Volume 49 | Number 1 Article 8

12-1-1970

Punishing Flag Desecrators: The Ultimate in Flag Desecration

Arnold H. Loewy

PUNISHING FLAG DESECRATORS: THE ULTIMATE IN FLAG DESECRATION

ARNOLD H. LOEWY*

A man's maturity is measured by his ability to tolerate those who criticize him, disrespect him, even abuse him—surely we can demand no less from our country.†

They used to say "actions speak louder than words"; today they say "the medium is the message."[1] But, however it may be expressed, it is apparent that many thoughts can be conveyed better by action than by word. Thus, where action is "closely akin to pure speech," it is imperative that it receive first amendment protection. Although this principle is not disputed as a general proposition,[2] there is considerable reluctance to apply it to those who would desecrate the American flag.[3] Such reluctance is understandable inasmuch as the American flag is the great symbol of our cherished liberties. Paradoxically, however, it is precisely because it symbolizes freedom that we, the American people, desecrate it far more than the disillusioned flag desecrator when we punish him for his despicable act. He as an individual may not understand the meaning of freedom and all that the flag symbolizes. However, we as a nation should understand freedom and should not let our love and reverence for the flag pervert the very freedom for which it stands.

In the three act play which follows, I hope to demonstrate the frequent incompatibility between flag desecration laws and the first amendment.

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† Attributable to the author.

[1] A phrase popularized by Marshall McLuhan. H. M. MCLUHAN, UNDERSTANDING MEDIA 7 (1964).

[2] *See, e.g.*, Tinker v. Des Moines School Dist., 393 U.S. 503, 505-06 (1969).

[3] *See, e.g.*, Street v. New York, 394 U.S. 576 (1969) in which four Justices (Warren, Black, White, and Fortas) indicated the inapplicability of the principle to flag desecrators while the remainder of the Court carefully avoided expressing any opinion on the question. See also Cowgill v. California, 396 U.S. 371 (1970) (per curiam).

ACT I

Scene 1

(Ivan Ivanavitch, a naturalized American citizen who had immigrated from Russia ten years ago, answers the doorbell of his New York City apartment at 9:00 A.M., October 1, 1970, and sees his brother Igor, who had been living in Russia and from whom Ivan had not heard in five years.)

IVAN: What are you doing here? I thought that you were still in Russia.

IGOR: I was, but I escaped from a Siberian prison camp and managed to get over here to join you in this land of freedom.

IVAN: What on earth were you in prison for?

IGOR: I was so disgusted with my country for crushing the Czechoslavakian revolution that I took my Russian flag to Red Square in Moscow, shouted "if our country is going to mistreat the Czechoslovakian people, we don't need any damned flag," and burned my flag. Naturally I was immediately arrested, convicted, and sent to a Siberian prison camp.

IVAN: Gee, isn't that a coincidence; I did the same thing. After learning of the My Lai incident, I took my American flag to Central Park, shouted "if our government is going to mistreat the Vietnamese people, we don't need any damned flag," and burned my flag.

IGOR: At least you didn't go to prison; that's the beauty of living in a free society.

IVAN: Don't be so sure; although I haven't been imprisoned, I have been sentenced to six months in jail. I'm presently out on bail pending an appeal to the United States Supreme Court.[4]

IGOR: How can that be? I always thought that in America you were free to express any idea you wanted to even if the government didn't like it; at least that's what Radio Free Europe said.

IVAN: Well, when the trial judge sentenced me to jail, he said, "Mr. Ivanavitch, I want you to understand the difference between speech

[4] On similar facts, the Supreme Court reversed Sidney Street's flag desecration conviction on the ground that he might have been convicted for what he said about the flag rather than for what he did to it. Street v. New York, 394 U.S. 576 (1969). Ivan Ivanavitch, on the other hand, was convicted for his act alone. His words were used only to prove his intent.

The statute under which both Street and Ivanavitch were convicted is N.Y. GEN. BUS. LAW § 136d (McKinney 1968), which authorizes punishment for any person who "[s]hall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by words or act [the American flag]."

and action. In this country, you are free to say what you want to say, but not to do what you want to do." I replied that "I did not hurt anybody by my actions. I did not block traffic or break windows or anything." "Furthermore," I said, "you would not have convicted me if I had been burning my shirt or a piece of paper or something; it's only because of the idea that I conveyed that I'm being punished." The judge then replied: "That is not why I convicted you; you are being punished for creating a potential breach of the peace by insulting your country's flag." Then I said: "But isn't speech supposed to challenge old ideas and get people excited. If someone tries to attack me, shouldn't *he* be arrested? Besides that, nobody did try to attack me or otherwise act unruly, and you know it." Whereupon the judge replied: "Nevertheless, I sentence you to six months in jail."

IGOR: Gosh, that's hard to believe; is there no place on earth where I can find freedom?

IVAN: I have a friend, Johnny Trueblood, a law student, who tells me that in spite of what happened to me, America really is a free country. He thinks that the Supreme Court will reverse my conviction, but that even if it doesn't, this country is still basically free. In fact, this afternoon his Constitutional Law seminar is going to be discussing the constitutionality of punishing flag desecrators, and he has invited me to attend. I'm sure that you will be able to attend also. There's Johnny at the door now.

(Ivan lets Johnny in the door and relates to him his conversation with Igor.)

JOHNNY TRUEBLOOD: Pleased to meet you, Igor; would you like to see some of the sights of New York before class? While we're walking, I'll try to explain the American concept of freedom to you.

IGOR: Fine, let's go.

Scene 2

(A street in New York City a few minutes later)

IGOR: Hey! There goes a man wearing a flag shirt;[5] let's ask him why he's wearing it.

JOHNNY TRUEBLOOD: Mister, would you be good enough to tell us why you're wearing that flag shirt?

MAN: Sure thing, man; I'm wearing this shirt because I hate everything

[5] Not surprising in view of one clothier's having sold 36,000 flag shirts to retailers across the nation. TIME, July 6, 1970, at 8.

America stands for. See the button I'm wearing with it. I got the idea from Abbie Hoffman.

IVAN: It says: "I've wrapped myself in the American flag like all good Fascist pigs."[6]

JOHNNY TRUEBLOOD: Aren't you afraid that you'll be arrested?

MAN: Hell man, the fuzz'll pick up a hippie like me for something anyway. I might as well do my thing while I'm out of jail. I better get going; no telling how much longer I'll be free.

IGOR: There's another man with a flag shirt.

JOHNNY TRUEBLOOD: Mister, would you be good enough to tell us why you're wearing that shirt?

SECOND MAN: It's groovy, man. Abbie Hoffman wears it and looks groovy.[7] So do Roy Rogers and Dale Evans.[8]

JOHNNY TRUEBLOOD: Did you know you could go to jail for wearing a flag shirt?[9]

SECOND MAN: You've got to be kidding. You mean they send people to jail for looking groovy. Man, somebody sure must be uptight about something. I sure hope they don't send Roy Rogers and Dale Evans to jail. I better get this thing off before a cop sees me.

IGOR: Who are Roy Rogers and Dale Evans?

IVAN: They are patriotic movie stars.

IGOR: Will they be arrested?

JOHNNY TRUEBLOOD: No.

IGOR: That hardly seems fair. Hey! There goes another man with a flag shirt.

JOHNNY TRUEBLOOD: Mister, would you please tell us why you're wearing that shirt?

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[6] See Hoffman v. United States, 256 A.2d 567 (D.C. App. 1969). Hoffman's buttons said "Vote Pig Yippie in Sixty-Eight" and "Wallace for President, Stand Up for America." *Id.* at 568.

[7] *Id.*

[8] See TIME, *supra* note 5, at 10.

[9] See Cowgill v. California, 396 U.S. 371 (1970) (per curiam); Hoffman v. United States, 256 A.2d 567 (D.C. App. 1969). Arguably there is a difference between tearing a flag to make a shirt and merely making a shirt to resemble a flag. *Cf.* Long Island Vietnam Moratorium Comm. v. Cahn, 39 U.S.L.W. 2015 (E.D.N.Y. 1970). However, the court in *Hoffman* did not seem concerned with that distinction in that Hoffman's shirt merely "resembled" the flag. *See* 256 A.2d at 570. The New York statute closely resembles the District of Columbia statute. For a summary of all of the flag desecration statutes, see Note, *Flag Burning, Flag Waving and the Law*, 4 VALPARAISO U.L. REV. 345, 362-67 (1970).

THIRD MAN: Certainly, gentlemen, I love my country, I'm proud to be an American, and I want the whole world to know it.[10]

JOHNNY TRUEBLOOD: Aren't you afraid that you'll be arrested for flag desecration?

THIRD MAN: Not a chance. The police know how loyal I am. I'm a veteran, I belong to the American Legion, and I have short hair and no sideburns. War protesters have been arrested for flying the flag upside down as a distress signal, but when the American Legion flew the flag upside down to protest the Pueblo incident, no charges were brought.[11] The police know who the good guys are.

JOHNNY TRUEBLOOD: Does that seem fair to you?

THIRD MAN: Of course it's fair, I'm a patriot; those longhaired hippies don't care about this country. I'd deport them all if it were up to me. Excuse me, please, I'm late for my John Birch society meeting.

JOHNNY TRUEBLOOD: Well, Igor, I don't think you've seen the best side of America so far. Here's an art gallery that sometimes uses flags in its works. Let's go inside.

Scene 3

(Inside the art gallery)

IGOR: Look at that symbolism! Here's an American flag shaped like a human body hanging from a yellow noose, and over there is another one that looks like a penis protruding from a cross.

IVAN: Well, Igor, now you're seeing American freedom in action; Johnny's told me that works of art are protected by the first amendment.[12]

JOHNNY TRUEBLOOD: I hate to say this, fellows, but there is some doubt as to whether *this* art is protected. Stephen Radich, who had an identical display in his art gallery, was convicted of flag desecration. His case is currently before the United States Supreme Court. We'll probably discuss it in class today.[13]

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[10] That patriots as well as protesters wear the flag is apparent from TIME, *supra* note 5, 8-10. See particularly, the picture entitled "Sacramento Flag Day." *Id.* at 10.

[11] *Id.* at 14.

[12] The Supreme Court has indicated that one of the purposes of the first amendment was "the advancement of truth, science, morality and *arts* in general." Roth v. United States, 354 U.S. 476, 484 (1957) (emphasis added), quoting from a letter of the Continental Congress to the inhabitants of Quebec.

