

Supreme Court of the United States

In the Matter of:

Docket No. 5

SIDNEY STREET,

Appellants

vs.

PEOPLE OF THE STATE OF NEW YORK

Appellee.

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Place Washington, D. C.

Date October 21, 1968

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Washington, D. C.

C O N T E N T S

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1		
2	David T. Goldstick, Esq., on behalf of Appellant	2
3	Harry Brodbar, Esq., on behalf of Appellees	23

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term, 1968

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4 Sidney Street, :

5 Appellant, :

6 v. :

No. 5

7 People of the State of New York, :

8 Appellee. :

9 -----
10 Washington, D. C.

11 Monday, October 21, 1968

12 The above-entitled matter came on for argument at

13 10:00 a.m.

14 BEFORE:

15 EARL WARREN, Chief Justice

16 HUGO L. BLACK, Associate Justice

17 WILLIAM O. DOUGLAS, Associate Justice

18 JOHN M. HARLAN, Associate Justice

19 WILLIAM J. BRENNAN, JR., Associate Justice

POTTER STEWART, Associate Justice

BYRON R. WHITE, Associate Justice

ABE FORTAS, Associate Justice

THURGOOD MARSHALL, Associate Justice

20 APPEARANCES:

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1 P R O C E E D I N G S

2 MR. CHIEF JUSTICE WARREN: No. 5, Sidney Street,
3 Appellant, versus New York.

4 THE CLERK: Counsel are present.

5 MR. CHIEF JUSTICE WARREN: Mr. Goldstick.

6 ORAL ARGUMENT OF DAVID T. GOLDSTICK, ESQ.,

7 ON BEHALF OF APPELLANT

8 MR. GOLDSTICK: Good morning, Mr. Chief Justice.

9 MR. CHIEF JUSTICE WARREN: Before you start, I should
10 have said that the orders of the Court as certified by the
11 Chief Justice and filed with the Clerk will not be announced
12 orally.

13 You may proceed.

14 MR. GOLDSTICK: Mr. Chief Justice, and may it please
15 the Court, this is an appeal from a conviction of the Criminal
16 Court of the City of New York wherein appellant was convicted
17 for malicious mischief in that he defiled and cast contempt
18 upon and burned an American flag in violation of section 1425
19 (16) (d) of the New York State penal law.

20 The charge was that he did willfully set fire to and
21 burn the American flag and shout, "If they did that to James
22 Meredith, we don't need an American flag."

23 The judgment has been unanimously affirmed by the
24 Appellate Term of the Supreme Court of the State of New York
25 and in turn was unanimously affirmed by the Court of Appeals,

1 Judge Fuld rendering the opinion.

2 The statute in question is set forth on page 5 of
3 appellant's brief. I might at the outset say that we agree
4 completely with Justice Fuld when he states that the central
5 issue in this case is whether or not the deliberate act of
6 burning an American flag in public as a protest may be punished
7 as a crime.

8 Parenthetically, we believe there is another issue
9 that was raised then and we raise here today that assuming that
10 New York State may punish such an act as a crime, may it do it
11 under the statute in question.

12 The facts are really undisputed. On June 6, 1966,
13 at about five-thirty in the afternoon, Sidney Street was sitting
14 in his apartment listening to the radio and he heard a news
15 broadcast that James Meredith while marching through Mississippi
16 was shot.

17 He went to his drawer, took out an American flag,
18 went out of his apartment to a street corner, put a piece of
19 paper on the street, holding the flag in one hand properly
20 folded, put a match to it and set it on fire.

21 A police officer testified at the trial that he saw
22 the smoke, came over to find out what had occurred, saw on the
23 street corner a flag partially burned and folded lying on the
24 ground, heard a man shouting -- he couldn't quite make out what
25 he was saying at the other street corner across the street,

1 heard a man shout, "We don't need no damn flag." Upon
2 identifying who the man was who turned out to be the defendant,
3 he asked him if it was his flag, the appellant said, "Yes, it
4 was my flag," and he said the words, "If they did that to James
5 Meredith, we don't need the American flag."

6 Q Mr. Goldstick, Judge Fuld, in his recital of
7 the facts in his opinion for the Court of Appeals, does
8 have a little minor error in his factual recital, does he not,
9 when he says that your client told the small crowd which had
10 collected that, "If they let that happen to Meredith, we don't
11 need an American flag"?

