer was undaunted by this confiscation and continued painting money.[186]

At the end of the 19th century, New York City painter Victor Debreuil continued in the money painting footsteps. Debreuil's work was heavily critical of money's role in the society of his time, particularly the great accumulation of wealth in the hands of a few, such as railroad magnates.[187] Though the Secret Service never arrested Debreuil, they confiscated several of his paintings, and destroyed at least one of them.[188]

This brief sketch of America's 19th-century *trompe l'oeil* money painters demonstrates that the image of currency can and does serve a crucial role in artistic expression. Realistic depictions of currency provided the foundation for an entire era of American painting. During their time, these artists provided graphic commentary on the role of money in the world around them.[189] Today, they provide an extra dimension to the historical understanding of that era. The latter part of the 19th century saw never-before-experienced accumulations of wealth and an obsession with money, particularly paper money. "Nothing in American painting more literally embodies that preoccupation than paintings of currency. Although there are earlier currency pieces in European art, there

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182. Stories of Haberle's outstanding skill at "fooling the eye" abound in the art history of this era. Haberle's 1890 painting entitled *Grandma's Hearthstone* featured a *trompe l'oeil* rendition of a fireplace which was so realistic that the owner of the painting's cat would curl up next to it to sleep. *Id.* at 36. While a cat may be easy to fool, Haberle's painting, *U.S.A.*, depicting a well-worn one dollar bill, even fooled the art critic of Chicago's *Inter-Ocean* newspaper. *U.S.A.* was in Chicago for an exhibit and the art critic denounced it as a fraud claiming it was only fragments of a bill pasted onto the canvas. Haberle immediately traveled to Chicago to defend his honor, and demonstrated that the work was indeed painted. ALFRED FRANKENSTEIN, AFTER THE HUNT 117 (1969).

183. CHAMBERS, *supra* note 15, at 25.

184. *Id.* at 31-32. The bills contained this printed warning:

> Counterfeiting, or altering this note, or passing any counterfeit or alteration of it, or having in possession any false or counterfeit plate or impression of it, or any paper made in imitation of the paper on which it is printed, is punishable by $5000 fine or 15 years at hard labor or both.

Id.

185. *Id.* at 47. The painting was ultimately released for exhibition on the condition that Meurer paint red lines through the pictures of currency. *Id.* The similarity between this condition imposed by the Secret Service in the 19th century and the new regulations issued by the Secret Service, requiring the words "non-negotiable" on all images of currency, is striking. *See supra* note 51 and accompanying text.

186. CHAMBERS, *supra* note 15, at 47.

187. Nygren, *supra* note 177, at 143.

188. CHAMBERS, *supra* note 15, at 68; Boggs, *supra* note 3, at 127.

189. Nygren, *supra* note 177, at 130.

is no precedent for the flood of such works in American art of this period."[190] Not only do these paintings provide historical insight, but they also define a distinctly American aspect of art history, an artistic movement with themes still very relevant today:

> [T]here is more to trompe l'oeil money painting than meets the eye. It is not only an art of mischievous replication; it is also an art of real content. It possesses an iconography, a structured symbolic language, that draws from, and addresses, the events and beliefs of a historically verifiable culture. That this slice of cultural history happens to be one of our own does not make this any less legitimate an observation. A democratic, middle-class, American iconography is still an iconography, and money painting plays an important role in its development.[191]

American artists' interest in painting currency did not end at the close of the last century. As already discussed, J.S.G. Boggs has almost exclusively dedicated himself to money painting. Depicting currency also caught the attention of modern art icon Andy Warhol. The majority of Warhol's work with the image of money were photo silkscreens rather than paintings. He silkscreened the image of both sides of the $1 bill, and then reproduced it numerous times on large pieces of cloth. Later, he moved on to depictions of money in pencil and watercolor.[192] Warhol's depictions of currency, although not intended to achieve the *trompe l'oeil* level of realism, were still in color, close to actual size, and quite realistic. There is no record of the Secret Service ever having investigated Warhol's depictions of currency.