[13] People v. Radich, 26 N.Y.2d 114, 257 N.E.2d 30, 308 N.Y.S.2d 846 (1970); *appeal docketed sub nom.* Radich v. New York, 38 U.S.L.W. 3498 (U.S. May 18, 1970) (No. 1589, 1969 Term; renumbered No. 169, 1970 Term). See note 72 and accompanying text *infra*.

IVAN: How can that be if art is protected?

JOHNNY TRUEBLOOD: Some people think that art ends where flag desecration begins. Hopefully though the Supreme Court will reverse Radich's conviction.

IGOR: Here are some pictures of a girl clothed only in an American flag and a pair of boots in various poses with a man who appears to be representing a soldier. Since this is only a picture, I'm sure that he couldn't be convicted.

JOHNNY TRUEBLOOD: I'm afraid you're wrong again; Robert Keough and others were convicted for distributing a publication containing photographs just like these.[14]

IGOR: You mean that you can be convicted in this country just for publishing a picture that somebody thinks is disrespectful to the flag.

JOHNNY TRUEBLOOD: Well, that's hard to say; the Supreme Court has never ruled on the question.[15]

Hey, there's my friend Donald Dove. How are you, Donald? I haven't seen you in a while.

DONALD DOVE: I've been in jail.

JOHNNY TRUEBLOOD: For what?

DONALD DOVE: I carried an American flag with a peace symbol where the stars belong in a peace parade and was convicted of flag desecration. The judge commended me for carrying the flag in the cause of peace, but felt that he had to convict me under the terms of the statute.[16]

JOHNNY TRUEBLOOD: Sorry to hear about it.

DONALD DOVE: Well, that's life when you oppose the establishment in America. Did you hear what happened to Tom and Dick. Oh, there they are now.

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[14] People v. Keough, 61 Misc. 2d 762, 305 N.Y.S.2d 961 (Monroe County Ct. 1969).

[15] The Supreme Court has held that a man could be convicted of placing a replica of a flag on the label of his beer bottle in contravention of a state statute prohibiting use of the flag for advertising purposes. However, the first amendment was not discussed in that case. Halter v. Nebraska, 205 U.S. 34 (1907). See discussion at text accompanying notes 48 & 65 *infra*. Compare Long Island Vietnam Moratorium Comm. v. Cahn, 39 U.S.L.W. 2015 (E.D.N.Y. 1970), wherein a three-judge panel held that New York's flag desecretion statute could not be applied against those who wore a button containing a representation of the flag upon which a peace symbol was superimposed.

[16] See complaint in Parker v. Morgan, filed in United States District Court for the Western District of North Carolina, wherein plaintiff describes a similar incident at pp. 5-6.

JOHNNY TRUEBLOOD: How are you guys? Donald's told me something happened to you.

TOM: That's right, we were using an American flag for a beach towel, and some cop arrested us for flag desecration.

JOHNNY TRUEBLOOD: What happened in court?

DICK: The judge sentenced us to thirty days in jail and suspended it on the condition that each of us write a two thousand word theme on "What the Flag Really Means to Me."[17]

JOHNNY TRUEBLOOD: What did you write?

DICK: I wrote that the American flag is worthless except as a beach towel and as something for the establishment to wrap around its lousy cops who pick on anybody who dares to be different.

JOHNNY TRUEBLOOD: What did the judge do?

DICK: You haven't seen me around for the last thirty days, have you?[18]

JOHNNY TRUEBLOOD: What did you write, Tom?

TOM: I wrote that the American flag is the great symbol of liberty for the United States, the greatest society in world history.

IGOR: Did you really believe what you wrote?

TOM: Of course not, but I've been free for the past thirty days, if you can call it that.

JOHNNY TRUEBLOOD: Ivan, I think we'd better get Igor out of here; I don't think he's learning much about freedom in the United States.

IVAN: To be very truthful, Johnny, neither am I.

Scene 4

(Back on the street on the way to the law school)

IVAN: Look, there's something we haven't seen today—a flag being flown according to protocol.

IGOR: There's somebody coming out of the house; let's ask him why he's flying the flag.

JOHNNY TRUEBLOOD: Sir, would you be good enough to tell us why you're flying the flag?

MAN: Certainly, that's my way of saying I love my country and support the President's Southeast Asian policy and the Vice-President's get-

[17] A similar fate befell Lloyd W. Smith and Michael C. Hemphill who were convicted of flag desecration on similar facts by North Carolina Chief District Judge Gilbert H. Burnett. Raleigh News and Observer, July 16, 1970, at 5, col. 2-4.

[18] In fairness to Judge Burnett, there is nothing in the newspaper article cited above to indicate that the sentence would have been reinstated if the judge had found the content of the themes unsatisfactory.

tough-on-campus policy. I think that everyone should fly the flag to show his support for these things.

IVAN: But, suppose somebody doesn't support these things. How does he indicate his opposition?

MAN: A true American would support these things. But if somebody doesn't, he can fly the flag just to show that he's patriotic.

IVAN: But wouldn't that make other people think that he was supporting these other policies.

MAN: So much the better.

JOHNNY: Excuse me, sir; we have to leave now or we'll be late for our seminar.

ACT II

(Seminar room at the law school.[19] Ivan and Igor have been introduced to the professor, who has permitted them to participate in the discussion.)

PROFESSOR: Mr. Wright, do you think that flag desecration is speech?

MR. WRIGHT: Not really, the demonstrator may be showing his general contempt for all that is American, but he is not really saying anything.

MR. LOEFT: I don't agree. If the man is saying I have contempt for America, it seems to me that he's saying a lot.

MR. WRIGHT: I suppose you would argue that a man who assassinated the President of the United States was really "saying a lot."

MR. LOEFT: He might be, but that wouldn't be constitutionally protected speech.

MR. WRIGHT: How do you draw the line?

MR. LOEFT: Basically, I ask whether apart from the idea being communicated, the action has any significance.

PROFESSOR: Would you please explain what you mean by that, Mr. Loeft?

MR. LOEFT: Certainly. The only significance of the flag is what it says. Stripped of its symbolic value, it becomes a cloth that nobody would care about. But it does say something to Americans; thus, those who desecrate it are saying something also. In short, the only reason for flag desecration laws is to protect the sensibilities of Americans who love and cherish everything for which it stands and to punish those who demonstrate by their act of desecration that they do not cherish these same ideals. Obviously there is an interest in preserving the life of the President that transcends communication of an idea. Specifically, the assassin is being punished for what he did to the President and to

[19] No particular law school is intended.

the country rather than merely for his manifested attitude towards the country.

PROFESSOR: Do you have any authority?

MR. LOEFT: Yes, in *Tinker v. Des Moines School District*, the Court held that wearing a black armband was "closely akin to 'pure speech.' "[20] The basis of the Court's opinion was the fact that wearing armbands has no significance beyond the idea sought to be conveyed.

PROFESSOR: Would it be fair to say that any symbolic act is constitutionally protected so long as the state has no substantial interest in precluding it?

MR. QUICK: Absolutely not. In *United States v. O'Brien* Mr. Chief Justice Warren speaking for the Court said: "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[21]

MISS BRIGHT: I disagree with Mr. Quick. Although on the surface his analysis seems impeccable, it is necessary to look behind the Chief Justice's statement to understand what he really meant. The reason for not treating all symbolic acts as "speech" is that frequently they will interfere with an important governmental interest unrelated to suppression; for example, Mr. Wright's illustration of presidential assassination as a means of protest. Thus, to avoid the necessity of apparently "balancing away"[22] freedom of speech, the Chief Justice simply defined symbolic speech out of existence whenever the governmental interest was sufficiently substantial to warrant it.[23] This is apparent from

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[20] 393 U.S. 503, 505 (1969).

[21] 391 U.S. 367, 376 (1968).

[22] A phrase frequently employed by Mr. Justice Black. *See, e.g.*, Scales v. United States, 367 U.S. 203, 261 (1961) (dissenting opinion).

[23] This is a popular constitutional approach for those Justices and commentators who do not believe that constitutionally protected speech ought to be balanced against other interests. To avoid that necessity, these Justices and commentators maintain that certain kinds of speech are not entitled to constitutional protection at all. *See, e.g.*, Street v. New York, 394 U.S. 576, 609-10 (1969) (Black, J., dissenting); Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 932 (1963). This process is sometimes denominated "definitional balancing" to distinguish it from "ad hoc balancing" where the Court concedes that constitutionally protected speech is involved but nevertheless balances it against other interests. See Strong, *Fifty Years of "Clear and Present Danger": From Schenck to Brandenburg—and Beyond*, 1969 SUP. CT. REV. 41, 59-61. For an illustration of the dangers inherent in the total rejection of "ad hoc balancing," see Loewy, *Free Speech: The "Missing Link" in the Law of Obscenity*, 16 J. PUB. L. 81, 82-84 (1967).

the test devised by Warren: "[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct . . . a government regulation [effectively suppressing it] is sufficiently justified 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."[24]

MR. WRIGHT: That line of reasoning assumes that the desecrator is saying something in particular by his act. He may just be expressing general contempt as I suggested earlier.[25] On the other hand, he might be protesting a particular governmental act or series of acts such as our guest, Mr. Ivanavitch, was doing. In any event, we do not know exactly what he is trying to say until he tells us with his words, and at that point, the act of flag desecration is unnecessary to convey his idea.[26] Thus, I contend that flag burning has no communicative significance itself.

IVAN: I don't agree with you. As a speaker, I could only convey the feeling that I was disturbed by what our country was doing; I could never convey the intensity of my feelings by mere words—I'm simply not that eloquent.

MR. LOEFT: To paraphrase Mr. Justice Holmes: Flag burning as well as "[e]loquence may set fire to reason."[27]

MR. QUICK: If you are suggesting that flag desecration is particularly effective speech, I cannot agree with you. Nothing turns off the "silent majority," whom I assume you are trying to persuade, quicker than an act of flag desecration.

IVAN: In retrospect, I think that you are correct.

JOHNNY TRUEBLOOD: Mr. Quick's observation may be correct, but it is immaterial. Surely, speech does not have to be persuasive in order to be constitutionally protected.[28] Further, even if flag desecration is

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[24] United States v. O'Brien, 391 U.S. 367, 376-77 (1968).

[25] See p. 55 *supra*.