12 A Well, we don't know if there is a factual error
13 there or not, and I will tell you why, Mr. Justice, because
14 the officer testified that he came over after the burning and
15 that he questioned the person there at the street corner.
16 Now, I don't know whether when he questioned him, if he
17 questioned him loud enough for the crowd to have heard the
18 questions. I think we may assume that he did. Certainly, we
19 may assume that the crowd did hear, "We don't need no damn
20 flag." That is without question. The other words, the
21 record just isn't quite clear. You are quite right.

22 Q No, I went through the record pretty carefully
23 yesterday, and I didn't see that there was anything to support
24 the statement that your client, as he was burning the flag,
25 told the small crowd, before the officer came, told the small

1 crowd that had collected --

2 A Oh, that is quite right. The statement was made
3 after the burning was done. Quite so. Quite so.

4 Let me ask the Court if they will turn with me to
5 page 5 of my brief so that we may examine the statute together,
6 and that I might point out what appellant's contentions are
7 concerning the infirmities of the statute.

8 I turn to the subdivision (d), in which it says,
9 "Shall publicly mutilate, deface, defile, or defy, trample
10 upon, or cast contempt upon either by words or act..."

11 At the outset, it becomes obvious that the insertion
12 in the statute "by words or act," shows us that the statute on
13 its face restricts freedom of speech.

14 Secondly, I would like to point out that the words
15 "cast contempt upon," the word "defile," the word "defy,"
16 have speech meaning as well as act meaning.

17 As a matter of fact, I find difficulty in seeing
18 where this statute does not on its face have an absolute
19 restriction on the form of verbal speech that somebody may use
20 towards the American flag. And this is borne out, I might say,
21 in the district attorney's brief in which he so interprets the
22 statute. Even in the Court of Appeals decision. I ask the
23 Court to turn with me for a moment to Judge Fuld's decision on
24 page 8 of the record, about 12 lines from the bottom of the
25 page. We see the observation by Chief Judge Fuld that

1 subdivision 16 of section 1425 is designed to prevent the
2 outbreak of such violence by discouraging contemptuous and
3 insulting treatment of the flag, and I infer from the word
4 "treatment," that certainly contemptuous treatment of the
5 flag may be by word as well as by act. We find that the
6 opinions of the Attorney General of the State of New York as
7 cited in the District Attorney's brief seem to indicate that
8 the statute is prohibiting words as well as acts. In fact it
9 seems to go farther even than the Court of Appeals decision.
10 The Attorney General seems to feel that all disrespect, of
11 any kind, shown to the flag is illegal under the statute.

12 Now, the point that I am trying to bring to the
13 Court's attention is that this is not a fanciful observation.
14 The convictions that we have had in New York over the past two
15 years are very real. Besides Street's conviction, we had a
16 conviction in the Radich case that is waiting appeal in the
17 New York Court of Appeals, where an owner of an art store
18 displayed in his art store and in the window some 40-odd
19 constructions of an artist's protest against the American flag.
20 And as Judge Basil observed in his dissent, the artist is
21 conveying by his pictures what you or I might be able to
22 convey by words, but that this is the way he can convey it
23 best.

24 You will notice in our reply brief we have a picture
25 of a poster, and I notice that Mr. Justice Stewart is taking a

1 look at it, and I think that all of us should take a look at
2 it together. Two weeks ago a police officer issued a summons
3 for violation of the statute for showing an American flag in a
4 bookstore window and replacing on the field where the stars are
5 the doves of peace and the signs of peace.

6 Now the question has to be asked, "All right, what
7 does that have to do with this case?" There is no question that
8 Street did something that isn't all speech. It is act as well as
9 speech, and, all right, suppose the statute goes too far, but
10 we should still be able to convict Street because, unquestion-
11 ably, New York has the power to outlaw this kind of conduct.
12 It is our position, Your Honors, that even if this Court took
13 that position, which we do not agree with, but assume for the
14 moment that we agreed that the State of New York could outlaw
15 this type of conduct.

16 Q Do you really argue that the State of New York
17 could not constitutionally outlaw the defacing of the flag by
18 physical acts?

