



VALUES

Raymond Waters

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19 JANUARY - 29 FEBRUARY, 2008

VALUES

With essays by Michael Zryd
and Norman Dorsen

CRAIG SCOTT GALLERY

FOREWORD: THE ART OF AMERICAN VALUES

Raymond Waters' first solo show – the "VALUES" exhibition at Craig Scott Gallery (January 19 – February 29, 2008) – engages with the values and symbols of American life and of the United States' presence in the world.¹ Each work simultaneously affirms and queries those values and symbols by making art from raw materials of American cultural identity. In "VALUES," Waters transforms vintage film reels, flag fabric, US currency, and tabloid newsprint into remarkably balanced works – powerful both conceptually and aesthetically. "VALUES" focuses on notions of allegiance and belonging, on the secular sacred and desecration, on the communication and defence of cultural (including political) values, on the struggle between the reflective and the hollow in public discourse, and on the interaction of American worldviews with universal experience.

The majority of the pieces in the "VALUES" exhibition – eleven in all – are created by Waters from the interaction of film and light. In a process of controlled spontaneity, Waters generates works that resonate with the spirit of Jackson Pollock's 'drip' works, both in result and process.² As Jackson Pollock so famously did and as did the Navajo sand painters who inspired Pollock, Waters works by standing over and moving around his canvas as he lays down his image.³ For the film works in which the light is from LED bulbs, Waters carefully prepares his canvas: first stretching it, then priming it, and finally painting it with either white oil paint or 12 karat gold leaf. He then engages in random, while still intuitively guided, drilling of holes for LED lights to be inserted from behind the canvas. The LED lights (for example, 70 lights in *The Skeleton Dance* [1929] and 535 lights in *King Kong* [1933]) are inserted, the canvas is then laid flat on the floor face up, and the lights are turned on. At this point, Waters lets the film roll off its reel and spool onto the canvas while he moves freely – again, both randomly and intuitively – around the canvas. At times he allows the weight of the reel to direct his movement and at times directs the reel in response to the evolving shape of the work as it gradually builds up on the horizontal canvas – like a dancer, alternately guiding and being guided by his dance partner.⁴ When the reel has fully played out, Waters affixes the film in a variety of places, carefully retaining the film intact where it has fallen on the canvas. Waters then seals the canvas inside a Plexiglas case to produce the final work.⁵

The precise interaction between the aesthetic and a conceptual planes of Waters' film works depends in each work on a range of factors from the physical properties (colour, gauge, length) of the film used, to the subject-matter and cultural referents of the film, to the source, intensity, and density of lighting selected for the

particular work. Following on from the opening observations, each work also embodies a tension at the level of social commentary about values (especially about American or Americanized values), a constant tension between homage and critique. In conversation with the works around them (notably Waters' flag works, discussed below), various film works interrogate the relationship between film and foundational values like freedom, democracy, equality and, now, security in American narratives. However, of at least equal significance is a reading of the works that emphasizes a difference between the film works and the other works in the show, albeit within an overarching thematic project concerning the relationship between objects (especially as commodities or as commodified) and value. Such an understanding arises from an interrogation of the value placed on the particular film media that Waters has chosen for these works (8mm and 16mm films, as well as one 35mm trailer). The essay in this catalogue by film scholar Michael Zryd, Associate Professor of Fine Arts at York University, explores this dimension in some depth.⁶

If Waters' film works draw life from their open-ended meaning(s), Waters' flag works – three in total (*New Orleans August 2005*; *You Are Either With Us or Against Us*; and *White Flag*)⁷ – are positively redolent with ambiguity. The flag works involve reconstituted American flags undulating against a backdrop of pure white gold painted on canvas. "Reconstituted" refers to the fact that the flags have first been shredded by Waters into strips before being put back together as new – and, paradoxically enough, renewed – objects. Respect embedded in critique, reverence alongside irreverence, the sacred faced with sacrilege, the emotive with the reflective, preservation within destruction, each work oscillates between these various poles and, as such, embodies the debates about values alluded to in the titles of the pieces.

The normative stakes signaled by Waters' flag works encompass both the symbolic significance of the American flag and a host of questions for which the flag⁸ as both image and physical object serves as a sort of stand-in: patriotism, inclusion, loyalty, constitutionalism, freedom (including the freedom to transgress), hope, and so on, as well as connected themes such as militarism, imperialism, and social stratification. At one further remove, the subject of Waters' works can also be understood as being not (only) the American flag but (also) the American flag in art – that is, the Stars and Stripes as already appropriated by contemporary art as well as contemporary art of the flag as already appropriated in popular imagery. For one cannot but draw a straight line through history that links Waters' works with Jasper Johns' 1950s flag works. It is also this icon and not simply the flag 'itself' as icon that is addressed by Waters.⁹ And we can expect that perceptual clashes over the meaning of Waters' work will parallel (while never replicating) the debates over what the Johns flag works meant, should be taken as having meant, now mean, or should be taken as now meaning.¹⁰

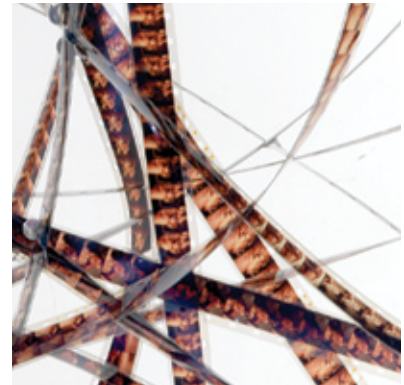
In the same way that medium categorically distinguishes what Waters has created with celluloid and light sources from what Pollock created with paint and enamel, the use of actual flags as medium (layered on

top of gold, with all of its own symbolic and metaphoric meanings) categorically distinguishes Waters' flag creations from those of Johns. There are also, of course, contextual features beyond medium that render Waters' works distinct (such as that the works in "VALUES" are produced in a different era with distinct societal and geopolitical backdrops framing both their creation and reception, that Waters leans even more toward the conceptual by choosing titles that serve as textual interlocutors with the works, that the works are produced not by an American but by a Canadian, and the fact that Johns and Pollock created what they created). One effort to take this interplay of concept and context seriously is the inclusion in the catalogue of an essay by a leading American law professor and civil liberties advocate, Professor Norman Dorsen of New York University, on the contemporary discourses of protected values that surround the issue of desecration of the American flag.¹¹