[26] This argument was advanced in *Street*. Brief of the Attorney General of the State of New York as Amicus Curiae at 4, Street v. New York, 394 U.S. 576 (1969).

[27] Gitlow v. New York, 268 U.S. 652, 673 (1925) (dissenting opinion).

[28] Indeed, the thrust of the "clear and present" danger test appears to be that the less persuasive certain types of speech (such as that urging violent revolution) are, the more likely they are to receive constitutional protection. Because of this fact, the test ("clear and present danger") has been subject to considerable

ineffective in the sense that it's unpersuasive, it is effective in other ways. In addition to conveying the depth of Ivan's feelings, it enabled him to communicate with far more people than he could have reached via a simple speech. A rich man could buy newspaper space or television time; but Ivan had to do something dramatic or not be heard at all; in essence, flag burning can be a "poor man's printing press."[29]

On the other hand, I must concede there may be a small category of non-communicative flag desecrators; for example, while walking to class today, we met a man who was wearing a flag shirt just because it looked "groovy." He didn't seem to want to convey anything in particular. Indeed, he claimed to have gotten the idea from both Abbie Hoffman and Roy Rogers.[30]

MR. LOEFT: Nevertheless, he seems to at least be trying to say that the flag ought not to be used exclusively to communicate patriotism: it ought also to be available to wear as a "groovy" shirt.

MR. WRIGHT: The trouble is that we don't know exactly what he is saying, a fact which buttresses my argument that flag desecration is a very poor means of communication.

MISS BRIGHT: If speech were to lose its constitutional protection simply because the speaker's meaning were unclear, most speech would be unprotected including some United States Supreme Court decisions[31] and some law professors' examinations. However, there is no real point to belaboring this issue in view of *Cowgill v. California*[32] in which the Supreme Court dismissed for want of a substantial federal question an appeal from a conviction of one who was wearing a vest made from an American flag where there was no evidence that the desecrator was trying to communicate anything by his act.[33]

PROFESSOR: Of course, the Court has been known to give full consideration to questions that it once deemed insubstantial.[34] Nevertheless, let's

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criticism. *See, e.g.*, Emerson, *supra* note 23, at 910-11. *See generally* Strong, *supra* note 23.

[29] *Cf.* H. KALVEN, THE NEGRO AND THE FIRST AMENDMENT 133 (1965) describing southern protest marches as the "poor man's printing press." *See generally* Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

[30] See p. 51 *supra*.

[31] *E.g.*, Roth v. United States, 354 U.S. 476 (1957).

[32] 396 U.S. 371 (1970) (per curiam).

[33] See particularly the concurring opinion of Mr. Justice Harlan (joined by Mr. Justice Brennan) wherein it was noted that appellant presented no evidence "that his conduct conveyed a symbolic message" despite his contention that it did. *Id.* at 372.

[34] Perhaps the most significant illustration is the "compulsory flag salute cases":

confine the remainder of our discussion to those flag desecrators who seek to express an idea by their act of desecration. What interest, if any, does a state have in precluding this? Is coercing patriotism a sufficient interest?

MR. WRIGHT: I think that it is. However, I contend that "coerce" is too strong a term. The statute merely encourages people to be patriotic, but limits its punishment to those who are affirmatively unpatriotic.

MR. LOEFT: Do you seriously think that there's a difference between coercing patriotic behavior and coercing behavior that is not unpatriotic?

MR. WRIGHT: I certainly do. In *West Virginia Board of Education v. Barnette*, the Court emphasized that the vice of a board of education resolution requiring a flag salute was "a compulsion of students to declare a belief."[35] Under a flag desecration statute, a person isn't required to declare anything, patriotic or otherwise.

IGOR: When the Russian government sentenced me to a Siberian prison camp for burning the Russian flag in Red Square, don't you think that it was trying to coerce me to be patriotic?

MR. WRIGHT: I suppose *that* government was. It believes in loyalty by coercion.

JOHNNY TRUEBLOOD: Look, Mr. Wright, I'm proud to be an American too, but let's call a spade a spade. If Russia was trying to coerce Igor into being patriotic by sending him to prison for desecrating the Russian flag, how can you deny that New York was doing the same thing when it sentenced Ivan to prison for the same act?

MR. WRIGHT: Well, in Russia, flag desecration is simply one of many ways to be sent to prison for disloyalty. If Igor had merely stated publicly "my country was unfair to the Czechs," he probably would have been convicted and sent to prison. Ivan, on the other hand, could publicly say "my country was unfair to the Vietnamese" without fear of governmental reprisals.

MR. STRICTMAN: Furthermore, as a result of *Barnette*, Ivan could not

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Dismissed—Hering v. Board of Educ., 303 U.S. 624 (1938), and Leoles v. Landers, 302 U.S. 656 (1937); Affirmed without opinion—Johnson v. Deerfield, 306 U.S. 621 (1939); *Cert. denied*—Gabrielli v. Knickerbocker, 306 U.S. 621 (1939); Practice held constitutional on merits—Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940); Practice held unconstitutional on merits—West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (discussed pp. 59-60, 78-79 *infra*). See Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 27 (1961).

[35] 319 U.S. 624, 631 (1943).

be punished for failure to salute the flag,[36] whereas I suspect that Igor could have been convicted in Russia for failure to salute the Russian flag.

JOHNNY TRUEBLOOD: Assuming the accuracy of those last two observations, you've merely established that Russia has more laws designed to coerce loyalty and conformity than the United States; you have not established that the law prohibiting flag desecration is not designed to coerce loyalty.

PROFESSOR: Perhaps we're overly concerned with semantics. I suppose it's fair to say that the purpose of flag desecration statutes is not to coerce loyalty, but to coerce people from affirmatively demonstrating disloyalty. Is that a legitimate state interest?

MISS BRIGHT: Definitely not. Although *Barnette* is factually distinguishable, much of its language suggests that the government has no legitimate interest in punishing demonstrations of disloyalty. For example, the Court said: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. . . ."[37] In *Street v. New York*, Mr. Justice Harlan, after quoting this language, concluded that these freedoms "encompass the freedom to express publicly one's opinions about our flag, including those opinions which are defiant or contemptuous."[38] Thus, I believe that a mere desire on the part of the government to prevent an affirmative act of disloyalty to the flag is precluded, probably by *Barnette* and certainly by *Street*.[39]

MR. WRIGHT: If Miss Bright is correct, just how is the government going to prevent disloyalties? I suppose that we'd all agree that a government cannot long endure if a substantial segment of its citizens are disloyal.

MR. LOEFT: You certainly don't seem to have much confidence in our system of government. We'd be in sad shape if our survival depended on our ability to punish citizens for expressions of disloyalty to the country. What we need to do is not punish expressions of disloyalty but encourage loyalty by manifesting tolerance towards those who dare

[36] Although those challenging the compulsory flag salute in *Barnette* did so on religious grounds, the Court emphasized that this fact was immaterial: "Nor does the issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held." 319 U.S. at 634.

[37] *Id.* at 642.

[38] 394 U.S. 576, 593 (1969).

[39] For further development of this argument, see pp. 78-79 *infra*.

to be different. When we punish a man such as Ivan for his political protest, we cannot help but nurture whatever feelings of disloyalty he may have and strengthen his feeling that America is unjust. In short, the surest way to promote disloyalty is to enforce a flag desecration statute against those who are already so disillusioned with America that they find it necessary to burn the flag.

MR. WRIGHT: Even if I could agree that punishing expressions of disloyalty per se were not a valid governmental purpose, surely the preservation of our image abroad is important. How does it look to a foreigner when he sees an American burning his own flag?

MR. LOEFT: If he thinks about it, he probably would think that we must have a pretty free society to permit such a thing until he reads about the flag burner being sent to jail. Then he would think that we're not so free after all.

MR. STRICTMAN: I don't agree; if a foreigner sees an American burning his flag, he's going to think that something's wrong in America.

MISS BRIGHT: Maybe there is, after all we're not perfect. I suppose that you'd like the world to think that we are.

JOHNNY TRUEBLOOD: I think that we're asking the wrong question. I'd like the world to think highly of us, but only if we deserve it. It would be no consolation to me to know that the world loves us if that love continues only because we sweep internal dissent under the rug. Beyond that, we're too hung up on our image. Some people say, "Stay in Viet Nam; what will other countries think if we get out?" Others say, "Get out of Viet Nam; what will other countries say if we stay in?" As a result, the merits of the question are frequently obscured. Furthermore, I think that the first amendment has already determined that even if our image abroad were of the utmost importance, it is less important than freedom to dissent. Suppose, for example, thousands of students were to make protest speeches against our government's role in Southeast Asia. The effect of these speeches may well be (or perhaps has been) to lower American prestige in the eyes of some; yet this is scarcely an argument for punishing the speaker or suppressing the speech. Indeed, if such an excuse were available, the government could always suppress dissent for fear of creating a disharmonious image abroad.

MR. WRIGHT: O.k., let's forget foreign images for the moment; what about our boys in Viet Nam? They risk their lives for us every day;

aren't they entitled to more moral support than a headline which reads "American Flag Burned in Central Park to Protest Viet Nam"? Such a headline can scarcely make their sacrifices seem worthwhile.

JOHNNY TRUEBLOOD: I must confess that when I was fighting in Viet Nam, I was incensed by such anti-war demonstrations. Since then, however, I have come to realize that our only reason for fighting was to permit the South Vietnamese to live in freedom. Thus, when I see a man like Ivan being punished for a symbolic expression of dissent, I ask myself whether I should have been fighting for freedom in Southeast Asia when we don't even allow this type of political dissent in the United States. In short, those of us who fought for freedom in a foreign land are done a disservice when the very freedom for which we fought is denied in this country allegedly to protect our morale.[40]

PROFESSOR: Are there any other possible reasons for punishing flag desecrators?