19 A I do not, Mr. Justice Fortas. I do not take
20 that position.

21 Q You don't take that position?

22 A I do not.

23 Q It is the speech element here that, or the
24 so-called symbolic speech, that bothers you here?

25 A It bothers me very much, and it also bothers me

1 that a statute on its face is so restrictive goes far beyond the
2 limited powers that Mr. Justice Fortas is referring to, and that
3 even if we assume that it could do what Mr. Justice Fortas says--
4 I quite agree with you, in all likelihood it probably could--
5 it can't go as far as the statute, and Mr. Street is in a
6 position to attack the statute.

7 Q Mr. Goldstick, I didn't quite understand. What
8 position do you not take?

9 A I do not take the position that the State of
10 New York cannot regulate conduct towards the flag. I am saying
11 that the State of New York may in certain circumstances with a
12 properly drawn statute narrowly construed for the purpose
13 intended prevent certain acts of flag desecration.

14 Q I didn't understand your brief to take that
15 position.

16 A Last night I really struggled with this problem
17 myself, because I have been struggling with it for two years
18 now. And I must confess to Your Honor that I have been back
19 and forth on the power of the State to regulate conduct towards
20 the flag and I have had to take the position that in this case
21 it makes no difference, whether or not we were to decide that
22 the State of New York does have such powers. I am willing to
23 concede for the purpose of this argument that it does have
24 that power.

25 Q As to this branch of your argument or to your

1 whole case?

2 A I am willing to concede for the entire case
3 that there is a limited amount of power that the State of New
4 York has to regulate conduct towards the flag.

5 Q I take it, though, you would say that that power
6 ends as of the moment that the conduct is communicative.

7 A Absolutely.

8 Q And that it ends as soon as there is a claim
9 that it is communicative?

10 A Well, I would say, first, we may not have to
11 reach that point, because the statute on its face obviously
12 restricts communicative acts, and that even if we had, for
13 example, a statute like the Federal Government has recently
14 enacted which omits any reference to speech, except, I might
15 point out, the word "defile" which has an interpretation
16 having speech connotation. Assuming that that word was out
17 and we had the Federal statute in question we would then have
18 to reach the question as to whether it was constitutionally
19 applied. But we can avoid that problem, although I am prepared
20 to speak on it, because I think even if we had the Federal
21 statute in New York, the particular facts in this case would
22 not allow a conviction.

23 But assuming for a moment that was the statute we
24 had, you know this goes far beyond the Federal statute. You
25 know, I might point out that the honorable Ramsey Clark and I

1 realize it is not binding on the Court in any manner whatsoever
2 he still made a very apt observation to Congress when they were
3 adopting the statute that the words as used in the New York
4 statute and in the proposed statute before Congress was very
5 much like the New York statute.

6 Q Let me see if I follow you. Of course, your
7 concession does not dispose of this matter for this Court, but
8 I want to get your position clear.

9 Suppose you have here a statute, the statute of New
10 York, that said it shall be unlawful for any person in public
11 deliberately to set fire to and burn an American flag. That's
12 all the statute said, and that's all Mr. Street did. And he is
13 indicted for that, and there is no speech element whatever.
14 You do not take the position that that would be a violation of
15 the United States Constitution?

16 A I do not.

17 Q If in addition to that, if he uses some language,
18 do you claim that that purges him?

19 A I am sorry, Mr. Chief Justice.

20 Q But if in addition to burning the flag he uses
21 some language, such as he does here, do you claim that that
22 purges him of burning the flag?

23 A That is the nub of the problem, because that is
24 exactly what we are saying. We are saying also that even under
25 this circumstance of Mr. Justice Fortas which he pointed out,

1 that the act could then be coupled with other acts that in and
2 of itself now brings it out of the simple due process problems
3 of a criminal statute and cloaks it with First Amendment
4 problems.

5 Q Don't you think that there would be any First
6 Amendment problem in the case put to you by Mr. Justice Fortas?

7 A Not necessarily, because on its face there is no
8 restriction of speech, but there may be, for example, as
9 applied, a person may be doing the burning and shouting, "This
10 United States does not belong in Vietnam."