Money represents a socially and politically powerful symbol. Even Justice Stevens, who advocated upholding the entirety of § 474 and § 504 in *Regan v. Time, Inc.*, recognized the power of currency as a symbol: "The familiar image of United States currency became a powerful symbol to the point of perhaps becoming somewhat of a modern icon."[193] If money were not a powerful symbol, *trompe l'oeil* money painters would not have depicted it, *Sports Illustrated* would have chosen another cover photograph for its February 16, 1981, issue, and Boggs would draw something else. The image of money is a powerful symbol because the reality and substance of money is a powerful force. An extensive discussion of the sociological implications of money exceeds the scope of this Note,[194] but a brief discussion of money's social and political aspects will help establish why its image is a powerful symbol and why the ideas expressed by that symbol have political and social value under the First Amendment.

Money in modern society is "a sociological phenomenon, a form of social interaction among people."[195] As Boggs emphasizes in his work, the value of paper money depends

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190. WILLIAM KLOSS, MORE THAN MEETS THE EYE: THE ART OF TROMPE L'OEIL 29 (1985).

191. CHAMBERS, *supra* note 15, at 96.

192. ANDY WARHOL: A RETROSPECTIVE 160-67 (Kynastin McShine ed., 1989).

193. 468 U.S. 641 at 695 (Stevens, J., concurring and dissenting). Stevens' assessment of the symbolic power of money is nearly the same as that of J.S.G. Boggs, although the similarities in their points of view on the subject probably end there. Boggs wrote: "Money is, of course, a powerfully charged symbol, as complex and diverse as any religious icon." Boggs, *supra* note 3, at 99.

194. For extensive scholarly discussion of the sociology of money, see FRANKEL, *supra* note 161, and MONEY AND THE MORALITY OF EXCHANGE (Maurice Bloch & Jonathan Parry eds., 1989).

195. FRANKEL, *supra* note 161, at 16.

upon trust in one another and in the political institution issuing the currency.[196] Boggs does not seek to undermine that trust or even to criticize it. Instead, Boggs tries to make people recognize that the value of money is a matter of faith which ought to be consciously accepted or rejected.[197]

In addition to Boggs' rather esoteric discussions of trust and value in society, on a more direct level, money simply plays a major role in most aspects of life. From the most personal level to the national level, money changes people's lives. An extensive survey of attitudes toward money conducted in 1986 found thirty-seven percent of respondents reporting that they and their spouse had argued about money over the past twelve months, making money the source of most marital controversy.[198] On a larger scale, money has come to be an issue of increasing importance in national politics. The average cost of a successful Senate electoral campaign has reached $4 million and the average cost of a campaign for the House of Representatives is $600,000.[199] With this much money required to run for office, concerns naturally arise about the antidemocratic notion of buying one's way into office.

Even this cursory glance at the major effect money has on individuals and societies illustrates the broad range of possible statements to make with accurate depictions of money. The plaintiff in *Wagner v. Simon* must have believed that the image of currency provided a particularly effective vehicle for a protest of economic policy and corruption.[200] A picture of currency also provided a succinct and memorable way to express an idea about the corrupting influence of money in college basketball, as the editors of *Sports Illustrated* magazine recognized.[201] Because money can mean so many things, many of which lie close to the heart of democracy and the political process, relegating depictions of money to black and white and distorted sizes takes away a substantial part of a speaker's vocabulary. In sum, the interest at stake here is an artistic, symbolic, and sociopolitical image with great power to communicate a variety of ideas. Under any theory of the First Amendment, those interests merit strong First Amendment protection. The numerous examples of money's communicative effect also emphasize that

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196. Boggs v. Bowron, 842 F. Supp. 542, 544-45 (D.D.C. 1993); *cf.* FRANKEL, *supra* note 161, at 16 ("That paper money could become the instrument of the highest monetary function, and even be used as a store of value, was possible only in social groups closely knit by mutual guarantees for protection . . . .").

197. *Boggs*, 842 F. Supp. at 544-45. Boggs illustrates this point by showing how the physical trappings of money can confuse the issue of its value. His drawings look almost exactly like money, but have no value (other than what art collectors will pay for them). Thus, money must be valuable for some reason other than the fact that it looks like money. It is this conclusion which Boggs hopes people will reach during their transaction with him. MONEY MAN, *supra* note 4.