MR. QUICK: In *Street*, Mr. Justice Fortas noted that a state could punish a man for burning his own shirt on a public sidewalk and creating a fire danger even if he were burning the shirt as a protest. He then concluded that "there is no basis for applying a different rule to flag burning."[41]

MISS BRIGHT: That was Mr. Justice Fortas' last free speech opinion and surely one of his worst.[42] Of course, Mr. Street or Mr. Ivanavitch could be punished for violating a generally applicable rule against creating a fire hazard. For example, if New York City had an ordinance which said "Because of the danger of fire and air pollution, it shall be unlawful to burn anything in Central Park," I have no doubt that a man who burned a flag or a shirt (or for that matter a flag shirt) whether to protest something or just for the hell of it could be punished.[43] However, Ivan was not convicted under such a statute. If he had burned his shirt, he would not have been convicted under

[40] Compare the reaction of ex-marine James Stern to laws precluding the wearing of flag shirts: "I didn't fight for the flag, I fought for the freedom we were supposedly there to protect. When I come back and try to exercise that freedom, they say you don't have the right." TIME, *supra* note 5, at 15. The article concludes: "He wears a flag shirt anyway."

[41] 394 U.S. at 616 (dissenting opinion).

[42] On the same day, Fortas wrote a dissenting opinion in Watts v. United States, 394 U.S. 705, 712 (1969) (per curiam), a free speech case. However, his dissent was not based on first amendment grounds.

[43] Arguably, the concession made by Miss Bright is not as clear as she suggests. See note *15 infra*, p. 85.

this statute inasmuch as the statute punishes only flag burning. If there was the slightest evidence that burning flags tends to create more of a fire or pollution danger than burning shirts, the Fortas rationale would be sound. However, no state has even pretended to be predicating its statute on such a ground. Rather, it has picked the American flag as opposed to other chattels to protect from burning solely because of the flag's symbolic significance.

MR. QUICK: Even if the "shirt" analogy is not sound, Justice Fortas went on to explain that "the flag is a special kind of personalty" and that while it "may be property in a sense . . . it is property burdened with peculiar obligations and restrictions."[44] In short, the flag is property "affected with a public interest."[45]

PROFESSOR: Do you have any authority for that beyond one Justice's dissenting opinion?

MR. QUICK: Yes, in the landmark case of *Halter v. Nebraska*, the Supreme Court noted that the "representation [of a flag] cannot belong, as property, to an individual."[46] In that case, the Court affirmed the conviction of a man who had placed the representation of an American flag on a beer bottle. Just as Halter owned the bottle, but not the representation of the flag printed thereon, a flag burner may own the cloth with which the flag is made, but he doesn't own the representation of the flag itself.

MR. LOEFT: Who does own it?

MR. QUICK: We all do. Each and every American.

MISS BRIGHT: I have difficulty with this whole line of reasoning. In the first place, I would hardly describe as a "landmark" an obscure 1907 case in which the first amendment was not even mentioned. Secondly, since that statute aimed at advertising,[47] it could be deemed necessary to prevent unfair competition. For example, a prospective purchaser

[44] 394 U.S. at 616, 617 (dissenting opinion).

[45] *Cf.* Munn v. Illinois, 94 U.S. 113, 130 (1876).

[46] 205 U.S. 34, 43 (1907).

[47] At least the segment of the statute under which Halter was convicted was so aimed: "The act, among other things, makes it a misdemeanor, punishable by fine or imprisonment, or both, for anyone to sell, expose for sale, or have in possession for sale, any article of merchandise, upon which shall be printed or placed, for purposes of *advertisement*, a representation of the flag of the United States." *Id.* at 38 (emphasis in original). Another segment of the statute forbids one to "publicly mutilate, deface, defile or defy, trample upon or cast contempt, either by words, or act, upon any such flag . . . ." *Id.* at 37-38 n.1. The Court limited its discussion to the advertising segment of this statute.

seeing two beer bottles, one with an American flag and one without, might conclude that the beer with the flag on the bottle was supported by the United States government. Thus, to prevent this occurrence, the government can and does forbid the use of the flag in *all* advertising.[48] Similarly, I suppose that the government could limit the use of the flag to official buildings so that its sole use would be as an identifying trademark. The trouble is that the government has not so limited the use of the flag. It permits, indeed encourages, people to fly it as a sign of support for the government.[49] Because of this permission, the government must also allow it to be used in an unconventional or disrespectful way as a symbol of protest. This conclusion is suggested if not compelled by last term's decision, *Schacht v. United States*,[50] wherein a unanimous Supreme Court reversed an actor's conviction for unauthorized wearing of a military uniform. The Court held that although a statute punishing all unauthorized use of a military uniform would be constitutional, a statute (such as the one at bar) permitting the unauthorized use of such a uniform in a theatrical production "that [did] not 'tend to discredit' the military,"[51] but punishing such use where the theatrical production did tend to discredit the military, was unconstitutional. Thus, if the government permits the flag to be used to credit the country, it also must permit it to be used to discredit the country.

[48] Candor compels the acknowledgment that the Court's rationale in *Halter* was directed more towards the preservation of the flag as a national symbol than the prevention of unfair competition. Nevertheless, Miss Bright's analysis is proper as a means of preserving the *Halter* result under a first amendment challenge. Indeed, one could reasonably contend that laws regulating advertising do not present substantial first amendment questions. See Valentine v. Chrestensen, 316 U.S. 52 (1942).

[49] See 36 U.S.C. § 174(d) (1964):

> The flag should be displayed on all days when the weather permits, especially on New Year's Day, January 1; Inauguration Day, January 20; Lincoln's Birthday, February 12; Washington's Birthday, February 22; Army Day, April 6; Easter Sunday (variable); Mother's Day, second Sunday in May; Memorial Day (half staff until moon), May 30; Flag Day, June 14; Independence Day, July 4; Labor Day, first Monday in September; Constitution Day, September 17; Columbus Day, October 12; Navy Day, October 27; Veterans Day, November 11; Thanksgiving Day, fourth Thursday in November; Christmas Day, December 25; such other days as may be proclaimed by the President of the United States; the birthdays of states (dates of admission); and on State holidays.

Of course, this federal statute is the law in each of the fifty states under the supremacy clause of the United States Constitution. U.S. CONST. art. VI, § 2.

[50] 398 U.S. 58 (1970).

[51] *Id.* at 62, *quoting* 10 U.S.C. § 772(f) (1964).

MR. WRIGHT: O.k., maybe the government doesn't have any interest in insuring only respectful use of its symbols; but what about the citizenry? People who love our great nation are highly offended by wanton acts of flag desecration. Doesn't the average man's sensibilities mean anything anymore?

MR. LOEFT: The Constitution does not permit sensibilities to be protected at the expense of speech. Mr. Justice Harlan emphasized this in *Street* by citing a long line of cases which have established that "[i]t is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."[52]

MR. STRICTMAN: Offensive ideas may be protected, but offensive manners of presentation are not. For example, in *Kovacs v. Cooper*,[53] the Supreme Court affirmed a conviction for using a sound truck to propagate a constitutionally protected message.

MISS BRIGHT: That was justified on the ground of privacy.[54] A man trying to enjoy the privacy of his home has no place to run when a noisy sound truck rumbles past his door.[55] On the other hand, a man offended by an act of flag desecration can simply turn his head and walk the other way.

MR. WRIGHT: What about the man who is offended by one glimpse of a flag being burned?

MR. LOEFT: A free society cannot worry about the sensibilities of people who are so thin-skinned that they become upset by a fleeting glance of an act of protest.

MR. WRIGHT: I suppose that you'd constitutionalize the right to walk through a college campus in the nude to protest a dress code; after all, you only have to look once.

MR. LOEFT: There's quite a distinction; the nude is offensive simply

[52] 394 U.S. at 592. The cases cited were Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963); Terminiello v. Chicago, 337 U.S. 1 (1949). *Cf.* Cantwell v. Connecticut, 310 U.S. 296 (1940). This position was recently reaffirmed in Bachellar v. Maryland, 397 U.S. 564 (1970). See text p. 79 *infra*.

[53] 336 U.S. 77 (1949).

[54] Whether the particular statute was necessary to protect privacy is a debatable point. *Compare* Mr. Justice Jackson's concurring opinion (*Id.* at 97) *with* Mr. Justice Black's dissent (*Id.* at 98).

[55] After all, he is already in his "castle." *Cf.* Rowan v. Post Office Dept., 397 U.S. 728 (1970); Breard v. Alexandria, 341 U.S. 622 (1951); *but cf.* Martin v. Struthers, 319 U.S. 141 (1943), discussed pp. 75-76 *infra*.

because he is nude, whereas the flag burner is offensive only because of the symbolic significance of his act.

MR. WRIGHT: That's a distinction without a difference: it's the act and not just the idea that I find offensive. Although I'll admit to being somewhat offended by a man who says "I hate America," I am far more offended by a man who burns his flag while uttering these remarks. Therefore, I contend that, like nudity, flag burning is offensive apart from the idea being conveyed.

MR. LOEFT: Would you be offended by a man who burned his flag because it was no longer fit for use?

MR. WRIGHT: Of course not; that's how he's supposed to dispose of an unfit flag.[56]

MR. LOEFT: Therefore, your displeasure with the flag burner, unlike the nudist, is at least in part based on the communicative significance of his act.

MR. WRIGHT: Not at all. There's a time and a place for everything. The man who respectfully burns a flag that is no longer fit for use is acting in accordance with the law. I'm no more offended by that than I am by nudity in the men's locker room. On the other hand, both flag burning and nudity are highly offensive when done publicly.

MR. LOEFT: That may be true, but your tolerance or lack thereof for the nude does not depend on what he is trying to convey. Contrawise, your intolerance for the public flag burner is based upon the disrespect he is showing towards our country which I contend is too closely tied to the idea he is trying to convey to serve as constitutional justification for the prohibition.[57]

PROFESSOR: Assuming that Mr. Loeft is correct, couldn't we punish a man who desecrates the flag in public on the "fighting words" rationale of *Chaplinsky v. New Hampshire*?[58]

MR. STRICTMAN: Chief Judge Fuld speaking for a unanimous New York Court of Appeals in *Street* thought so. Citing *Chaplinsky*, he described Sidney Street's act of flag burning as "literally and figuratively 'incendiary' and as fraught with danger to the public peace as if he had stood on the street corner shouting epithets at passing pedestrians."[59]

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[56] 36 U.S.C. § 176(j) (1964).

[57] For further development of this issue, see 79-80 *infra.*

[58] 315 U.S. 568 (1942).

[59] 20 N.Y.2d 231, 237, 229 N.E.2d 187, 191, 282 N.Y.S.2d 491, 496 (1967).