11 Q What if he is not saying anything?

12 A No words?

13 Q Don't you think this is a First Amendment
14 problem?

15 A No, I don't think there is. There has to be a
16 communication.

17 Q Don't you think that is a communication in and
18 of itself?

19 A Not necessarily.

20 Q Could it be? He doesn't say a word. He just
21 burns the American flag in front of public places like this.

22 A Could it be? The answer to that --

23 Q You mean that if Street had not said a word, that
24 if he had not said a single word, that he just burned the flag,
25 then you wouldn't be here?

1 A If Street had not said a word -- not
2 necessarily. I am trying to get to the "not necessarily" part.
3 If the burning of the flag took on a secondary meaning -- for
4 example, if this were a protest where people realized that the
5 burning was for a purpose, a protest, was a communication.

6 Before Kleenex was on the market, for example, the
7 word Kleenex had no secondary meaning for a number of years.
8 But it got a meaning because people started using it. The same
9 thing with draft card burning. Today when a fellow burns a
10 draft card in public, we very well know what he is doing, that
11 he is communicating a protest against the Vietnam war. Flag
12 burning hasn't gotten that secondary meaning, but I submit it
13 may very well get to that point.

14 But that is not our problem at this time. I am
15 willing to concede right now that the simple act of burning the
16 flag in New York, but not under the statute because the
17 statute goes far beyond that problem.

18 Q Yes, but my question to you, which you answered,
19 I postulated that the statute did not contain any reference
20 to verbal statements, but the New York statute does, as you
21 pointed out.

22 A I agree with Mr. Justice Fortas.

23 Q I am not indicating any attitude.

24 A I understand. I might point out --

25 Q That the language of the New York statute in this

1 respect does not make a difference, but your answer to my
2 question was very carefully restricted.

3 A Thank you. I might --

4 Q I will ask you, in connection with the precise
5 argument you are now making what you say about this statement,
6 "But it has never been deemed an abridgement of freedom of
7 speech or the press to make a course of conduct illegal merely
8 because the conduct was in part initiated, evidenced, or
9 carried out by means of language, either written, spoken, or
10 printed."

11 A Mr. Justice Black, I hope by the time I finish
12 today, and after this Court has seriously considered the merits
13 of the case, that that statement would not be the law of this
14 land.

15 Q In other words, we would have to overrule that?

16 A I am not saying that, because we don't even have
17 to reach that question, because we have a statute on its face
18 that abridges the freedom of speech, and you don't even have to
19 reach that problem. What I am saying, however --

20 Q Why don't we have to reach it if you say if the
21 conduct itself does not violate the Constitution, but it does
22 violate it because of the language in the statute.

23 A The reason, Mr. Justice Black, that I say we
24 don't have to reach it is because Street stands convicted under
25 a statute that was unconstitutional on its face as being an

1 obvious restriction on verbal speech that says you can't use
2 words, and that he has a right, I believe, to attack that
3 statute and thereby attack his conviction, even though New York
4 may well have the right to outlaw exactly what he did. And I
5 think Thornhill v. Alabama is exactly that type of a situation.

6 But to get back to your question, Your Honor, I would
7 like to feel that the issue here on an act as well as words is
8 whether a communication was made, and whether the communication
9 was understood, because isn't this truly the problem of a
10 freedom-of-speech case? A communication of an idea to the public
11 and the receipt of that communication by the public, and this is
12 the nub of the issue that Mr. Justice Black referred to, and
13 this is the nub of the other issue in this case, which I freely
14 admit does not have to be reached, but if reached, should be
15 decided on drawing criteria for us to know when act and speech
16 is speech, and when act and speech is not speech, and therefore
17 not entitled to First Amendment protection.

18 If I might digress just for a moment --

19 Q I notice that Judge Fuld's opinion doesn't deal
20 with your argument, which I gather is an argument of overbreadth,
21 that because the statute deals both with conduct and words, this
22 appellant has standing to attack the constitutionality of the
23 statute on its face. Is that your argument?

24 A Yes, it is.

25 Q Now, why is it Judge Fuld's opinion didn't deal

1 with that?

2 A He deals with it only in a footnote--

3 Q I raise this because I gather the States are
4 going to contend it does not abridge free speech. And that it
5 was not considered because you did not raise it.