The connection of the "VALUES" exhibition to Pollock and Johns is not only a substantive one. The show also represents what might be called a planned happenstance. It was originally planned to take place some time in late 2007 but then ultimately scheduled for January 2008 in order to pay a more obvious kind of art-history tribute to the work of these two great American artists for whom 2008 marks a significant anniversary. The vernissage of "VALUES" is precisely on the eve of the 50th anniversary of the opening of "Jasper Johns – Paintings" (January 20, 1958, Leo Castelli Gallery, New York), which was Johns' first solo show (and a show in which several of his iconic flag works were exhibited).¹² This year – 2008 – is also the 60th anniversary of the year that is generally recognized as the single most important year in the development of Pollock's signature 'drip' paintings including *Number 1A, 1948* (1948), which was the first Pollock painting acquired by the Museum of Modern Art (in 1950).¹³ As well, that year – 1948 – was the year of Pollock's first solo show of works produced since he had evolved his path-breaking techniques.¹⁴

Thus it is that the probing of values in Raymond Waters' inaugural solo show takes on added significance in view of the connection to two central exponents of post-war American art and to a legacy that both announced and contributed to new understandings of contemporary values, in and through art. Nor should we ignore that the work of Johns and Pollock helped accelerate debates about the value of art itself, leading eventually, through Warhol and others, to an era of simultaneously ironic and mutually subversive relationships between art and commodity (a long moment in which we still find ourselves). By including the non-flag and non-film work *Five Hundred Dollars* in the show (as well as by calling on the seductive beauty and power of white gold in the flag works, and in some of the film works), Raymond Waters reminds us that works of art about values can never avoid turning their gaze back on themselves.

Craig Scott*



Raymond Waters

by Michael Zryd*

Like much conceptual art, Raymond Waters's work plays with the tensions that operate between objects and the social, political, and cultural discourses that surround them and invest them with meaning. Waters's boxes showcase how value is attached to particular objects, upon which is projected monetary, patriotic, and cultural value – and of course, the commodity value that is artificially generated in the art market. In the case of *Five Hundred Dollars* (2006), which presents shredded US currency, Waters points to the remarkable parallels between currency and art objects apart from their shared relationships to commodification. Like a traditional painting, each dollar bill is authorized by signature (the Treasurer of the United States and the Secretary of the Treasury). Like an art multiple (e.g., a lithograph), each dollar bill is individually numbered. These guarantees of authenticity and uniqueness further index monetary value, which is in turn a symbolic value (for a particular fraction of gold held in Fort Knox, for instance).

In the same way that monetary value is projected upon the little pieces of paper that make up currency, so enormous patriotic value is projected onto the US flag. The flag is a state-sanctioned configuration of stars and stripes that, unlike the dollar's specifications of size (15.3 x 6.5 cm), paper type, and printing process, can be scaled to enormous extremes and printed on practically any receptive surface (textiles, paper, stickers, coffee mugs, etcetera). The massive legislative energies expended in the U.S. over the decades on attempting to make it illegal to destroy representations of the flag (or units of US currency, for that matter) indicate the intensity of these projections of symbolic value onto simple objects. Waters's deliberate "reconstitutions," whether wrought by shredding currency only to rearrange the shreds on a canvas surface or, as in *You Are*

Either With Us Or Against Us (2007), by custom-ordering a black and white stars and stripes only to cut and reweave it, point to the absurdities of these projections by bringing us back to the brute simplicity, and surprising fragility, of the "originals."

Waters's film works comprise the majority of the pieces in the "VALUES" exhibition. While sharing a similar strategy of appropriation and reconfiguration, these film works invert the trajectory of value mobilized by the currency and flag works.¹

Within the economies of value that encircle the kinds of film prints so meticulously uncoiled and spooled in Waters's film works, the film print is the poor cousin. What is valued in film, both culturally and financially, is located at the opposite ends of a film print's production and use. The first is the negative, made by film artists and studios, from which multiple positive film prints are struck. These negatives are preserved in archives and function as the "original" film object. The second is what film audiences pay for when they attend theatrical screenings: the screen story and spectacle that is enacted when the film print is "performed" by film projectors to create the illusion of movement that animates the static strip of individual film frames. Literally, the projection of light through the film print creates monetary, and in turn perhaps cultural, value for the narratives produced through this process.

But the film print has rarely been valued for its own sake. Indeed, commercial film prints have always been subject to physical violence. Most commercial film prints are destroyed by their distributors (the practice known as chain-sawing) after first-run screenings in order to avoid pirating. The 16mm and 8mm versions that Waters uses in all but one of the works are even more devalued in the commercial realm, even as they performed an important social function by virtue of where they were screened before the video tape and then DVD eras.² Whereas the commercial theatrical standard is the 35mm film print, 16mm and 8mm gauges were largely reserved for schools, colleges, and community centres, and more private contexts of pornography (e.g., *Stag Porn (1970's) 8mm* [2007]).³ Especially compared to the preciousness of art objects, not only are film prints anonymous but they are increasingly treated as disposable as libraries and universities dispose of 16mm and 8mm prints in favour of DVDs. Film prints are, in fact, close to mechanical art multiples (e.g., like posters and commercial reproductions styled as 'lithographs' even though they bear no relationship to true artist-created lithographs starting from stone slabs), including the extent to which, like films prints, such reproduced images will often not be numbered or signed. But it is also true that, over time, some prints occasionally acquire rarity and hence commercial value, as original negatives are lost or as Kodak or Fuji discontinue print stocks. Also, while 16mm and 8mm copies of 35mm original films rarely become valuable outside amateur collectible circuits, they are becoming increasingly rare as digitalization has resulted in their disposal. The activities of amateur collectors come to approximate more and more the activities of art collectors who focus not necessarily on aesthetic value but on saving the anachronistic from total disappearance – whether that collecting impulse stems from a desire to invest in the rare (with perhaps

an expectation of future profit from that rarity) or by a desire to preserve cultural history, or both.⁴

Hence the interest of Waters's treatment of these vintage film prints. Rather than destroy these objects, Waters respects their material density, and preserves the wholeness of the strip. The LED lights behind the prints in many of the works ironically evoke the glamour of the marquee although, appropriately for the 'amateur' media of 16mm and 8mm film, using hardware store holiday lights. Other prints are mounted with light boxes, where backlighting results in a different aesthetic in relation to colour and a greater awareness of the fact that film consists of a series of individual frames that the viewer is invited to inspect close-up. But, as with his other work, loaded cultural and even racial battles are in play, evoked in the titles of the films he chooses. *King Kong* and *Little Black Sambo* still spark sharp racial anxieties, though once again attenuated from the actual objects (the 16mm and 8mm prints) that Waters unrolls onto the canvases that are later encased in their Plexiglas display cases.⁵ Similarly, the copyright battles waged by the Disney corporation to protect Mickey Mouse and the early Disney cartoon *The Skeleton Dance*, as well as the campaigns from industry against Dr. Seuss' *The Lorax* with its critique of environmental destruction and commercial greed, are so much *sturm und drang* in Waters's seemingly innocent treatments.