JOHNNY TRUEBLOOD: That reasoning troubles me. If the "fighting words" rationale can justify punishment whenever something is communicated by some word or symbolic act that most people find unacceptable, the first amendment would be limited to protecting politically acceptable speech, which scarcely needs protection. I would agree with the Court of Appeals for the District of Columbia Circuit which held that the "fighting words" must be actually likely to cause a breach of the peace.[60] That was not true in Street's case[61] inasmuch as he was acquitted of disorderly conduct, and it was certainly not true in Ivan's case.

MR. WRIGHT: They're lucky that I wasn't there. I'd have beaten their brains out.

MR. LOEFT: That's a pretty violent way to react to an act which you described as "not really saying anything."[62]

MR. WRIGHT: He was insulting my country in an offensive manner. Indeed, if I had seen him burn the flag, I'd have been far more offended than I would have been had he personally called me "a damned racketeer and a damned Fascist."[63] Furthermore, most patriotic Americans would rather be insulted themselves than have their flag desecrated. This love of country over self is embodied in such immortal remarks as John Kennedy's "ask not what your country can do for you; ask what you can do for your country."[64]

MR. LOEFT: I doubt that President Kennedy meant for you to beat Ivan's brains out.

MR. WRIGHT: Be that as it may, a Street or an Ivanavitch who desecrates our sacred American flag is inviting retaliation even more than a Chaplinsky who insults a town official. That's why in *Halter v. Nebraska*, the Supreme Court said:

> For that flag every true American has not simply an appreciation but a deep affection. No American, nor any foreign born person who enjoys

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[60] Williams v. District of Columbia, 419 F.2d 638 (D.C. Cir. 1969).

[61] Street v. New York, 394 U.S. 576 (1969), discussed pp. 60, 65 *supra*; pp. 78-79 *infra*.

[62] P. 55 *supra*.

[63] The epithets delivered by Chaplinsky, 315 U.S. at 569. The complaint charged Chaplinsky with calling the town official "a Goddamned racketeer and a damned Fascist," but Chaplinsky denied that he had employed the name of the Diety. *Id.* at 570.

[64] J.F. Kennedy, *Inaugural Address* in PUBLIC PAPERS OF THE PRESIDENTS 3 (1961).

> the privileges of American citizenship, ever looks upon it without taking pride in the fact that he lives under this free government. Hence, it has often occurred that insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot.[65]

> Even so libertarian a writer as Zechariah Chafee has said: "The man who talks scurrilously about the flag commits a crime, not because the implications of his ideas tend to weaken the Federal Government, but because the effect resembles that of an injurious act such as trampling on the flag, which would be a public nuisance and a breach of the peace."[66]

MISS BRIGHT: The Supreme Court unequivocally rejected the Chafee rationale for punishing scurrilous talk about the flag when it said of Street's verbal insult to the flag: "Though it is conceivable that some listeners might have been moved to retaliate upon hearing appellant's disrespectful words, we cannot say that appellant's remarks were so inherently inflammatory as to come within the *small class* of 'fighting words' which are 'likely to provoke the average person to retaliation and thereby cause a breach of the peace.' "[67]

MR. STRICTMAN: That may be true of mere words, but surely the act of burning the flag is indeed figuratively as well as literally incendiary.

MISS BRIGHT: Even if I were to assume that certain kinds of flag desecration under certain circumstances, such as burning a flag in front of someone who had just manifested sentiments similar to those manifested by Mr. Wright a moment ago, would constitute "fighting words,"[68] the statutes punishing flag desecration are not so limited.[69] For example, as Mr. Trueblood has noted, both Street and Ivan were convicted even though there was no evidence of breach of the peace.[70] The Supreme Court in *Street* also noted that "even if appellant's words might be found within that category (fighting words), [the statute] is not narrowly drawn to punish only words of that character, and

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[65] 205 U.S. at 41.

[66] Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 150 (1941).

[67] 394 U.S. at 592, quoting from *Chaplinsky*, 315 U.S. at 574 (emphasis added).

[68] "If you burn that flag, I'll beat your brains out."

[69] Even there, it is at least arguable that a man ought not to lose his first amendment rights because of hostility on the part of his addressees. *Cf.* Cooper v. Aaron, 358 U.S. 1 (1958); *but see* Feiner v. New York, 340 U.S. 315 (1951). Both cases are discussed pp. 80-83 *infra*.

[70] Text accompanying notes 60 & 61 *supra*.

there is no indication that it was so interpreted by the state courts."[71] Since *Street*, the New York Court of Appeals has construed its flag desecration statute to apply to an art dealer who used the flag for "protest art" in his art gallery, notwithstanding a lack of evidence of physical violence.[72] Inasmuch as the Supreme Court has held that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved,"[73] I contend that nobody can be punished under a flag desecration statute unless that statute is construed to apply only to those acts of flag desecration which in fact are likely to produce a breach of the peace.[74]

MR. WRIGHT: If all else fails, I'd punish the flag desecrator for inciting a revolution against the government.

MR. LOEFT: How can you attribute so much clarity of thought to a flag burner, when you've indicated that frequently "we don't know exactly what he is saying"?[75] Furthermore, even if some flag burners are signaling a call to revolution, others, such as Ivan, are not. Thus, to justify convicting flag burners for this reason, the statute would also have to be narrowly drawn.[76]

PROFESSOR: We're running short of time. Are there any constitutional reasons other than free speech for not punishing flag desecrators?

JOHNNY TRUEBLOOD: I think that these statutes are both unconstitutionally vague and a denial of equal protection. For example, the New York statute forbids one to "cast contempt . . . upon the flag."[77] Does this mean only a cloth flag or any representation of a flag? Does one cast contempt upon a flag if he puts a peace symbol where the stars should be or if he flys it upside down as a distress symbol? Because of this inherent vagueness, the statute lends itself to discriminatory enforcement and hence a denial of equal protection.[78] We saw several illustrations of such discrimination on the way to school today.[79]

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[71] 394 U.S. at 592.

[72] People v. Radich, 26 N.Y.2d 114, 257 N.E.2d 30, 308 N.Y.S.2d 846 (1970); *appeal docketed sub nom.* Radich v. New York, 38 U.S.L.W. 3498 (U.S. May 18, 1970) (No. 1589, 1969 Term; renumbered No. 169, 1970 Term). See pp. 52-53 *supra.*

[73] Shelton v. Tucker, 364 U.S. 479, 488 (1960).

[74] For further analysis of this issue, see pp. 80-84 *infra.*

[75] See p. 58 *supra.*

[76] For further analysis of this issue, see pp. 84-85 *infra.*

[77] N.Y. GEN. BUS. LAW § 136d (McKinney 1968).

[78] *Cf.* Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[79] Act I, Scenes 2, 3 & 4 *supra.* Perhaps Long Island Vietnam Moratorium

MR. STRICTMAN: Mere unequal enforcement of a statute does not constitute a denial of equal protection. One seeking to challenge a statute on this ground must prove systematic discrimination against an individual or group.[80]

JOHNNY TRUEBLOOD: I am not suggesting that this is a valid statute which has been discriminatorily applied. Rather, I contend that the infirmity is the inherent vagueness of the statute itself. The Supreme Court has consistently held that where a statute gives a public official discretion as to what speech to allow and what not to allow, it cannot stand.[81]

MR. STRICTMAN: I can't see that flag desecration statutes are particularly vague. While it is true that there will be some close cases, this is true under any statute. As Mr. Justice Holmes said, "[T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or short imprisonment, as here; he may incur the penalty of death."[82] A marginal flag desecrator knows that he's taking his chances.

JOHNNY TRUEBLOOD: That's fine, so long as you're talking about ordinary criminal statutes; there the actor takes his chances. However, where the first amendment is involved, the Supreme Court has told us that "[t]he objectionable quality of vagueness and overbreadth does not depend upon the absence of fair notice to a criminally accused . . . , but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application."[83]

PROFESSOR: Are there any other possible constitutional objections to flag desecration statutes?

MR. LOEFT: Yes, I think that they establish a religion. The very word "desecrate" means "to divest of sacred or hallowed character."[84] That sounds mighty religious to me.

MR. WRIGHT: In the first place, some of the statutes don't even use the

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Comm. v. Cahn, 39 U.S.L.W. 2015 (E.D.N.Y. 1970), cited note 15 *supra* will ameliorate some of the more egregious instances of selective enforcement.

[80] Snowden v. Hughes, 321 U.S. 1, 8 (1944).

[81] *See, e.g.*, Shuttlesworth v. Birmingham, 394 U.S. 147 (1969); Cantwell v. Connecticut, 310 U.S. 296 (1940).

[82] Nash v. United States, 229 U.S. 373, 377 (1913).

[83] NAACP v. Button, 371 U.S. 415, 432-33 (1963). See also Winters v. New York, 333 U.S. 507 (1948).

[84] AMERICAN COLLEGE DICTIONARY 327 (1953).

term "desecrate."[85] Secondly, we should look at what the statute does, not what it says.

MR. LOEFT: For once I agree with you. The proper question is indeed what does the statute do, and these statutes preclude a manifestation of disrespect for a symbol, thereby protecting the flag in the same manner as ecclesiastical laws protect against the desecration of sacred symbols. I think that the *Joseph Burstyn* case[86] in which the Court held that sacrilegious movies could not be denied constitutional protection should rule this case.

MR. WRIGHT: That case didn't hold that any remark, regardless of how offensive to religion, was constitutionally protected. However, even if I were to agree with a recent Columbia Law Review note which suggests that traditional laws against blasphemy are unconstitutional,[87] it would not follow that a law protecting a sacred secular symbol is unconstitutional.

MR. LOEFT: In *Engle v. Vitale*, the Court said that "each separate government in this country should stay out of the business of writing or sanctioning official prayers [in that case a non-sectarian one]."[88] I say that each separate government should stay out of the business of creating quasi-religious sacred symbols.

PROFESSOR: That's certainly a novel approach, Mr. Loeft, but I doubt that the Court will adopt it. It chose to rely on freedom of speech rather than religion in both the *Burstyn* case, which you've cited, and *Barnette*.[89] Therefore, if the Court would uphold flag desecration laws against the other arguments advanced, I doubt that the religion clauses would compel a contrary result. In any event, we've reached the end of the hour; class dismissed.

ACT III

Scene 1

(Outside of the United States Supreme Court Building, several months later)

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[85] *E.g.*, N.Y. GEN. BUS. LAW § 136 (McKinney 1968).