6 A We did, and it was considered, Your Honor, at
7 page 4A of the decision, footnote 1. We raised the entire
8 argument of overbreadth and vagueness in the Court of Appeals.

9 Q How about the trial court?

10 A Well, at the trial court, I might point out,
11 that on an examination of the record, as I was making my
12 motion, I was politely asked really to sit down. We never
13 really got to finish making our motion, and not only was the
14 issue discussed at the trial court, but it was also discussed
15 at the Court of Appeals and dealt with in that motion.

16 But I might point out, Mr. Justice White, that the
17 overbreadth argument is a First Amendment argument and not a
18 14th Amendment argument. We raise First Amendment questions.
19 It would be my understanding that provided any issue on First
20 Amendment infirmities raised in any manner whatsoever, whether
21 it be overbreadth or on its face or improper application of the
22 statute, it would still be a First Amendment objection and
23 properly raised.

24 Q Well, what would you say if we thought we had to
25 read Judge Fuld's opinion as not treating the question because

1 as a matter of State law your failure to raise it at the trial
2 precluded any right to have it considered in the Appellate
3 Court? If we had to read it that way, then where would we
4 stand?

5 A Of course, if you read it as if I did not raise
6 it. But it was raised, and in my motion at the trial court I
7 raised a First Amendment objection. I said the statute is void
8 for First Amendment problems, and Judge Fuld passed on First
9 Amendment problems and the whole question of overbreadth is a
10 First Amendment problem and not a vagueness or due process
11 problem.

12 Q What if the Court disagreed with you on that
13 and said simply that you had to raise it a little more
14 precisely?

15 A I have no argument with Mr. Justice White. If
16 that was the decision, certainly, under the rules of the court--

17 Q The First Amendment raises all the issues.

18 A I would believe, sir, that it does.

19 Q Do you have to rely on that?

20 A In this case? If I haven't raised -- as far as
21 the overbreadth, I would say yes. But as far as the--

22 Q As far as the overbreadth, you would have to
23 rely on that position?

24 A Yes, I would.

25 Q Do you think, then, that it is the rule in New

1 York that, is it the general rule that the Appellate Court
2 does not consider things that are not raised in the trial
3 court?

4 A Not so, because the Court of Appeals considered
5 the vagueness question, which was not raised at the criminal
6 court level. The vagueness question, though disposed of in a
7 footnote, was still considered. We had pointed out that the
8 statute was vague, because they never said what flag they were
9 talking about. That was disposed of in a footnote, and that
10 was the total consideration given to the vagueness argument.

11 Q There is something else that bothers me, Mr.
12 Goldstick, and that's the reason I asked you about your answer
13 to Justice Fortas' question.

14 Judge Fuld, in footnote 1, appearing on page 4A of
15 the appendix in this case seems to say for the highest court of
16 New York that this statute simply prohibits public mutilation
17 of the flag. And that is the way he construes the statute.

18 Of course, we have to take that construction as though
19 the statute were written that way. And, of course, we have
20 to take that construction as though the statute were written
21 that way, under accepted conventional doctrines in this Court.

22 A In due deference to Your Honor's observation,
23 I again refer back to page 8A of the opinion as to the construc-
24 tion of the statute, and it seems to me that the language by
25 discouraging contemptuous and insulting treatment of the flag

1 in public is the construction given to this statute by Judge
2 Fuld. And I might --

3 Q What do you think that that first footnote means,
4 the last phrase of it? The provision was meant to apply to
5 public mutilation of the American flag.

6 A I can't answer that question.

7 Q It means something, obviously, you and I would
8 have to agree.

9 A Of course it means something, but I think there
10 is another answer to your question, and that is simply that
11 the construction of the Court of Appeals was not available
12 to the criminal court judge when he tried the case.

13 Q Tell me, Mr. Goldstick, is the whole of your
14 motion at page 13A in the trial court, the motion to dismiss?

15 A Page 13A?

16 Q Is this it? "Before we plead to this case, I
17 would like to make a motion to dismiss." Is that it?

18 A Yes, Your Honor, that is it.

19 Q And what is it in that motion that you say raises
20 the overbreadth question?

21 A Simply the reference to the First Amendment,
22 that we were engaged in First Amendment activities.

23 Q "Under the First Amendment, I feel --" This is
24 the only reference, isn't it, to the First Amendment? Under
25 the First Amendment, the Constitution of the United States,

1 and of the New York State constitution that freedom of speech
2 may provide for protest in many forms, whether it be by burning
3 the flag, demonstration, or picketing. This is a form of
4 demonstration and protest.

