



STREET v. NEW YORK  
SUPREME COURT OF THE UNITED STATES  
394 U.S. 576  
April 21, 1969  
[5 - 4]

**OPINION:** Justice Harlan...Appellant Street has been convicted in the New York courts of violating...[a] New York Penal Law **which makes it a misdemeanor "publicly to mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by words or act any flag of the United States."**...We must decide whether...that conviction denied to him rights of free expression protected by the First Amendment and assured against state infringement by the Fourteenth Amendment...

Appellant testified that during the afternoon of June 6, 1966, he was listening to the radio in his Brooklyn apartment [and] heard a news report that civil rights leader James Meredith had been shot by a sniper in Mississippi. Saying to himself, "They didn't protect him," appellant, himself a Negro, took from his drawer a neatly folded, 48-star American flag which he formerly had displayed on national holidays, left his apartment and carried the still-folded flag to the nearby intersection of St. James Place and Lafayette Avenue. Appellant stood on the northeast corner of the intersection, lit the flag with a match, and dropped the flag on the pavement when it began to burn.

Soon thereafter, a police officer halted his patrol car and found the burning flag. The officer testified that he then crossed to the northwest corner of the intersection, where he found appellant "talking out loud" to a small group of persons. The officer estimated that there were some 30 persons on the corner near the flag and five to 10 on the corner with appellant. The officer testified that as he approached within 10 or 15 feet of appellant, he heard appellant say, "**We don't need no damn flag,**" and that when he asked appellant whether he had burned the flag appellant replied: "Yes; that

is my flag; I burned it. **If they let that happen to Meredith we don't need an American flag.**" Appellant admitted making the latter response, but he denied that he said anything else and asserted that he always had remained on the corner with the flag.

Later the same day, appellant was charged...with having committed "the crime of Malicious Mischief..."

Street argues that his conviction was unconstitutional for three...reasons. *First*, he claims [the statute] is overbroad...because [it] makes it a crime "publicly to defy...or cast contempt upon [an American flag] *by words*..." *Second*, he contends [the statute] is vague...because it does not clearly define the conduct which it forbids. *Third*, he asserts that New York may not constitutionally punish one who publicly destroys or damages an American flag as a means of protest, because such an act constitutes expression protected by the Fourteenth Amendment. **We deem it unnecessary to consider the latter two arguments, for we hold that [the statute] was unconstitutionally applied in appellant's case because it permitted him to be punished merely for speaking defiant or contemptuous words about the American flag. In taking this course, we resist the pulls to decide the constitutional issues involved in this case on a broader basis than the record before us imperatively requires...**

We [must] consider whether it is our duty to reverse if we find, as we do..., that Street's words could have been an independent cause of his conviction and that a conviction for uttering such words would violate the Constitution...

In the leading case of *Stromberg v. California*<sup>1</sup>, the appellant was convicted by a jury under a California statute making it an offense publicly to display a red flag for **any one of three** purposes. Finding that it would be unconstitutional to punish one who displayed for the first-named reason, this Court rejected the state court's reasoning that the appellant's conviction could nevertheless be sustained because the other two statutory reasons were severable and constitutional. This Court said:

"The verdict against the appellant was a general one. It did not specify the ground upon which it rested...It is impossible to say under which clause of the statute the conviction was obtained. If any one of these clauses...was invalid, it cannot be determined upon this record that the appellant was not convicted under that clause...It follows that...the conviction cannot be upheld."

...It is true that in the present case the general verdict was rendered by a judge, not a jury. However, if the ground of the judge's decision cannot be ascertained from the record, then the danger of unconstitutional conviction is not significantly less than in the cases just discussed. Nor would it be appropriate to remand the case to the trial judge for a *post hoc* explanation of the grounds of his decision. Hence, we conclude that the case is governed by the rule of *Stromberg*, and that appellant's conviction must be set aside if we find that it could have been based solely upon his words and that

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<sup>1</sup>Case 1A-S-5 on this website.

a conviction resting on such a basis would be unconstitutional...

At the time of his arrest, appellant was standing on a street corner and speaking to a small crowd; on the opposite corner lay the burning flag. Appellant said to the crowd: "We don't need no damn flag"; and when questioned by a police officer appellant stated: "If they let that happen to Meredith we don't need an American flag." According to the officer, the crowds which gathered around appellant and around the flag did not obstruct the street or sidewalk and were neither unruly nor threatening.

In these circumstances, we can think of four governmental interests which might conceivably have been furthered by punishing appellant for his words: (1) an interest in deterring appellant from vocally inciting others to commit unlawful acts; (2) an interest in preventing appellant from uttering words so inflammatory that they would provoke others to retaliate physically against him, thereby causing a breach of the peace; (3) an interest in protecting the sensibilities of passers-by who might be shocked by appellant's words about the American flag; and (4) an interest in assuring that appellant, regardless of the impact of his words upon others, showed proper respect for our national emblem.