Waters's film-based mixed media pieces must also be considered in relation to the tradition of found footage or recycled filmmaking, in which pre-existing footage is reconstituted into new works. Such works by other artists often enact the traditional work of collage forms, using strategies of juxtaposition and montage to create disjunction (Dada), the uncanny (Surrealism), and/or political critique, especially when images are taken from the mass media (e.g., Joseph Cornell's *Rose Hobart* [1936], Bruce Conner's *A Movie* [1958]). Some re-present entire films in the tradition of Duchamp's readymades (e.g., Hollis Frampton's *Works and Days* [1969], Ken Jacobs's *Perfect Film* [1986]). Finally, there are some works, like those of Waters, that take films out of the projector and lay them out in space in order to emphasize their materiality. Peter Kubelka and Paul Sharits have laid out their mathematically organized films in grid formations in lightboxes while Canadian Richard Kerr's *Collage d'Hollywood* (2003) is woven onto diamond-shaped looms. These artists tend to use the static representation of their films to foreground formal aspects of the projected equivalent. Kubelka's black and white frames mimic a musical score. Kerr's chemical processing and painting of the filmstrip, which increases the density (and interest) of the Hollywood trailers he uses as original material, is further layered by the weaving overlaps in the light box. But these treatments of the image ultimately emphasize the flatness of the filmstrip.

In contrast, Waters's Plexiglas enclosures both literally contain and foreground the playful sensual curviness of the film strip, and its capacity to loop, tangle, and unwind. This emphasis on the film object (and, more broadly conceived, the film medium) – as opposed to the film image – strengthens the conceptual and political critique inherent in Waters's work: what makes these brute objects so susceptible to censorship, social outcry, and mechanisms of political and economic control?



Flag Desecration in Courts, Congress and Country*

*Norman Dorsen***

The issue of flag desecration will not go away. For two decades the Supreme Court did its best to avoid deciding whether the First Amendment protected the burning of an American flag as a form of political protest, but in 1989 it could do so no longer. And when it decided, by a 5-4 majority in *Texas v. Johnson*, that a flag burner was constitutionally protected, powerful forces were unleashed to reverse the ruling. The issue is still with us.

I. The Background

In view of all the emotional attention that the flag now receives, it is striking that it played a small role before the Civil War. Outside of the Fourth of July or Washington's birthday, little attention was paid to it. Even public schools did not fly the flag at that time.

Although a flag act was passed in 1818, which specified that its stripes should be horizontal, "[e]arly Congresses discussed the national flag infrequently and with marked indifference." The Civil War was the turning point, with veneration for the stars and stripes – in the North only, of course – becoming one feature of a new sort of patriotism. Toward the end of the 19th century, partly as a reaction to the increasing use of the flag as a commercial symbol, a flag protection movement grew. This resulted in statutes passed by every state that typically banned putting marks on a flag, or "publicly" mutilating, defacing, or casting contempt on

the flag "by words or act." [Following the lead of the Supreme Court in a 1907 decision], the courts upheld prosecutions for desecrating the flag in many states, with most of the cases involving political protests rather than commercial uses and the bulk of them clustered during the two World Wars, when patriotism was heightened.

But in 1943, in one of the turning points in Supreme Court history, the Court ruled that, under the First Amendment, school children who were Jehovah's Witnesses could not be penalized if they refused to salute the American flag because of religious or conscientious scruples. The *Flag Salute* case presents this question: If someone cannot be punished for showing disrespect for the flag by refusing to do something, can a person be punished for showing disrespect through doing something, specifically the burning or mutilating of the flag? For about 25 years the issue lay dormant, but in April 1967 a flag burning in New York's Central Park during an anti-Vietnam War demonstration attracted wide attention. Within three weeks, more than a hundred bills were introduced in Congress to outlaw flag burning, and the first federal law was overwhelmingly passed in 1968, making it a crime "knowingly" to cast "contempt" upon "any flag of the United States by publicly mutilating, defacing, defiling, burning or trampling upon it." ...

The 1968 law never reached the Supreme Court. But another incendiary issue was decided that year – whether a young man named David O'Brien could be legally convicted for burning his draft card in protest against the war. By an 8-1 vote the Supreme Court said yes, in a three step analysis that bears on flag burning. First, the Court refused to look at the motive of Congress in passing the law that criminalized draft card burning. Second, the Court said, expressive action or symbolic speech – like draft card or flag burning, or union picketing – would be treated differently from "pure" speech. In symbolic speech cases the government need not demonstrate a "compelling interest" to punish the speech – the usual First Amendment test; it need only show that it was advancing a "substantial" policy reason unrelated to the suppression of free expression. Third, under this test, the draft card law was valid because the government had a substantial interest in making sure that all draft registrants had their cards with them at all times.

Applying this reasoning to statutes punishing flag desecration, the central question is whether the government has a substantial interest unrelated to suppression of free expression to punish those who desecrate the flag.

Between 1969 and 1974 the Supreme Court considered several flag cases but found various reasons for not deciding this question. ... This finally occurred in 1989.

II. *Texas v. Johnson*

The case began at the 1984 Dallas convention of the Republican Party when members of a group called

the Revolutionary Communist Youth Brigade protested the planned renomination of Ronald Reagan. Justice Brennan's opinion for the Court described what happened when the demonstration ended in front of Dallas City Hall:

Gregory Lee Johnson unfurled [an] American flag, doused it with kerosene, and set it on fire. While the flag burned, the protestors chanted: "America, the red, white, and blue, we spit on you." After the demonstrators dispersed, a witness to the flag burning collected the flag's remains and buried them in his backyard. No one was physically injured or threatened with injury, though several witnesses testified that they had been seriously offended by the flag burning.

Gregory Johnson was charged under a Texas law that prohibited intentionally desecrating a public monument, a place of worship or burial, or a state or national flag. The law defined "desecration" to mean a physical mistreatment of the flag "in a way that the actor knows will seriously offend one or more persons." A jury found Johnson guilty, and the case eventually went to the highest Texas criminal court, the Court of Criminal Appeals, where to general astonishment the conviction was reversed. The opinion, written by a highly conservative judge, concluded that Johnson engaged in symbolic speech, and that no asserted state interest supported the conviction. The statute therefore was "too broad for First Amendment purposes."

The case then moved to the U.S. Supreme Court, where it was argued and decided in the spring of 1989. Almost everyone thought the Texas high court's opinion would be reversed because the Supreme Court rarely takes such a case merely to affirm. Once again, the experts were confounded. Two generally conservative justices, Scalia and Kennedy, joined the three liberal justices, Brennan, Marshall, and Blackmun, to hold that the First Amendment protected flag-burning.