5 Is that what raises the question?

6 A Absolutely, Your Honor, and I might say --

7 Q I would say, on the face of it, Mr. Goldstick,
8 that that would be something like an argument based on symbolic
9 speech. There is conduct, but that the conduct has the
10 protection of the First Amendment.

11 A I might add, Your Honor, that we also handed in a
12 trial memorandum when we made the motion, and the trial
13 memorandum had a full point on overbreadth. That isn't a
14 part of the record, but it was certainly -- and I direct you
15 to page 2, when I was very abruptly requested by the judge,
16 "Sorry, Mr. Goldstick, no more motions. Let's sit down."

17 The issue was raised and argued all the way up, and
18 I am concerned that it wasn't fully treated by Judge Fuld.

19 There is just one other point that I would like to
20 make, if I may, and that deals with the problem of the statute
21 as applied. You will notice in the record that Sidney Street
22 was charged with disorderly conduct and with breach of the
23 peace. He was acquitted of disorderly conduct, and there is
24 nothing in the record, not a scintilla of proof, that there was
25 disorderly conduct or that a breach of the peace occurred, or

1 that a breach of the peace was likely to occur.

2 Now, Judge Fuld bases his decision on the right of
3 New York, under its police power, to restrict acts that would
4 cause a breach of the peace or likely to cause a breach of the
5 peace. But it is our contention, Your Honor, that there was
6 no breach of the peace, no evidence of a likelihood of a breach
7 of the peace, and the only way, therefore, that Street could
8 have been convicted under this theory that this is a statute
9 that prevents a breach of the peace would have to be that
10 there is something inherently dangerous in this type of conduct
11 and so that therefore the State of New York has a right to
12 prevent conduct that is inherently dangerous.

13 Q Mr. Goldstick, I thought Chief Judge Fuld's
14 had to be read somewhat differently, that is to say that
15 assuming this is within the ambit of the First Amendment, the
16 statute, and prosecution here are within the ambit of the
17 First Amendment, the conviction was nevertheless justified
18 on the clear and present danger principle, that is to say that
19 there was, in the circumstances of the case, a clear and
20 present danger of public disorder, and therefore, according to
21 Judge Fuld, the conduct was not protected by the First
22 Amendment.

23 A Mr. Justice Fortas, this Court, I recommend to
24 your reading the record, and, of course, under your powers you
25 have the right to review the record, with regard to the findings

1 of the Court of Appeals, and I simply submit that Judge Fuld's
2 observations are not supported by the record.

3 Q Let's go into that. In your judgment, is my
4 reading of what Judge Fuld was saying incorrect? You have now
5 advanced a different theory which is that Judge Fuld misread
6 this as a disorderly conduct statute, or breach of the peace
7 statute, and that reading it that way to arrive at his conclu-
8 sion. My own impression in reading his opinion was that he
9 was recognizing that there was a First Amendment problem
10 engaged in this analysis for the purpose of demonstrating to
11 his satisfaction, anyway, that the First Amendment did not
12 protect this particular conduct.

13 A Well, his analysis, if I understand it, would
14 be based upon the power of the State to make some regulations,
15 even though they may fly in the face of the First Amendment
16 problems, and the issue then becomes, Where is the line drawn
17 between what the State can do with regard to First Amendment
18 problems? And I respectfully submit that if you do an analogy
19 of a statute, if it comes under the breach of the power of the
20 State to prevent public disorder, then the analogy must follow,
21 what is that power, when we come across a freedom-of-speech
22 problem. And the power has historically been, and as far as
23 my reading of the cases in this court has always been, Has
24 there been a breach of the peace, or will a breach of the peace
25 likely occur? And you will examine the record to see if it is

1 here.

2 Q Well, Mr. Goldstick, are we to read everything
3 that Chief Judge Fuld said against the background of the open-
4 ing sentence in the opinion. We are called upon to decide
5 whether the deliberate act of burning an American flag in pub-
6 lic, as a protest, may be punished as a crime.