The issue of trust and money will probably become even more relevant as society undergoes another shift in the way money is used. Much like the paper money revolution during the Greenback Era, the decline of paper money may be the revolution of this age. The move to a "cashless society" has picked up speed in the past several years, with a 200% increase in the use of electronic transactions since 1986. Thomas McCarroll, *No Checks. No Cash. No Fuss?*, TIME, May 9, 1994, at 60. Goods and services ranging from fast food to utility service have converted to cashless electronic debit systems, and many financial analysts predict the advent of an all-in-one "smart card" with a computer chip containing an individual's financial data. In addition to raising complex privacy issues, the ascent of digital methods of payment and exchange will require an assessment of the issues of trust and value and how they apply to digital money. *Id.*; *see also* Albert B. Crenshaw, *Seeking the Card That Would Create a Cashless World*, WASH. POST, Apr. 3, 1994, at H1.

198. LEWIS YABLONSKY, THE EMOTIONAL MEANING OF MONEY 4 (1991).

199. Michael Ross, *Campaign Finance Reform May Be Clinton's Hardest Sell*, L.A. TIMES, June 9, 1993, at A23.

200. 412 F. Supp. 426, 428 (W.D. Mo. 1974), *aff'd*, 534 F.2d 833 (8th Cir. 1976).

201. Regan v. Time, Inc., 468 U.S. 641, 646 (1984).

§ 474 and § 504 are content-based, since it is precisely the depiction's communicative effect which they target.

Courts must also discern the degree of First Amendment abridgment caused by the challenged regulations. The regulation at issue here is § 504's color and size restrictions. Concededly, § 504 does not abridge expression as radically as possible since § 474's broad ban of all depictions of currency regardless of intent might have been left unmodified by § 504. However, the color and size restrictions still present a substantial abridgment.

Particularly with artistic expression, color and size matter a great deal since they are important avenues for artistic expression. Thus, depriving an artist of the ability to depict currency in color (its actual color or any other) and restricting its size seriously impedes artistic expression. With these color and size restrictions in effect and applied to artistic expression, the *trompe l'oeil* movement in painting as it applied to currency never could have happened. The objective was to create "the closest possible facsimiles of objects in order to play the visual games of illusion successfully."[202] Thus, on purely artistic grounds, the color and size restrictions would have almost completely abridged the *trompe l'oeil* money painting movement.

As for the social or political content of the paintings of the Greenback Era, the depictions would not have had the same impact nor made the same statement had they not looked like real money. The often critical and ironic views of money presented in these paintings relied on the artists' ability to arrange visual puns around realistic images of currency.[203] Without the depiction of realistic-looking currency, the statement would have been lost, or at least its force greatly diminished.

In terms of sociopolitical expression involving money, the color and size requirements also seriously restrict expression. Without an accurate depiction, the message may appear less serious or credible. Particularly in the case of J.S.G. Boggs, forbidding depictions in color or of the correct size would make the message of his work impossible. Boggs wants his audience to think about why they accept money, and to think about what it means for money to be genuine. If Boggs' bills looked completely different than actual currency, this would provide a superficial reason for the listener to reject the bill without having to think about Boggs' message. Boggs acutely understands the impact of the color and size restrictions on his work: "They want to turn my work into some kind of joke. By making my work larger or smaller or in some other color, they limit my vocabulary to the drab or to the comic."[204] Boggs' First Amendment interest is almost entirely abridged by the color and size restrictions of § 504.

Of course, one instance of a severe abridgment does not alone indicate that most expression will be abridged. However, it is plausible that expression involving depictions of currency would appear cartoonish and less likely to be taken seriously if depicted in only black and white and not close to actual size. The cover of *Sports Illustrated* would

202. CHAMBERS, *supra* note 15, at 15.

203. *See generally id.* (presenting many *trompe l'oeil* paintings and discussing how the various artists juxtapose other items against the currency such as newspaper clippings, postage stamps, playing cards, or weapons); Nygren, *supra* note 177, at 136-40 (describing Haberle's compositions).

204. Roberts, *supra* note 6, at B1.

certainly lose its visual impact if the bills flying through the basketball hoop were in black and white. Because the bills in the picture are real, in full color, and so numerous, the cover is shocking—which is the very effect desired by the magazine.