Justice Brennan's opinion quickly concluded that flag-burning was expressive conduct under the First Amendment and that there was no issue of public disorder in the case. He then turned to whether the Texas law would be governed by the usual strict First Amendment standard or the more lenient rule that the *O'Brien* draft card burning case specified for certain cases of mixed speech and action. Brennan said that the *O'Brien* test did not apply because Texas's interest in preventing breaches of the peace was not implicated on the record of the case and the interest in preserving the flag as a symbol of nationhood and national unity was "related to the suppression of expression." Unlike the *O'Brien* draft card case, where the government had a governmental interest to make sure that draft registrants possessed their cards, Texas's purpose was simply to censor expression that offended. In a critical passage, Brennan said that to punish Johnson in these circumstances would violate "the bedrock principle underlying the First Amendment" that "the Government may not prohibit expression of an idea simply because society finds the idea itself offensive

or disagreeable.” ...

There were dissenting opinions by Chief Justice Rehnquist and Justice Stevens, written with unusual passion. The reason for this was not the theoretical nature of the First Amendment issue, but rather that the American flag was at the heart of the controversy. To many, the flag reflects all that is good about the country or, as Justice Stevens wrote, the flag represents “nationhood and national unity” and the “ideas that characterize the society . . . as well as the special history that has animated the growth and power of those ideas.” The intentional defacement of that symbol burns harshly into the minds and hearts of those who share this view. Justice Oliver Wendell Holmes was fond of saying that “we live by symbols,” and if this is so there is hardly a more emotive symbol than the flag. ...

Chief Justice Rehnquist and Justice Stevens sought to avoid the implications of the fact that a symbol conveys an idea. Rehnquist said that the flag is not “simply another ‘idea’ or ‘point of view’ competing in the marketplace of ideas” because “millions and millions of Americans regard it with an almost mystical reverence.” He recalled at length how at Iwo Jima, in the Second World War, U.S. Marines fought thousands of enemies hand to hand and finally reached the top of Mount Suribachi, where they raised the flag. That ascent, he pointed out, cost nearly 6,000 American lives.¹ ...

The dissenters, following Texas, maintained that the flag as a symbol of nationhood and national unity should survive because this interest is “compelling” and the law was aptly tailored to further it. ...

...[F]lag burning should be protected expression because it quintessentially represents political dissent, as Professor Steven Shiffrin has pointed out:

The flag-burning prohibition is a naked attempt to smother dissent. If we must have a “central meaning” of the First Amendment, we should recognize that the dissenters – those who attack existing customs, habits, traditions and authorities – stand at the center of the First Amendment and not at its periphery. Gregory Johnson was attacking a symbol which the vast majority of Americans regard with reverence. But that is exactly why he deserved First Amendment protection.²

III. The Political Struggle after *Johnson*

But what may be true as a matter of constitutional principle is often not accepted by the public. The *Johnson* decision was met with virtual hysteria – by the people, in the press, and in the Congress. Immediately there was a nation-wide movement to “protect the flag” by overturning the decision. ...President George [Herbert Walker] Bush and many members of Congress of both parties condemned the ruling, and scores

of proposals for a constitutional amendment to overturn it were introduced in Congress. ...

Almost everyone in Congress agreed that something had to be done, with the vast majority urging an immediate constitutional amendment to permit punishment of flag burners. A few maintained that a federal statute might be drafted that would pass muster with the Supreme Court – after all, only one more vote was needed to reverse the Johnson result. Despite the urgent mood, the issue might have faded away if President Bush had not made a major speech in favor of a constitutional amendment. Bush's reaction to the decision in *Johnson* in 1989 was the culmination of an electoral strategy he adopted during his 1988 presidential campaign against Michael Dukakis. Bush had visited flag makers in Ohio and New Jersey and surrounded himself with flags at every opportunity. ...

The critical question in the summer of 1989 was whether there were enough votes in both Houses of Congress to pass a constitutional amendment by the necessary two-thirds margin, or whether Congress would have to settle for a statute that would be immediately tested in the courts. The proposed amendment was simply worded: "The Congress and the States shall have power to prohibit the physical desecration of the flag of the United States." ...[T]he amendment was spare; it merely prohibited "desecration" without defining it, as Texas and most other states had done in its laws. Presumably, Congress and each state could "enforce" the amendment according to its own view of what desecration meant[.] ...

[In contrast to the proposed constitutional amendment], [t]he proposed statute ... was more detailed. It provided for punishment for anyone who "knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States," except for "any conduct consisting of the disposal of a flag that has become worn or soiled." It defined "flag of the United States" as "any flag . . . or any part thereof, made of any substance, of any size, in a form that is commonly displayed."³

In the summer of 1989, ... [t]here were three broad positions in Congress: those who favored doing nothing – that is, allowing flag desecration to go unpunished; those who favored a statute; and those who favored a constitutional amendment. ...

The third group, those favoring an amendment to the Constitution, ... said that nothing short of an amendment would do justice to the almost holy symbol of the American flag.

The Senate passed the statute and then rejected the constitutional amendment. It was rejected because the statute gave cover to senators who privately agreed with the Supreme Court, and because it took the wind out of the sails of pro-amendment senators since the Senate had now done something to criminalize flag burning.

In the end, the constitutional amendment was defeated in the Senate by a surprisingly large margin, receiving only 51 votes of the 67 required if everyone voted. The statute itself – the new Flag Protection Act or FPA – passed easily. The House vote was 380-38 and in the Senate it was 91-9, roughly a ten to one margin in each chamber.

IV. *United States v. Eichman* [1990]

President Bush favored a constitutional amendment, and therefore he refused to sign the new statute. But he didn't veto it either, which meant that the bill became law without his signature on midnight, October 27, 1989. Within hours flags were burned across the country. Eventually there were arrests and prosecutions, in which lower courts in Seattle and Washington, D.C. ruled that the Supreme Court decision in the *Johnson* case governed and the law was thus unconstitutional.

The statute soon was on the way to the Supreme Court. ...[T]he Court, again in an opinion by Justice Brennan, followed the *Johnson* precedent by an identical margin of 5-4. ...

V. The Constitutional Amendment

A. The Continuing Congressional Struggle

We have seen that in 1989 adroit management by the Democratic leadership in the Senate derailed the flag amendment by supporting the FPA as a substitute. Four times since then an amendment has been pressed in the Congress.⁴ While it has been defeated each time, sometimes narrowly, the pressure from its supporters has not abated.⁵...

1995. After the Republicans captured both houses of Congress in the 1994 elections, veterans groups and others who had seemed dispirited a few years before mounted a new campaign to reverse the *Johnson* and *Eichman* decisions. And this time they came close to victory. In June 1995, the House of Representatives voted 312-120 in favor, well more than the two-thirds needed, with House Democratic Leader Richard Gephardt and many other Democrats and Republicans switching their votes from 1990.