7 A I can't answer that question. I don't know
8 whether we should read the entire --

9 Q We ought to introduce our opinions with a
10 statement, hoping that the opinion will then be read as bearing
11 on, as answering the question to which the opinion goes, and
12 that certainly reads as though he regarded the cases, doesn't
13 it, as presenting simply a question of so-called symbolic speech?

14 A Oh, I see the point, Your Honor, and I seem to
15 feel that that may be so, but that does not mean that the
16 point was not properly raised, or perhaps just discarded. I
17 can't answer what went on in the mind of the judges in the Court
18 of Appeals. I can't answer that.

19 Q Mr. Goldstick, I think I am right in saying that
20 you haven't mentioned in your brief or your oral argument the
21 possibility of mootness in this case. Do you think that is a
22 problem?

23 A It was briefed, Your Honor, in our appeal to this
24 Court.

25 Q In your appeal, but not in your brief.

A Yes. And it really is not moot from Mr. Street's

1 point of view, because if this conviction is affirmed, we have
2 a hearing waiting for us back before the New York City Transit
3 Authority on this man's job, so from Mr. Street's point of
4 view, this is far from a moot issue.

5 Q Although he was given a suspended sentence and
6 the period has now passed, as I understand it, during which any
7 other sentence could now be imposed?

8 A That is quite true, but I have a letter in my
9 files from the Transit Authority. We are holding up the hear-
10 ing, awaiting the determination of this Court.

11 Thank you very much, Mr. Chief Justice.

12 MR. CHIEF JUSTICE WARREN: Mr. Brodbar.

13 ORAL ARGUMENT OF HARRY BRODBAR, ESQ.,

14 ON BEHALF OF APPELLEES

15 MR. BRODBAR: Mr. Chief Justice, and may it please
16 the Court: It is the State's contention that the appellant
17 was convicted only for the act of burning; that any reference
18 to language is mere surplussage. The officer set forth some
19 language in this information, his complaint, but that language
20 is language that is usually set forth by a police officer to
21 indicate intent on the part of the participant in the crime.

22 It is our feeling also that the language used, "if
23 they did this to Meredith, we don't need an American flag."
24 That language is not contemptuous. Certainly, the officer
25 wouldn't have arrested him for merely making that statement.

1 The record is clear that the officer came to the
2 scene because he saw a flag burning. He then went over to some
3 of the people in the crowd and asked him who burned the flag.
4 He then went to the appellant and asked the appellant whether
5 he burned the flag. And the appellant told him, "If they did
6 this to Meredith, we don't need an American flag."

7 The officer then went back to the scene, the opposite
8 corner, attempted to stamp out the fire, picked up the flag,
9 took it to police headquarters and marked it as part of an
10 invoice. By inadvertence, the flag was never marked in
11 evidence, although I have it here with me.

12 It is obvious then that the arrest was only for the
13 burning of the American flag. There was another statement made
14 by the appellant, which the officer had overheard: "We don't
15 need no damn flag."

16 It is also significant that the officer did not make
17 that part of his complaint; that he ignored that statement,
18 against strengthening the State's position that the arrest was
19 for the act.

20 In passing, I might say that the words "damn flag"
21 would be considered contemptuous under the case of Chapinsky
22 versus New Hampshire, where the statements "damn Fascist" and
23 "damned racketeer" were held to be words which might incite
24 retaliation, and the court there unanimously affirmed the
25 conviction.

1 The appellant cannot find any solace in any argument
2 that the appellant was convicted under a general verdict.
3 There was perhaps for the words, for the act, or for both.
4 It is obvious that he was arrested, tried, and convicted only
5 for the act of burning the American flag.

6 Chief Judge Fuld prefaces the opinion of a unanimous
7 court with the following: "We are called upon to determine
8 whether the deliberate act of burning an American flag in
9 public, as a protest, may be punished as a crime."

10 Q Mr. Brodbar, how many people were there?

11 A Thirty to forty people, Your Honor.

12 Q Is it in the record?

13 A Yes, sir, Your Honor.

14 Q Suppose he burned it at night and there was
15 nobody there?

16 A Well, the word "public" connotes the presence of
17 people.

18 Q How many people?

19 A Enough people to start a riot, a reasonable
20 amount of people. Five people would be enough, perhaps.

21 Q I thought the definition of a riot was three or
22 more.

23 A I would say that three or more people would have
24 to be present. I would also say that thirty to forty people
25 was a significant amount.