With examples such as Boggs and *Sports Illustrated*, it is plausible to believe that some artists or other commentators may have considered expressing an idea using the image of currency, but declined due to fear of violating these laws. This "chilling effect" is also an abridgment of speech, since the expressive depictions never come into existence at all. Expression using currency is abridged by being relegated to unrealistic depictions, or by being prevented from occurring at all.

Traditionally, the ad hoc balancing test makes some inquiry into whether alternative methods of expression exist. "[T]he availability of alternative channels for the speaker to reach the same audience with the same message . . . is a necessary part of the constitutional analysis when government abridges speech without regard to its expressive content."[205] One alternative to realistically depicting money is to instead use unrealistic images of currency in black and white and within the size limits. The reasons why that alternative constitutes a significant abridgment were discussed in the preceding section.

Another alternative which the proponents of these statutes might offer is that the same message could be expressed verbally instead of visually. For example, Boggs could write essays about his work (which indeed he has[206]) rather than rely on his depictions of currency to make his point. Likewise, *Sports Illustrated* could have just featured an article discussing the point shaving scheme at Boston College. The truism that "a picture is worth a thousand words" has earned its proverbial status by being so accurate. An image means something different than the words which describe it or define it. "A woman with long black hair and a strange smile" certainly does not accurately convey everything DaVinci's *Mona Lisa* expresses. Because there are so many aspects of the *Mona Lisa* which defy words, the thought can only be conveyed through an image. Thus, the suggestion that artists could verbally, rather than pictorially, express their thoughts provides no alternative at all. The thoughts they would express verbally are inherently different thoughts than they would express visually.

The proposed regulation requiring the words "non-negotiable" on depictions of currency[207] suffers from the same constitutional infirmities as a complete ban on color depictions. The "non-negotiable" requirement does not narrowly serve the government's interest. The artistic and political expression which has fallen victim to § 474 and § 504 "gives itself away" as expressive activity anyway, even without the words "non-negotiable." The cost of this proposed rule, in First Amendment terms, is great since requiring the words "non-negotiable" on all depictions of currency would often defeat the purpose of such depictions. The power of the *trompe l'oeil* money painters' and their modern counterpart, J.S.G. Boggs', work stems from the fact that the currency looks real, even if the context in which it is presented undercuts that realism. Not only artistic depictions of currency rely on realism. The powerful effect of the *Sports Illustrated* cover

205. TRIBE, *supra* note 71, § 12-23, at 982.
206. *See, e.g.*, Boggs, *supra* note 173; Boggs, *supra* note 3.
207. *See supra* note 51 and accompanying text.

photo showing $100 bills stuffed in a basketball hoop would have been diminished by the words "non-negotiable" on each of the bills.

In sum, the color and size requirements work a substantial abridgment of the First Amendment interests. They take away two particularly important modes of artistic expression—color and size. Further, they impede the artist's ability to communicate effectively with images of currency by relegating such depictions to nonrealistic ones.

CONCLUSION

Sections 474 and 504 regulate expression based on content and fit into none of the unprotected categories of speech. As such, the statutes should be declared unconstitutional. Even if subjected to the ad hoc balancing test reserved for content-neutral regulations of speech, § 474 and § 504 must fail. These sections ineffectively serve the government's interest and seriously impede protected expression.

One option for curing the First Amendment problems would be simply to repeal § 474 and § 504 altogether. Doing so would not deprive the government of opportunities to prosecute those intending to do wrong since those people making money with intent to defraud fall within other sections of Title 18. If § 474 and § 504 remain in their current form, explicit exceptions ought to be made for those engaging in political and artistic expression without any intent to defraud. Under either of these options, the government's interest in punishing and preventing counterfeiting continues to be served by § 471 and § 473, but the First Amendment interest in depictions of money are also protected.

The government has an undeniably strong interest in maintaining the reliability and stability of its currency, but censoring expression that does not intend to counterfeit or defraud is not constitutionally sound. Furthermore, § 474 and § 504, as applied to artistic and political expression, do not effectively serve that interest. If § 474 and § 504 no longer applied to artistic and political expression, the government would not lose anything valuable in its fight against counterfeiting. What would be gained, however, is the continuation of the American tradition of using images of money to make statements about society, about art, about politics, or about money itself. Money talks and everyone should be able hear what it has to say.