What accounted for the change? ...[One] important factor – because it seemed to reflect the mood in the country – was the emphasis that proponents placed on the general sense that there was something approaching a crisis in the body politic, and that the amendment was an effort by mainstream Americans to reassert community values and protest against the vulgarization of society.

But the amendment lost in the Senate, ... when supporters fell short with 63 out of the necessary 67 votes, increasing by five the number of votes they had gotten in 1990.⁶...

B. The Merits

... American history is unambiguous. Since the adoption of the Bill of Rights in 1791, as part of the original settlement between those favoring and those opposing the adoption of the Constitution itself, there have been only seventeen amendments. ...

Six amendments address individual rights: the three Civil War Amendments designed to bring former slaves into full citizenship (Amends. XIII-XV), and those amendments granting women the suffrage (Amend. XIX), outlawing the poll tax, which had been wielded to deny the vote to African-Americans (Amend. XXIV), and extending the ballot to 18-year-olds (Amend. XXVI).

All these amendments expand individual liberty. If the flag desecration amendment becomes law, it will be the first that restricts liberty, surely not a high recommendation....

History is of course relevant to the way in which the flag desecration amendment is viewed, but as is often the case the history is disputed. The opponents of an amendment point to a famous "desecration" of the English flag by George Washington during the early days of the Revolutionary War. On taking command of the colonial army, Washington removed both the cross of St. George and the cross of St. Andrew from an English flag. He then sewed six white stripes onto the red field, thus creating the 13 red and white stripes that remain to this day.

An even earlier incident culminated in *Endecott's Case*, in which a defacer of the English flag, in apparent protest against King Charles I, was successfully prosecuted in 1634 in the Massachusetts Bay Colony. Senate proponents of a constitutional amendment pointed to this case as evidence that flag desecration has long been punishable. Senate opponents stressed that the Bay Colony offered no protection to free expression and asserted that "[i]t should be inconceivable that the actions of the British colonial government repressing American patriots should be the model" for a proposed constitutional amendment in the late 20th century. It is difficult to give *Endecott's Case* much weight in the current controversy.

... A far more important objection to the present amendment than anything gleaned from colonial history is the vagueness of its key terms, "flag" and "desecrate," neither of which is defined in the text. ...

VI. Final Reflections

It may be true, as scholars have written, that *Texas v. Johnson* is an "easy case" and "obvious." But as events have proved since 1989, it would be an error to ignore the sources and implications of the persistent pressure to amend the Constitution to permit prosecution of flag burning and other forms of "desecration." This

suggests that the issue may one day be resolved politically but not settled sociologically or psychologically.

This is so although flag desecration has no discernible impact on the economy, on other pressing domestic issues, on national security, or on international affairs. But the constitutional controversy over the flag shows, once again, that we do not live by bread alone. There have been other recent struggles whether to remove the Confederate battle flag from the South Carolina Statehouse and, in Northern Ireland, over “what flag flies atop government buildings.” Cecilia O’Leary has persuasively observed that “[a]s long as there are structures of inequality, nationalism will remain conflicted over who speaks for the country, who has ‘a right to the flag,’ what memories and symbols deserve official recognition, and whether the nation-state will guarantee or limit the rights of citizenship.”⁷ ...

[T]he flag issue has had staying power, for two main reasons. The first is political. As Representative Jenkins stated in [a] dialogue [between Representative Jenkins and me] at a committee hearing, polls regularly show that a majority of the people want to “protect” the flag, and it is therefore understandable that some politicians would continue to press the matter for whatever electoral benefit can be derived.

The second reason cuts deeper. To many, flag desecration has become a metaphor for late 20th century permissiveness, self-indulgence and even anarchy, and it therefore must be opposed and stamped out. Professor Stephen Presser in 1998 congressional testimony supporting a flag amendment referred to the constitutional goal of “secur[ing] a certain baseline of civilized behavior” and said that “the personal liberty element of our tradition has, in effect, spun out of constitutional control.” ...

These impulses are underscored in the proposed amendment by the word “desecration,” which suggests a modern religious crusade rather than merely a conventional dispute over public policy. The despoilers of the flag, in this view, are not merely insulting one of the nation’s great symbols, but indulging in blasphemy, leading to the charge from opponents that such religious imagery “veer[s] close to idolatry because the concept of ‘desecration’ applies only to religious objects and not to other things, no matter how justly admired.” ...

These attitudes, when added to the broad patriotic feeling about the flag, explain the zeal for an amendment. But this very zeal promotes a special danger to the rule of law. In the hands of some prosecutors, the elastic amendment, if ratified and implemented by a congressional statute, could be a license to proceed against the politically unpopular, the counter-culture and the despoilers of our body politic that Professor Presser, among others, deploras. ...