[86] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

[87] Note, *Blasphemy*, 70 COLUM. L. REV. 694, 733 (1970). The author's conclusion appears to be based more upon freedom of speech than nonestablishment of religion. See note 89 *infra* and accompanying text.

[88] 370 U.S. 421, 435 (1962).

[89] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), discussed pp. 59-60 *supra* and pp. 78-79 *infra*.

Present: Ivan, Igor and Johnny

IVAN: I'm really scared; what will I do if the Supreme Court affirms my conviction?

IGOR: Don't worry, Ivan, I'll take care of your apartment while you're in prison. After that we can try to find a truly free society in which to live.

JOHNNY TRUEBLOOD: Now don't start talking that way; this is a great nation even if it does occasionally make mistakes. I fully believe that the Court will reverse your conviction, but even if it doesn't, you'd be very foolish to leave the country.

IGOR: I'm not so sure of that. Remember your classmate who threatened to beat Ivan's brains out. If one has to choose between expressing dissent and preserving his brains, I question how great this nation is.

JOHNNY TRUEBLOOD: Mr. Wright just got carried away emotionally; I wouldn't take him seriously.

IVAN: Well, he certainly had some case law to back him up. If the "fighting words" rationale of *Chaplinsky* is combined with the "love of flag" rationale of *Halter*, I could be in real trouble, and in view of the four man dissent in *Street* and the dismissal for want of a substantial question in *Cowgill*, I'm scared to death.[90]

JOHNNY TRUEBLOOD: Let's go inside; I think they 're ready to announce their decisions. Let's hope they decide your case today and declare you a free man.

Scene 2

(Inside the Supreme Court, a few minutes later. The Court is about to announce its decision in Ivanavitch v. New York.)

OPINION OF THE COURT:[91]

[90] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), discussed pp. 66-69 *supra* and pp. 80-84 *infra*; Halter v. Nebraska, 205 U.S. 34 (1907), discussed pp. 67-68 *supra* and p. 78 *infra*; Street v. New York, 394 U.S. 576 (1969), discussed throughout; Cowgill v. California, 396 U.S. 371 (1970), discussed p. 58 *supra* & p. 74 *infra*.

[91] The opinion about to be presented is not being attributed to any particular Justice. However, the author believes that it is not inconsistent with the general philosophy of any Justice presently sitting on the Court (Mr. Justice Blackmun excepted because he has not been on the Court long enough for the author to form an opinion of his first amendment philosophy). Although in *Street* Mr. Justice White appeared to reject the result about to be suggested, he refrained from giving any reasons. 394 U.S. at 515 (dissenting opinion). To the author's knowledge, the Justice has never articulated a philosophy opposed to that espoused by the opinion about to be presented. Mr. Justice Black also dissented in *Street*. However, his

The case before us presents questions that strike at the heart of the proper role of government in a society that is truly committed to freedom of speech as a living principle. On the one side, we have a young naturalized citizen of this great nation, who became so disillusioned with some of our actions in Viet Nam that he found it necessary to register a protest that would be heard. Being unknown and non-flamboyant as a speaker, he concluded that the only way to attract attention was to burn the American flag as part of his protest. On the other side, we have the State of New York which seeks to vindicate the majesty of the flag and protect the sensibilities of its citizens who love it.

The facts are not disputed. Appellant, Ivan Ivanavitch, who had been skeptical of our involvement in Viet Nam for some time, heard of the My Lai massacre on the evening news. Shortly thereafter, he took his American flag (which he had proudly purchased upon becoming a naturalized citizen) and walked to Central Park, determined to be heard. Upon arriving at the park, he shouted, "If our government is going to mistreat the Vietnamese people, we don't need any damned flag!" and simultaneously burned his flag. Unfortunately for Ivanavitch, the act did not attract nearly the attention for which he had hoped. Indeed, there is no evidence that anybody even stopped to think about what he was doing, that is, anybody except a New York City policeman, who observed the act and immediately arrested appellant for violating New York General Business Law § 136d which forbids one to "publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by words or act [the American flag]."[1] Appellant was convicted by the New York Supreme Court. The conviction was affirmed per curiam by both the Appellate Division of the Supreme Court and the New York Court of Appeals. We noted probable jurisdiction.

This is the second conviction under this statute to reach our Court. In *Street v. New York*, 394 U.S. 576 (1969), we held the "words" provision of § 136d to be unconstitutional. We explicitly left open the

[1] Although the term "American flag" is not mentioned in that section of the statute, there is no doubt that it is the American flag to which the prohibition refers.

rationale appears to be inconsistent with the philosophy he has espoused in other first amendment cases. 394 U.S. at 610. See pp. 75-76 *infra*.

Although the opinion attributes certain arguments to the State of New York, the author is not implying that New York or any of its attorneys either have or are likely to make any particular argument.

Henceforth, Court footnotes will be numbered in italics while the author's footnotes will continue to be numbered in roman face type.

question of whether a conviction based on the act of burning a flag alone would be constitutionally permissible where applied to a defendant whose act of burning was performed as a political protest. Again last term in *Cowgill v. California*, 396 U.S. 371 (1970), we left that question open when we dismissed for want of a substantial federal question an appeal from a man who was convicted of wearing a flag vest for no apparent political reason. Thus, for the first time, we are squarely faced with the task of deciding whether flag desecration laws can be employed to stifle this highly emotional form of political dissent.[2]

Appellant argues that § 136d (1) denies freedom of speech, (2) denies equal protection, (3) is unconstitutionally vague, and (4) constitutes an establishment of religion. Because we agree with appellant's first contention, it is unnecessary to consider the remaining three.

Appellee vigorously contends that appellant's act of wanton disrespect is not speech within any accepted meaning of the term and that even if it were, the state's interests are sufficient to outweigh any limited free speech interest that appellant might have. Each of these arguments will be considered separately.

I

Of course, it is far too late to argue that ideas communicated nonverbally are for that reason alone not entitled to constitutional protection. Any such narrow reading of the First Amendment was negatived at least as early as *Stromberg v. California*, 283 U.S. 359 (1931), wherein this Court held that a conviction for public display of a red flag "as a sign, symbol or emblem of opposition to organized government" could not stand consistently with the freedom of speech protected by the Fourteenth Amendment.[3] *Stromberg* was followed in *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), wherein this Court struck down a board of education resolution requiring students to salute the flag.[92]

[2] There is no unanimity among lower federal courts on this question. *Compare* Hodsdon v. Buckson, 310 F. Supp. 528 (D. Del. 1970) (unconstitutional) *with* United States v. Ferguson, 302 F. Supp. 1111 (N.D. Cal. 1969) (constitutional).

[3] When *Stromberg* was decided, the first amendment had not been definitely incorported into the fourteenth amendment as such. Three Justices presently on this Court continue to maintain that the protection offered by the two amendments is not necessarily coterminous. [The Chief Justice, Mr. Justice Harlan, and Mr. Justice Blackmun—see Hoyt v. Minnesota, 399 U.S. 524 (1970) (Blackmun, J., dissenting)]. By our use of the term "first amendment" throughout the remainder of this opinion, we mean only so much of the first amendment as each individual Justice thinks is incorporated into the fourteenth.

[92] *See* pp. 59-60 *supra* & pp. 78-79 *infra*.

More recently, we sustained the right of school children to wear black armbands to school as a protest against the Viet Nam conflict, *Tinker v. Des Moines School District*, 393 U.S. 504 (1969). Finally, just last term, we unanimously reversed the conviction of a young actor for unauthorized use of a military uniform where the basis of his conviction was the play's tendency to discredit the military. *Schacht v. United States*, 398 U.S. 58 (1970).

Recognizing that non-verbal methods of communication are sometimes entitled to constitutional protection, New York argues the true test for ascertaining what is "speech" is whether the conduct contravenes a valid criminal statute. *Giboney v. Empire Storage and Ice Co.*, 336 U.S. 490, 498 (1949). It further contends that the general validity of flag desecration statutes has been established by *Halter v. Nebraska*, 205 U.S. 34 (1907), and *Cowgill v. California, supra.* Although there is language in Mr. Justice Black's dissenting opinion in *Street v. New York, supra,* to suggest that the test suggested by New York is the proper one to apply to the question at bar, we believe that such a test would constitute a significant departure from our traditional approach in First Amendment cases.

Specifically, Mr. Justice Black said, "It passes my belief that anything in the Federal Constitution bars a State from making the deliberate burning of the American flag an offense. . . . 'It rarely has been suggested that the constitutional freedom for speech and press extends to immunity for speech or writing used as an integral part of conduct in violation of a valid criminal statute.' " 394 U.S. at 610 (quoting from *Giboney*, 336 U.S. at 498). Reduced to a syllogism, the position appears to be as follows: major premise—First Amendment considerations are irrelevant if the statute is otherwise valid; minor premise—the statute is valid apart from First Amendment considerations; conclusion—therefore the statute, being valid apart from the First Amendment, is valid in spite of the First Amendment.

This Court has consistently rejected the major premise of that syllogism. For example, in *Martin v. Struthers*, 319 U.S. 141 (1943), we reversed the conviction of a woman who was distributing religious literature in contravention of an ordinance which provided: "It is unlawful for any person distributing handbills, circulars or other advertisements to ring the door bell, sound the door knocker, or otherwise summon the inmate or inmates of any residence to the door for the purpose of

receiving such handbills, circular or other advertisements they or any person with them may be distributing." Although conceding that the ordinance was reasonably related to preventing both nuisances and criminal activity and that it could be applied constitutionally to commercial advertising,[4] the Court concluded that the municipality's interest in applying the statute to appellant was not sufficiently great to outweigh her free speech interest. Indeed, even *Giboney* recognized the special protection to which the First Amendment is entitled: "In holding this [that the particular conduct was not protected by the First Amendment], we are mindful of the essential importance to our society of a vigilant protection of freedom of speech and press. *Bridges v. California*, 314 U.S. 252, 263 (1941). States cannot consistently with our Constitution abridge those freedoms to obviate slight inconveniences or annoyances. *Schneider v. State*, 308 U.S. 147, 162 (1939). But placards used as an essential and inseparable part of a *grave offense against an important public law* cannot immunize that conduct." 336 U.S. at 501-02 (emphasis added). Thus, in holding that the "preferred position"[5] of the First Amendment requires the state to establish more than the general validity of the law, we do not break new ground, but simply follow our own well established precedents.[93]

Nevertheless, as we held in *Cox v. Louisiana*, 379 U.S. 536, 555 (1965), "the First and Fourteenth Amendments [do not] afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech." Although the dichotomy suggested by *Cox* has been criticized,[6]

[4] That we thought that the statute in *Martin* could be applied to commercial advertising was apparent from footnote 1 wherein we noted that "this ordinance was not aimed solely at commercial advertising" and cited Valentine v. Chrestensen, 316 U.S. 52 (1942), which held that commercial advertising is not entitled to the same constitutional protection as noncommercial speech. *Cf.* Breard v. Alexandria, 341 U.S. 622 (1951).