**In the circumstances of this case, we do not believe that any of these interests may constitutionally justify appellant's conviction...for speaking as he did.** We begin with the interest in preventing incitement. Appellant's words, taken alone, did not urge anyone to do anything unlawful. They amounted only to somewhat excited public advocacy of the idea that the United States should abandon, at least temporarily, one of its national symbols. It is clear that the Fourteenth Amendment prohibits the States from imposing criminal punishment for public advocacy of peaceful change in our institutions. Even assuming that appellant's words might be found incitive when considered together with his simultaneous burning of the flag, [the statute in question] does not purport to punish only those defiant or contemptuous words which amount to incitement, and there is no evidence that the state courts regarded the statute as so limited. Hence, a conviction for words could not be upheld on this basis.

Nor could such a conviction be justified on the second ground mentioned above: the possible tendency of appellant's words to provoke violent retaliation. 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 that small class of "fighting words" which are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace." *Chaplinsky*<sup>2</sup>. And even if appellant's words might be found within that category, [the statute] is not narrowly drawn to punish only words of that character, and there is no indication that it was so interpreted by the state courts. Hence, this case is again distinguishable from *Chaplinsky*, in which the Court emphasized that the statute was "carefully drawn so as not unduly to impair liberty of expression..."

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<sup>2</sup>Case 1A-S-8 on this website.

Again, such a conviction could not be sustained on the ground that appellant's words were likely to shock passers-by. Except perhaps for appellant's incidental use of the word "damn," upon which no emphasis was placed at trial, any shock effect of appellant's speech must be attributed to the content of the ideas expressed. **It 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.** *Cantwell v. Connecticut*.<sup>3</sup> And even if such a conviction might be upheld on the ground of "shock," there is again no indication that the state courts regarded the statute as limited to that purpose...

We have no doubt that the constitutionally guaranteed "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 opinions about our flag, including those opinions which are defiant or contemptuous.

Since appellant could not constitutionally be punished under [the statute] for his speech, and since we have found that he may have been so punished, his conviction cannot be permitted to stand. In so holding, we reiterate that we have no occasion to pass upon the validity of this conviction insofar as it was sustained by the state courts on the basis that Street could be punished for his burning of the flag, even though the burning was an act of protest...We add that **disrespect for our flag is to be deplored no less in these vexed times than in calmer periods of our history. Nevertheless, we are unable to sustain a conviction that may have rested on a form of expression, however distasteful, which the Constitution tolerates and protects...**[W]e reverse the...Court of Appeals...

Just to be clear, the Court did not rule on the Constitutionality of flag "**burning**" in this case.

**DISSENT:** Justice Fortas...**I believe that it is necessary briefly to set forth the reasons why the States and the Federal Government have the power to protect the flag from acts of desecration committed in public.**

If the national flag were nothing more than [an object], subject only to the rules governing the use of private personalty, its use would nevertheless be subject to certain types of state regulation. For example, regulations concerning the use of [property] which are reasonably designed to avoid danger to life or property, or impingement upon the rights of others to the quiet use of their property and of public facilities, would unquestionably be a valid exercise of police power. They would not necessarily be defeated by a claim that they conflicted with the rights of the owner of the regulated property.

If a state statute provided that it is a misdemeanor to burn one's shirt or trousers or shoes on the public thoroughfare, it could hardly be asserted that the citizen's constitutional right is violated. If the arsonist asserted that he was burning his shirt or trousers or shoes as a protest against the

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<sup>3</sup>Case 1A-R-3 on this website.

Government's fiscal policies, for example, it is hardly possible that his claim to First Amendment shelter would prevail against the State's claim of a right to avert danger to the public and to avoid obstruction to traffic as a result of the fire. This is because action, even if clearly for serious protest purposes, is not entitled to the pervasive protection that is given to speech alone. *Cantwell v. Connecticut*. It may be subjected to reasonable regulation that appropriately takes into account the competing interests involved.

The test that is applicable in every case where conduct is restricted or prohibited is whether the regulation or prohibition is reasonable, due account being taken of...First Amendment values. If, as I submit, it is permissible to prohibit the burning of personal property on the public sidewalk, there is no basis for applying a different rule to flag burning. And the fact that the law is violated for purposes of protest does not immunize the violator.

Yes, but Street wasn't charged with "burning personal property on a public street."

Beyond this, however, the flag is a special kind of personalty. Its use is traditionally and universally subject to special rules and regulation. As early as 1907, this Court affirmed the constitutionality of a state statute making it a crime to use a representation of the United States flag for purposes of advertising. *Halter v. Nebraska*. Statutes prescribe how the flag may be displayed; how it may lawfully be disposed of; when, how, and for what purposes it may and may not be used. A person may "own" a flag, but ownership is subject to special burdens and responsibilities. A flag may be property, in a sense; but it is property burdened with peculiar obligations and restrictions. Certainly, as *Halter v. Nebraska* held, these special conditions are not *per se* arbitrary or beyond governmental power under our Constitution.

One may not justify burning a house, even if it is his own, on the ground, however sincere, that he does so as a protest. One may not justify breaking the windows of a government building on that basis. Protest does not exonerate lawlessness. And the prohibition against flag burning on the public thoroughfare being valid, the misdemeanor is not excused merely because it is an act of flamboyant protest.