NOTES

Notes on FOREWORD

- * Director, Craig Scott Gallery, Toronto; Professor of Law, Osgoode Hall Law School of York University, Toronto
- 1 Born in 1965, Raymond Waters is a graduate of the Ontario College of Art (now OCAD), and a student of media, communications, and the history of contemporary art. Until now, he has chosen to be a below-the-radar artist. His work – including pioneer work in New York involving bar codes as themes of his paintings – has been acquired by a select circle of collectors (primarily in the US, Canada, and Russia).
 - 2 When the Museum of Modern Art (MoMA) writes about Pollock's 'drip' work that "the image as a whole is dense and lush – yet its details have a lacelike filigree, a delicacy, a lyricism," they could also be describing Waters' film works, such as *The Gold Rush (1925) Charlie Chaplin, or The General (1927) Buster Keaton, or Martin Luther King Jr., From Montgomery to Memphis (1972)*. The Museum of Modern Art, *MoMA Highlights* 194 (New York: The Museum of Modern Art, revised 2004, originally published 1999). In terms of the phrase just employed to describe Waters' film works – "controlled spontaneity" – this could also apply to Pollock, who bristled at the notion that his drippings and pourings were entirely accidental (or, worse, produced while inebriated). Apart from the fact that "Pollock never touched alcohol when he was in his studio" (Ines Janet Engemann, *Jackson Pollock and Lee Krasner* 54 (Munich – Berlin – London – New York: Prestel Verlag, 2007), Pollock is recorded as saying that "I can control the flow of paint; there is no accident..." Ellen G. Landau, *Jackson Pollock* 152, 172, fn. t 258 (London, 1989) quoted in Engemann, *ibid.*, 54.
 - 3 In Pollock's own words: "...I prefer to tack the unstretched canvas to the hard wall or the floor....On the floor I am more at ease. I feel nearer, more a part of the painting, since this way I can walk around it, work from the four sides and literally be in the painting. This is akin to the method of the Indian sand painters of the West..." Kirk Varnedoe, "Comet: Jackson Pollock's Life and Work" in *Jackson Pollock* (exhibition cat., Museum of Modern Art, 1.11.1998-2.02.1999), New York, 1985, 53, as quoted in Engemann, *ibid.*, 54.
 - 4 Compare: [A]lthough "[Pollock's] works ...have neither a single point of focus nor any obvious repetition or pattern, they sustain a sense of underlying order. This and the physicality of Pollock's method have led to comparisons of his process with choreography, as if the works were the traces of a dance." The Museum of Modern Art, *MoMA Highlights* 194 (New York: The Museum of Modern Art, revised 2004, originally published 1999).
 - 5 For the works with light boxes, canvas is replaced by a Plexiglas sheet and no holes are drilled. Otherwise the process is the same.
 - 6 Michael Zryd, "Raymond Waters", *infra*.
 - 7 *White Flag* will appear in the exhibition but has not been completed at the time of going to press. Thus, no image of *White Flag* is reproduced in the catalogue. A fourth flag work, *New Orleans No.2*, will not be exhibited, but is available to view on request.
 - 8 And, indeed, for so many Americans, metaphorical meanings that have ossified into the literal in a way not dissimilar to fundamentalist readings of scripture.
 - 9 A half-century after the first flag works by Johns (in 1954-55), a journalist speaks of "the iconic status of [Johns'] *Flag*, one of his earliest works, an equivalent in American college bedrooms to the place occupied in British ones by Matisse's *Blue Nude*." Emma Brockes, "Master of few words" (Interview: Jasper Johns)," *The Guardian*, July 26, 2004.
 - 10 Johns himself recently offered some insights, along with journalist Brockes, into both contested meanings and the evolutions in meaning over time with respect to the 'same' object:
"Johns' most important work with signs is *Flag* [1955]. It is a collage of the Stars and Stripes made out of encaustic, ...which Johns dropped scraps of newspaper into and allowed to set. *Flag*'s challenge to the notion that symbols of state are fixed and inviolable – that they are not, under any circumstance, open to interpretation – was received at the time as blasphemous. The bits of newspaper symbolised the conflicting fictions upon which nations are built and the encaustic, an unstable material, was perceived by critics

to be a metaphor for the unstable nature of identity. These subtleties have largely been lost through the work's mass reproduction and *Flag* is now displayed, more often than not, as a straightforward expression of patriotism. 'But I wasn't trying to make a patriotic statement,' says Johns. 'Many people thought it was subversive and nasty. It's funny how feeling has flipped.' " (Brockes, *ibid.*)

- 11 An edited, and heavily condensed, version of the article, Norman Dorsen, "Flag Desecration in Courts, Congress and Country," (2000) *17 T.M. Cooley L. Rev* 417.
- 12 The Castelli press release contains the following commentary: "The subjects of [Johns'] work are simple visual symbols: targets, numbers from 1 to 9, or letters from A to Z, the American flag. ...The flag appears alone in red, white and blue; again against an intense orange field; or as a ghost of itself, its stars and stripes almost obliterated in a huge white canvas." Leo Castelli, *Press release: Jasper Johns – Paintings*, January 1958.
- 13 "'1948 was his miracle year. It was the year in which he really got into his stride with drip painting,' said Jeremy Lewison, the former director of collections at the Tate who has written a book on Pollock and is now an art consultant." Ed Pilkington, "Mexican Splashes Out Record \$140m for Jackson Pollock's Drops of Genius: 1948 work by American master becomes world's most expensive painting," *The Guardian*, Nov 2, 2006. The works created in 1948 include *Summertime: Number 9A* (1948), which work vaulted Pollock into the popular consciousness when reproduced as part of a two-page spread (with Pollock posing in front of the piece) in a 1949 *Life* magazine article entitled "Jackson Pollock: Is he the greatest living painter in the United States?" discussed in Ines Janet Engelmann, *Jackson Pollock and Lee Krasner* 52-54 (Munich – Berlin – London – New York: Prestel Verlag, 2007).
- 14 At the Betty Parsons Gallery in New York: Engelmann, *ibid.*, 93. Depending on the account, Pollock began his experimentation with the dripping, pouring and flinging techniques with which he is associated either in 1946 or 1947 (the latter year being the year when the acclaimed *Cathedral* [1947] was painted: *ibid.*, 46, 93. Pollock's first solo show (in his pre-drip period) was in 1943 at Peggy Guggenheim's short-lived Art of the Century Gallery: *ibid.*, 92.

Notes on Raymond Waters

- * Currently an Affiliated Scholar at Oberlin College in Ohio (2006-2008), Michael Zryd is Associate Professor in Cinema and Media Studies in the Department of Film, York University (Toronto), where he teaches American cinema, experimental film and video, documentary film, film theory and aesthetics. While earning his doctorate at New York University, he worked in New York at Archive Films and the Film-Makers' Cooperative and curated a Hollis Frampton retrospective at Anthology Film Archives. He is past President of the Film Studies Association of Canada.
- 1 Paralleling the currency and flag works, other works by Waters reconstitute precious originals, as in the work called *Various Tabloids* (2006), and other recent works by the artist not included in "VALUES." For instance, pieces created by layering unscratched lottery tickets (e.g *Cash for Life* [2006]) or by shredding e-Bay-purchased historical documents (e.g *1964 Warren Commission Report on the Assassination of President John F. Kennedy* [2006]; *Time Magazine*, Vol. 1, No. 1, March 3, 1923 [2006]; *Life*, Vol. 1, No. 1, November 23, 1936 [2006]) and pop culture symbols (e.g *1992 Sex, by Madonna*, No. 0544292 [2006]; "*The Man Who Kept Oprah Awake at Night*" [2006]; *Upper Deck Premier Edition Baseball Cards 1-800 set, 1988-89* [2006]; *Playboy*, Vol. 1, No. 3, 1954 [2006]; *Green Lantern No. 1, 1960* [2006]) play with similar levels of projected value and fetishized rarity. This playfulness – and the beauty of these serially or chaotically rearranged objects – contrasts with the gravity of the political and cultural issues that surround (some of) the objects themselves. The emphasis on the objecthood and objectness of these culturally loaded items allows us to see more clearly the absurdity of the symbolic fights that occur around sacralized and desecrated objects.
 - 2 The exception in "VALUES" is *Snow White and the Seven Dwarfs* (1937) 35mm, Walt Disney Productions. This work is a trailer and not the full film; intended for publicity over a limited time period, it also shares with 8mm and 16mm film the quality of disposability (from the point of view of the commercial film world).
 - 3 Waters's *Deep Throat* (1972) 16mm (2007) references the subsequent mainstreaming of pornography in the early 1970s, and the attendant censorship battles that preceded it.
 - 4 Some observers, unaware of the distinctions between prints and negatives or between 35 mm commercial prints and

the 16mm and 8mm prints used in more educational and community contexts, may interpret the film works as the destruction of a valued commodity, or even as the desecration of a valued cultural object. In these cases, a similar relationship exists in the film pieces between viewer and work as in other works by Waters.