[5] A phrase frequently employed by this Court to describe the status of the first amendment.

[6] *E.g.*, Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 23: "The Court's neat dichotomy of 'speech pure' and 'speech plus' will not work. . . . To begin with, I would suggest that all speech is necessarily 'speech plus.' If it is oral, it is noise and may interrupt someone else; if it is written, it may be litter."

[93] Apart from his dissent in *Street*, Mr. Justice Black has consistently adhered to these precedents; he authored *Martin* and *Giboney*. Indeed, he went farther than the Court in Breard v. Alexandria, 341 U.S. 622 (1951), in which the Court, over his dissent, refused to apply *Martin* to a door-to-door magazine salesman.

we are willing to assume that the dichotomy is a real one and that flag desecration constitutes "speech plus."

Of course, this conclusion does not resolve the issue; it merely presents it. We still must determine what interest on the part of the state will be sufficient to justify appellant's conviction.[94] New York suggests that the appropriate test is that devised in *United States v. O'Brien*, 391 U.S. 367, 377, wherein this Court held that "a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the 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." Appellant argues that the *O'Brien* test ought not to apply: first, because his act of flag burning like the wearing of armbands in *Tinker v. Des Moines School District, supra,* was "closely akin to 'pure speech,'" 393 U.S. at 505,[7] and, second, because *O'Brien* was more restrictive in the protection granted First Amendment rights than any other modern First Amendment decision.[8] Although there is considerable force in these arguments, we have decided to apply the *O'Brien* tests as the touchstone for First Amendment protection in this case. We now turn to an analysis of the reasons proffered by the state to justify this conviction.

II

New York contends that it has at least four interests sufficient to justify this limitation on symbolic speech: (1) insuring proper respect for the flag, (2) protecting the sensibilities of its citizenry, (3) preventing

[7] The basis of this argument is that flags, like armbands, have no value apart from their symbolic significance. Draft cards, on the other hand, are reasonably related to the smooth functioning of the selective service system.

[8] Those who have criticized *O'Brien* have objected more to the application of the test than to the test itself. Specifically, questions have been raised as to the importance or substantiality of the aid to the smooth functioning of the selective service system provided by the statute when contrasted to the interference with free speech engendered thereby. *Compare* Martin v. Struthers, *supra, with* Giboney v. Empire Storage and Ice Co., *supra. See, e.g.*, Alfange, *Free Speech and Symbolic Conduct: The Draft Card Burning Case*, 1968 SUP. CT. REV. 1, 23; Loewy, *The Warren Court as Defender of State and Federal Criminal Laws: A Reply to Those Who Believe That the Supreme Court Is Oblivious to the Needs of Law Enforcement*, 37 GEO. WASH. L. REV. 1218, 1227 (1969).

[94] It does not matter whether we call this process "ad hoc balancing," "definitional balancing," or something else; it is a process in which the Court must engage since it is apparent that some methods of communication are constitutionally protected, whereas others are not. See note 23 & accompanying text *supra.*

breaches of the peace, and (4) preventing a violent revolution or attempted revolution. We consider them seriatum.

First: Appellee strenuously urges that at least since *Halter v. Nebraska, supra,* it has been the prerogative of a state to pass laws insuring proper respect for our nation's flag. However, in view of the Court's failure to even discuss the First Amendment in that 1907 case, we do not view it as controlling. More recently, in *West Virginia Board of Education v. Barnette, supra,* this Court in holding a compulsory flag salute unconstitutional said, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." 319 U.S. at 642. We echoed those sentiments in *Street v. New York, supra,* where we held that " 'the freedom to be intellectually . . . diverse or even contrary, and the right to differ as to things that touch the heart of the existing order' encompass the freedom to express publicly one's opinion about our flag, including those opinions that are defiant or contemptuous." 394 U.S. at 593, quoting from *Barnette.*

Appellee recognizes the relevance of these cases, but argues that they are distinguishable. It would distinguish *Barnette* on the ground that that case dealt with a particular method of demonstrating respect—the salute. Thus, it would read *Barnette* as holding that a state cannot require an individual to show respect in any particular way so long as he is in fact respectful, but that it can punish him for an affirmative act of disrespect. Of course, much of this argument has been undercut by *Street.* In recognition of this fact, appellee argues that *Street* should be limited to "pure speech." Thus, the appellee would have us glean the following rules from *Barnette* and *Street*: No man can be punished for failure to affirmatively demonstrate respect for the flag in any particular way; nor can anyone be punished for speaking contemptuously of the flag; but a man who casts contempt upon the flag by an act such as burning can be punished.

We concede that if we were bent on minimizing the First Amendment protections developed by these cases, it would be possible to read them as restrictively as appellee suggests. However, to do so would be to preserve the body shell of the decisions on the one hand while tearing out their heart on the other. This we cannot and will not do. We believe that the heart of Mr. Justice Jackson's great *Barnette* opinion was this simple but classic statement: "We can have intellectual individualism and the rich

cultural diversities that we owe to exceptional minds only at the price of occasional eccentricities and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." 319 U.S. at 641-642.

We agree with our late brother Jackson that how one respects the flag does not matter much. On the other hand, one who burns the flag is perhaps saying things that indeed "touch the heart of the existing order." Yet, as *Barnette* reminds us, it is precisely this kind of speech which needs constitutional protection. Therefore, we hold that New York's desire to insure proper respect for the flag is not sufficient to justify this conviction.

Second: Appellee urges that flag desecration laws are necessary to protect the sensibilities of its citizenry. Applying the *O'Brien* test, we assume *arguendo* that this "is within the constitutional power of the government" and that "it furthers an important or substantial governmental interest." However, we do not agree that "the governmental interest is unrelated to free speech."

New York concedes as it must in view of a long line of cases culminating in *Street*[9] that "the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." 394 U.S. at 592. Indeed, any other rule would destroy a primary purpose of the First Amendment. As we said in *Terminiello v. Chicago*: "(A) function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." 337 U.S. 1, 4 (1949).

Nevertheless, the state contends that it can protect people's sensibilities from an offensive manner of presenting ideas so long as it is neutral as to content. For example, it argues that it can punish one for wearing a shirt which says "(four letter obscenity) the draft" so long as it is prepared to punish one who would wear a shirt saying "(four letter obscenity) the draft resister." We accept the state's contention *arguendo*,

[9] The long line of cases include Terminiello v. Chicago, 337 U.S. 1 (1949), Edwards v. South Carolina, 372 U.S. 229 (1963), and Cox v. Louisiana, 379 U.S. 536 (1965). Just last term we reaffirmed this position. Bachellar v. Maryland, 397 U.S. 564 (1970).

but hold that it is inapplicable here because § 136d is not neutral as to content. To illustrate, the average New Yorker would not be offended by the burning of an ordinary piece of cloth. Indeed, if the cloth were colored to represent the Viet Cong flag, he would probably be delighted to see it burn. His reason for not being happy or neutral when the American flag is burned is that the flag burner is effectively saying "I do not share your views as to the sacredness of the American flag." If further proof were needed that flag burning is not inherently offensive, we need only look to 36 U.S.C. § 176(j) which provides as follows: "The flag, when it is in such condition that it is no longer a fitting emblem for display, should be destroyed in a dignified way, *preferably by burning*" (emphasis added). Thus, we conclude that the governmental interest in protecting the sensibilities of its citizens is not sufficiently unrelated to speech to qualify under *O'Brien*.

Third: Appellee, relying on *Feiner v. New York*, 340 U.S. 315 (1951), and *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), argues that § 136d is necessary to prevent breaches of the peace. Applying the *O'Brien* criteria to this interest, nobody would gainsay that preventing breaches of the peace "is within the constitutional power of the government" and "furthers an important or substantial governmental interest." Ivanavitch, however, argues that where the unpalatability of the message is the cause of the potential breach of peace, "the governmental interest is [not] unrelated to the suppression of free expression." New York, on the other hand, contends that since it is concerned with the potential reaction of the crowd rather than the content of the speech, its interest is unrelated to the First Amendment. We find it unnecessary to resolve this question since we have determined that the fourth *O'Brien* criterion has not been met in that this "restriction on . . . First Amendment freedoms is . . . greater than is essential to the furtherance of [the State] interest."

We base this conclusion on the simple, and obvious, fact that this statute is not limited to those acts of flag desecration which are in fact likely to produce a breach of the peace.[10] *Feiner v. New York, supra*, cited by appellee, is an instructive case in point. There, the police arrested a speaker for disorderly conduct only after he had been speaking for several minutes and warned to stop after a large restless crowd had gathered which the police believed they could not adequately handle. Even there, the Court

[10] *See, e.g.*, People v. Radich, 26 N.Y.2d 114, 257 N.E.2d 30, 308 N.Y.S.2d 846 (1970); *appeal docketed sub nom.* Radich v. New York, 38 U.S.L.W. 3498 (U.S. May 18, 1970) (No. 1589, 1969 Term; renumbered No. 169, 1970 Term).

was sharply divided and included a dissent which described the decision as "a dark day for civil liberties in our nation" and "a long step toward totalitarian authority." 340 U.S. at 323. The dissent contended that the police should have attempted to quiet the crowd or arrest the man who threatened the speaker (dissenting opinion of Black, J.). But whether *Feiner* was correctly decided or was "a long step toward totalitarian authority," we will not extend it beyond its facts. Rather, we will continue to insist that when a state wishes to prevent breaches of the peace, it must not suppress speech at least until it appears likely that the speech is going to cause a breach of the peace. This is not a novel concept. For years, this Court has looked askance at statutes which burden free speech with a ten-ton weight when a ten-pound weight will adequately protect whatever interest the state may have.[11] The reason that this Court has maintained such an attitude is that First Amendment rights are too precious to sport away unnecessarily. Thus, a state which can satisfy its interests without interfering with freedom of speech is not justified in asking this Court to sanction its decision to interfere anyway.