- 5 *Martin Luther King Jr., From Montgomery to Memphis (1972) 16mm (2007)* invokes race in American history in direct documentary fashion, while Buster Keaton's *The General* is set in the American Civil War (*The General (1927) Buster Keaton 8mm [2007]*).

Notes on Flag Desecration in Courts, Congress and Country

- * Extracted from Norman Dorsen, "Flag Desecration in Courts, Congress and Country," (2000) 17 *T.M. Cooley L. Rev* 417, with the permission of Norman Dorsen and the editors of Thomas M. Cooley Law Review. For the sake of space, most footnotes are omitted. An ellipsis indicates where material has been cut.
- ** Stokes Professor of Law, New York University School of Law. Former President, American Civil Liberties Union, 1976-1991. Founding director of Hauser Global Law School Program, NYU, in 1994. Editorial director of the International Journal of Constitutional Law from its inception. First recipient of American Association of Law Schools (AALS) Award for Lifetime Contributions to the Law and to Legal Education (2007). [Professor Dorsen] is grateful for the valuable assistance of Jay Ward Brown, Stevenson Munro, and David J. Milton [on the original article].
- 1 See the extraordinary depiction of that struggle in James Bradley, *Flags of Our Fathers* (2000). [orig. footnote 26]
- 2 *Id.* See Steven Shiffrin, "The First Amendment and the Meaning of America," in *Identities, Politics, and Rights* 318 (Sarat & Kearns eds., 1995). In the same vein, Professor Frank Michelman, a former law clerk to Justice Brennan and a perceptive reader of his opinions, recently asserted that "the rhetorical hero of Justice Brennan's opinion for the Court in *Johnson*... is not the autonomous, rebellious protester, it is the political society that protects his act of protest for sake of the self-respect of its people and of the structural value of dissent." Frank J. Michelman, *Brennan and Democracy* 79 (1999). [orig. footnotes 35 & 36]
- 3 Flag Protection Act of 1989, 18 U.S.C.A. § 700 [orig. footnote 40]
- 4 [*Ed.*: that is, up to 2000.]
- 5 [*Ed.*: Professor Dorsen gives an account of the four Congressional battles, up to and including 1999-2000. Only one, that of 1995, is digested in this extract.]
- 6 [*Ed.*: One indication that the flag continues to play the role of a Janus-faced symbol of freedom in cultural and political discourse in the US is that, as recently as 2006, yet another vote took place in the US Senate on a proposed amendment to the US federal constitution that would have seen 'flag desecration' constitutionally prohibited. The amendment motion almost passed in the Senate, this time failing to reach the required 67 votes by a single vote (66-34). In the various Congressional episodes prior to 2006, the closest the Senate – as opposed to the House of Representatives – has come to endorsing a constitutional amendment was four votes shy of the required 67. As other Senators had done in the past, in 2006 it was Senator Hillary Clinton who played the role of sponsor of an alternative approach, a statutory regime criminalizing flag desecration. This tactic, as before, would seem to have been designed to take the wind out of the sails of the full-blown constitutional amendment approach, even as support for a statutory prohibition allowed the Senator (and others supporting the statute) to argue to the electorate that they were strong patriots. The statutory alternative was voted down in the Senate by 64-36, failing by 15 votes to reach the 51 votes needed for a statute to be adopted. See Anne E. Kornblut, "Senator Clinton and Liberals Split Over Flag Desecration," *N.Y. Times*, June 28, 2006, at A16. For a chronology of the campaign for a flag-related constitutional amendment from the perspective of the Citizens' Flag Alliance, Inc. and the American Legion – which have, in their own words, "waged a battle to secure a flag-protection amendment since 1989" – see <http://www.legion.org/documents/cfa/pdf/campaigns.pdf>. The next cycle of amendment attempts has begun with an amendment resolution having been introduced in the House of Representatives, and jointly sponsored by both Republicans and Democrats, on January 11, 2007.]
- 7 Cecilia Elizabeth O'Leary, *To Die For: The Paradox of American Patriotism* 9 (1999). [orig. footnote 83]



Five Hundred Dollars

Various U.S. \$1, \$5, \$10, \$20 Bills
Shredded and Glued to Canvas
Mounted to Board with Plexiglas Case
168.3 cm by 114.5 cm by 11 cm
66 1/4 by 45 1/16 by 4 3/8 in.
2006



Various Tabloids, Fall 2006

Shredded and Glued to Canvas
Mounted to Board with Plexiglas Case
168.3 cm by 114.5 cm by 11 cm
66 1/4 by 45 1/16 by 4 3/8 in.
2006



New Orleans August 2005

Shredded American Flag
Glued to Canvas with 12k White Gold Leaf
Mounted to Board with Plexiglas Case
71.12 cm by 101.6 cm by 11 cm
28 by 40 by 4 ³/₈ in.
2007



You Are Either With Us Or Against Us

Shredded Black & White American Flag
Glued to Canvas with 12k White Gold Leaf
Mounted to Board with Plexiglas Case
114.5 cm by 168.3 cm by 11 cm
45 1/16 by 66 1/4 by 4 3/8 in.
2007



The General (1927) Buster Keaton 8mm

8mm Film Glued to Canvas
Mounted to Board with 140 LED Lights
with Plexiglas Case
168.3 cm by 114.5 cm by 11 cm
66 1/4 by 45 1/16 by 4 3/8 in.
2007





King Kong (1933) 16mm

16mm Film Glued to Canvas
Mounted to Board with 535 LED Lights
with Plexiglas Case
153.67 cm by 245.11 cm by 22.86 cm
60 1/2 by 96 1/2 by 9 in.
2007