New York, however, argues that under *Chaplinsky v. New Hampshire, supra,* so long as appellant's act was substantially akin to "fighting words," the conviction should be sustained even though in fact there was no violence or threat of violence. The state notes that we affirmed Chaplinsky's conviction for calling a town official "a damned racketeer and a damned Fascist" even though there was no evidence of actual violence on the part of the addressee, nor did any breach of the peace transpire.[12] In affirming the conviction, we said: "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." 315 U.S. at 571-572. It

[11] Although the term "overbreadth" has been used in our free speech cases only since the 1960s; the concept is considerably older than that. *See, e.g.,* Thornhill v. Alabama, 310 U.S. 88 (1940).

[12] Apparently, a riot did transpire, ostensibly because of Chaplinsky's comments to the local citizenry regarding religion. However, the insultee was not one of the rioters, and the fact of the riot was immaterial to his conviction.

will be observed that there were at least three different reasons suggested for holding Chaplinsky's "fighting words" to be unprotected: (1) they "inflict injury," (2) they "tend to create a breach of the peace," and (3) they "are no essential part of the exposition of ideas." We will consider these reasons in inverse order.

Appellant urges us to limit *Chaplinsky* to those utterances which "are no essential part of the exposition of ideas." In so urging, he contends that if Yetta Stromberg's display of a red flag (Stromberg v. California, *supra*) and Mary Beth Tinker's wearing of a black armband (Tinker v. Des Moines School District, *supra*) were each an essential part of the exposition of an idea, then his, Ivan Ivanavitch's, burning of an American flag should be accorded like significance. We agree with appellant that unless we overrule *Stromberg* and *Tinker* (which we have no intention of doing), we must find that his burning of the flag was an essential part of the exposition of an idea.[13] Nevertheless, we cannot distinguish *Chaplinsky* on that ground because we do not believe that defendant's failure to expound an idea was really the basis of *Chaplinsky*. Specifically, we do not agree that Chaplinsky's statement to the town official was something other than the expression of an idea. He wished to inform the town official of his opinion of him and did so in a way which was not only unquestionably clear, but was all too clear; indeed, that was the whole trouble. Thus, we turn to the "tend-to-create-a-breach-of-the-peace" rationale.

New York strenuously urges that Ivanavitch's act of flag desecration was more likely to provoke a violent reaction than Chaplinsky's "fighting words." Although conceding that the act did not in fact cause a breach of the peace, the state reminds us that that was also true of Chaplinsky's so-called "fighting words." We are also told that the average patriotic American citizen would be more provoked and more likely to retaliate against one who subjects his country's flag to the ultimate insult than he would against one who merely personally insults him. Ivanavitch counters this by noting that since *all* people are likely to be upset by a personal insult whereas only *some* people are upset by flag desecration, that the state cannot punish all flag desecrators in the same manner that it punishes

[13] Appellee would distinguish *Stromberg* and *Tinker* on the ground that the act of flag desecration communicates nothing in particular unless and until it is verbally explained. We find that distinction illusory inasmuch as all symbolic acts must be explained to be meaningful. For example, wearing a black armband would be meaningless unless at some point somebody had explained that it was designed as a protest against our involvement in Viet Nam.

all those who employ "fighting words" in face-to-face discussion, but can punish only those desecrators who in fact create a "clear and present danger" of violence.[95]

We conclude that unless we adopt appellant's interpretation of *Chaplinsky*, we would invite the speedy demise of the First Amendment. To illustrate, in future cases a state may contend that it can punish somebody for carrying a Viet Cong flag or even a red flag (see *Stromberg v. California, supra*) on the ground that a patriotic American citizen would be more incensed at these acts than he would be at a personal insult. Surely, we could not say with confidence that this contention would not be true. Thus, we would be inviting states to protect the sensibilities of its citizens at the expense of First Amendment rights. As early as 1917, we said in a different but related context: "It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution." *Buchanan v. Warley*, 245 U.S. 60, 81 (1917). This principle was reaffirmed in *Cooper v. Aaron*, 358 U.S. 1 (1958) where we held that manifest hostility to integration in schools did not justify state interference with those who sought to integrate it. Yet, the logic of appellee's argument would have compelled us to permit segregation in the Little Rock school system so long as the school board could show that the average citizen of Little Rock would have been more provoked and more likely to retaliate against a Negro who integrated the school system than against an individual who personally insulted him. We did not do that there, and we will not do it here.[96]

Indeed, we can not believe that *Chaplinsky* meant to imply that the mere likelihood of violent response was a sufficient reason to deprive speech of First Amendment protection. Rather, we believe that the real basis of *Chaplinsky* was the fact that insulting or "fighting" words inflict injury by their very utterance. New York argues that the flag desecrator in the same manner inflicts injury by his very act. We find ourselves unable to accept this analogy because we believe the injuries to be of very different kinds. The injury involved in *Chaplinsky* is a very personal type.

[95] For a discussion of the vicissitudes of the "clear and present danger" test, see Strong, *supra* note 23.

[96] This analogy has not gone unnoticed by commentators. *See, e.g.*, Emerson, *supra* note 23, at 933.

Effectively, the addressee has been verbally slapped in the face. Thus, the statute can be viewed as a special type of assault statute. On the other hand, the injury, if any, of one who witnesses a flag being desecrated is a vicarious one based on his love for his country. While we recognize that in some cases, this kind of injury can be as or more severe than a personal insult, we cannot agree that it is entitled to the same kind of protection. This conclusion is necesssitated by the fact that any other conclusion would mean that if an idea is repulsive enough to enough people, its dissemination could be precluded lest its citizens be injured.

Thus, we refuse to expand upon *Chaplinsky*'s "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problems" and hold that New York may not prevent breaches of the peace with a statute that is so broad that it punishes flag desecration whether or not it is likely to create a breach of the peace.[14]

Fourth: New York contends that this statute is necessary to prevent a violent revolution or attempted revolution. It concedes that there is no "clear and present danger" of a takeover, but argues that the appropriate test is " 'whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.' " *Dennis v. United States*, 341 U.S. 494, 510 (1951). The state rightly contends that a Communist takeover or attempted takeover is a very serious evil and that in view of recent events such as the bombing of a building at the University of Wisconsin; the kidnapping and murder of a judge in San Rafael, California; and the increased wave of policemen being killed, the evil is not altogether improbable.[97] Nevertheless, we cannot agree that there is a sufficient relationship between these unquestionably unlawful activities and flag burning. Although it may be true that in some isolated instances the flag burner is calling for "revolution now," the statute is not limited to coverage of these instances. Even if it were, it strains credulity to believe that outlawing flag burning would impede those who were otherwise intent upon waging armed warfare against the United States. Indeed, one of the best ways to head off a potential revolution is to maximize freedom. The last thing this country

[14] Indeed, in view of New York's disorderly conduct statute upheld in Feiner v. New York, *supra*, it is difficult to understanding why a special disturbing-the-peace-by-means-of-flag-desecration statute should be necessary.

[97] New York made a similar argument in *Street*. Brief for Appellee at 69-73, Street v. New York, 394 U.S. 576 (1969).

needs to do is to make a martyr out of some revolutionary by convicting him for flag desecration.

Thus, we find that this staute is not reasonably related to preventing a revolution and therefore interferes with freedom of speech to a greater extent than is necessary for the achievement of that governmental purpose. Thus, it cannot withstand the fourth *O'Brien* criterion.

Inasmuch as none of the state interests have been sufficient to justify the invasion of Ivanavitch's First Amendment rights, we have no choice but to reverse his conviction.

III

We conclude this opinion with a warning to those who would read our decision as a license to destroy property in the name of protest. We emphasize that what we have given Constitutional protection to today is flag burning, not building burning. Indeed, even the right to burn or otherwise desecrate a flag is not absolute. A man who takes a flag from another's flagpole and desecrates it can be convicted of wanton injury to the property of another, whether or not his motivation for so acting was political protest. Similarly, a college student who lowers a university flag to half staff after the college president has ordered it flown at full staff can be convicted of trespass, as can a construction worker who raises a City Hall flag to full staff after the mayor had ordered it flown at half staff. *Cf. Adderley v. Florida*, 385 U.S. 39 (1966). The reason for these results is that where a particular flag is involved, somebody must make the ultimate decision as to where it will be flown, and this decision need not be made by the side which has the largest delegation available to enforce its will. We hold only that a statute that is designed absolutely to forbid public flag desecration cannot constitutionally be applied to one who desecrates the flag as an act of protest.[15] Finally, we wish to emphasize that what we have done today breaks no new ground. We have simply applied well established principles to the resolution of a new problem. As we said in both *Barnette* and *Street*, "The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own." 394 U.S. at 576, 319 U.S. at 641. We cannot let

[15] We intimate no view as to the propriety of punishing one who burns his flag as an act of protest in violation of a generally valid anti-burning ordinance. The resolution of that question would depend on the substantiality of the municipality's reasons for the ordinance. *Compare* Martin v. Struthers, *supra, with* United States v. O'Brien, *supra.* However, for purposes of today's decision we have assumed *arguendo* that such an ordinance would be valid.

our love and reverence for that flag cause us to weaken the very freedom for which it stands; for that would be the ultimate in flag desecration. *Reversed.*

Scene 3

(Outside of the Supreme Court Building a few minutes later)

IGOR: Congratulations, Ivan, you're a free man! Johnny sure was right about America; what magnificent libertarian sentiments! You surely wouldn't hear anything like that from any Russian court.

JOHNNY TRUEBLOOD: There really wasn't anything unusual about today's decision. Most of the sentiments you refer to were taken from earlier decisions. It was simply a matter of applying them to this case.

IVAN: I agree with Igor. I was extremely impressed. After seeing how committed this country really is to liberty, you can bet that I'll never again burn the flag that is symbolic of that liberty just because of my dissatisfaction with something that the government or some of its officials are doing.

IGOR: I feel the same way about this country, Ivan. You've certainly won a great victory.

JOHNNY TRUEBLOOD: You have indeed won a great victory, Ivan, but our country has won a greater one!

THE END

Postscript: The story presented by the above play is fictitious. The events depicted therein have not yet happened and indeed may never happen. Nevertheless, it is submitted that unless something approximating the opinion depicted in Act III, Scene 2, does transpire, our boasting of being a free society will be *pro tanto* so much rhetoric.