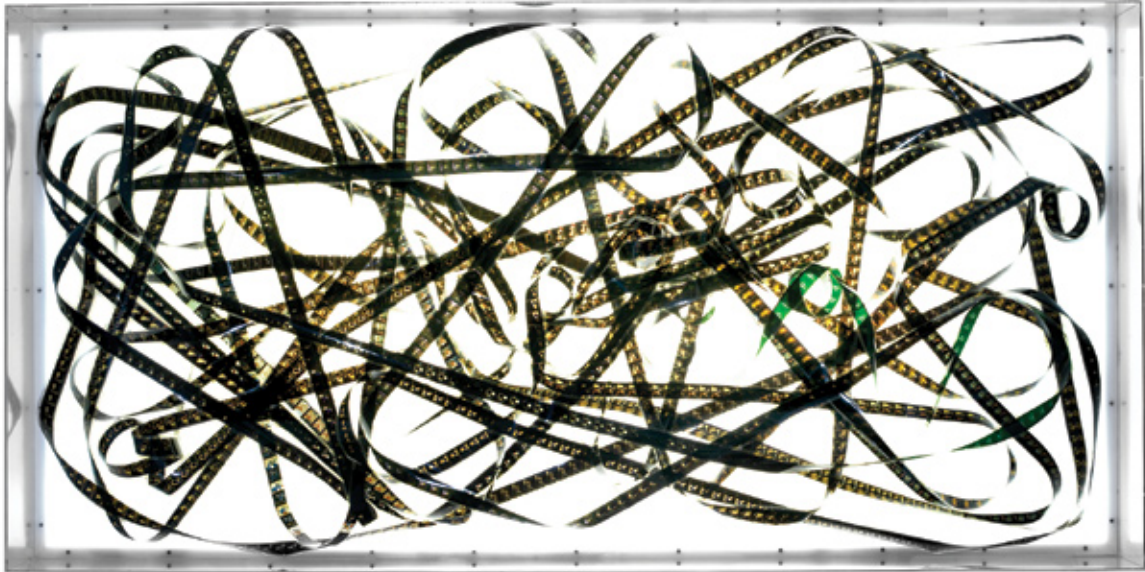
The Gold Rush (1925) Charlie Chaplin 8mm

8mm Film Glued to Canvas
Mounted to Board with 140 LED Lights
with Plexiglas Case
168.3 cm by 114.5 cm by 11 cm
66 1/4 by 45 1/16 by 4 3/8 in.
2007



Mickey Mouse (1932 & 1933) 16mm

16mm Film Glued to Canvas
Mounted to Board with 105 LED Lights
with Plexiglas Case
82,55 cm by 167,64 cm by 11 cm
32 1/2 by 66 by 4 3/8 in.
2007



Snow White And The Seven Dwarfs (1937) 35mm

35mm Film Glued to Plexiglas on Light Box
with 2 Fluorescent Lamps with Plexiglas Case
81.91 cm by 167.64 cm by 25.4 cm
32 1/4 by 66 by 10
2007



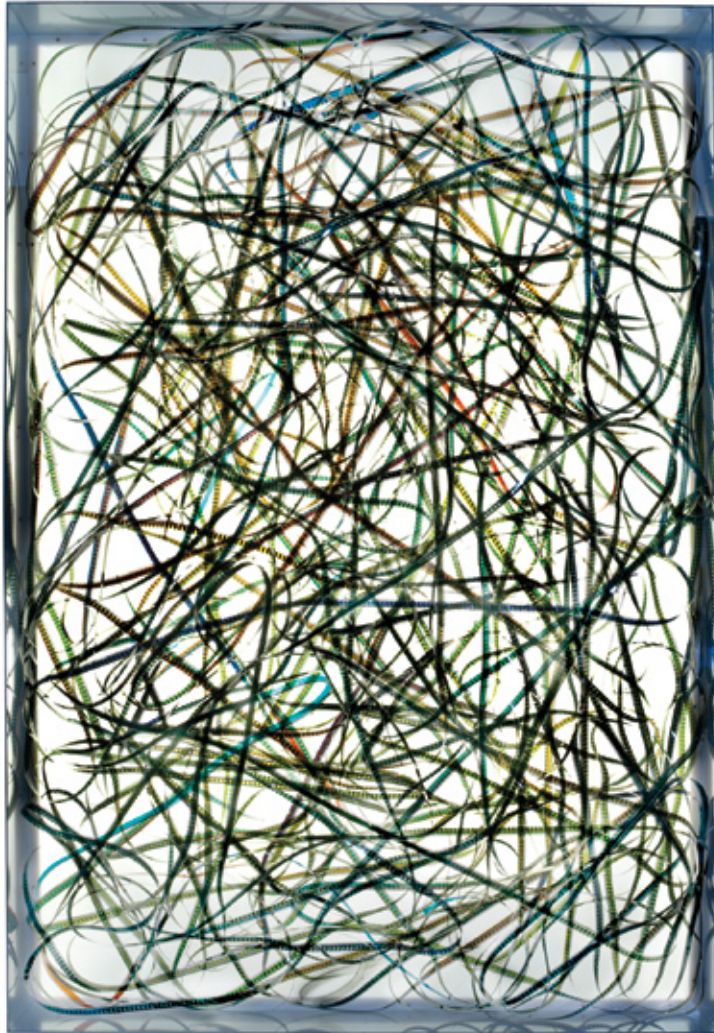
Stag Porn (1970's) 8mm

8mm Film Glued to Plexiglas on Light Box
with 2 Fluorescent Lamps with Plexiglas Case
102.87 cm by 71.75 cm by 20.95 cm
40 1/2 by 28 1/4 by 8 1/4 in.
2007



Deep Throat (1972) 16mm

16mm Film Glued to Plexiglas on Light Box
with 2 Fluorescent Lamps with Plexiglas Case
102.87 cm by 71.75 cm by 20.95 cm
40 1/2 by 28 1/4 by 8 1/4 in.
2007



The Lorax (1972) Dr. Seuss 16mm

16mm Film Glued to Plexiglas on Light Box
with 4 Fluorescent Lamps with Plexiglas Case
168.59 cm by 115.25 cm by 27.30 cm.;
66 ³/₈ by 45 ³/₈ by 10 ³/₄ in.
2007



*Martin Luther King Jr.,
From Montgomery to Memphis (1972) 16mm*

16mm Film Glued to Plexiglas on Light Box
with 4 Fluorescent Lamps with Plexiglas Case
168.59 cm by 115.25 cm by 33.34 cm.:
66 ³/₈ by 45 ³/₈ by 13 ¹/₈ in.
2007



The Skeleton Dance (1929) 8mm

8mm Film Glued to Canvas
with 12k White Gold Leaf Mounted to Board
with 70 LED Lights, with Plexiglas Case
101.6 cm by 71.12 cm by 11 cm
40 by 28 by 4 ³/₈ in.
2007



Little Black Sambo (1935) 8mm

8mm Film Glued to Canvas
with 12k White Gold Leaf Mounted to Board
with 70 LED Lights, with Plexiglas Case
101.6 cm by 71.12 cm by 11 cm
40 by 28 by 4 ³/₈ in.
2007

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Essays

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Front Cover

*Martin Luther King Jr.,
From Montgomery to Memphis
(1972) 16mm, 2007 (detail)*

Back Cover

*Five Hundred Dollars,
2006 (detail)*



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