1 Q So we really don't know what the statute means
2 by "public," do we?

3 A Well, the statute does not define "public." We
4 must go back to the case law on that. The word "public" signi-
5 fies the presence of a reasonable number of persons which might
6 give rise to the danger that the statute intends to prohibit.

7 Q Well, I can see no difference myself between
8 burning the flag on my front lawn and burning it in Yankee
9 Stadium, can you?

10 A No, I cannot.

11 Q You couldn't?

12 A Except that the chances for a disturbance might
13 be greater in Yankee Stadium. But the disturbance is there
14 nevertheless. On your lawn there are other persons present.

15 Q Suppose they are all friends?

16 A Friends may, too, retaliate to the burning of an
17 American flag.

18 Q Suppose they all agree with me that the flag
19 should be burned?

20 A Then the flag must be protected from people who
21 agree to burn a flag contemptuously.

22 Q Where is that in the statute?

23 A The statute does not say that, but in Coulter
24 against Nebraska, a case that was before this Court in 1906,
25 although there the flag was used in an advertising scheme.

1 Q Have you got anything in there about what
2 "publicly" means?

3 A I beg your pardon?

4 Q I am still on the word "public." I find it
5 very difficult.

6 A There is nothing in the statute in regard to the
7 word "public." We must accept the dictionary meaning of the
8 word "public," that it connotes a reasonable, sizable amount of
9 persons, who are present at a scene, and who might bring
10 disturbance because of an act committed by a person. I think
11 even two persons present at a scene might justify conviction of
12 Mr. Street.

13 If this court should in its wisdom determine that the
14 language "defile by word" is unconstitutional -- what I mean
15 to say is this: In Chapinsky against New Hampshire, the court
16 did not go into the second portion of the statute. The first
17 portion dealt with words and names, and the second portion
18 dealt with sounds and noises. The court there did not go into
19 the second portion, and convicted Chapinsky for the use of
20 names, epithets hurled upon the persons in the area. It is
21 our view that this Court, although the appellant was sentenced
22 for the act of desecration, it is our view and our hope that the
23 Court also determines the validity of the expression "words in
24 the statute."

25 For, if it does not, then any proscription of physical

1 acts will be dissipated, because the path will be left open for
2 desecration by words.

3 It is significant also that Chief Judge Fuld discusses
4 in his opinion many cases dealing with symbolic expression, and
5 does not go into any cases where pure language was used. It is
6 also the State's contention that the court did not render an
7 inconsistent verdict by dismissing the more general charge of
8 disorderly conduct and holding him under the statute which
9 specifically prohibited the act.

10 Mr. Street could not be sentenced under two charges.
11 Section 1938 of the penal law of the State of New York prohibits
12 that. The entire tenor of the trial revolved about the
13 flag burning itself. At the time of the cross-examination of
14 the appellant, at the time of the cross-examination of the police
15 officer, there was nothing discussed about pure language. Only
16 the act was discussed.

17 It is also significant that this case, the trial of
18 this case, took place six weeks after Miranda against ARizona,
19 and experienced counsel did not set up the Miranda rule as a
20 bar to the language which has been elicited from the officer
21 from the appellant at the time of his arrest.

22 Q But the language is in the charge specifically.

23 A Yes, it is in the charge.

24 Q Why was it put in the charge?

25 A Because it is customary for officers to place

1 in a complaint any language which inculcates an appellant.

2 Q Well, they only put part of it in; they didn't
3 put it all in.

4 A That part was enough to indicate that the
5 appellant intended to dishonor the flag of our nation.

6 Q But you have it in quotes.

7 A Yes, sir, Your Honor.

8 Q It looks like a speech.

9 A But if you will notice the second paragraph,
10 the general paragraph preceding the language, the language only
11 describes the act of burning the American flag.

12 Q Suppose this statute had said it should be a
13 crime to burn the American flag in public or to mention the
14 American flag in public. I am giving you a ridiculous case to
15 explore a point. Suppose that the information read, and the
16 officer testified that he found the defendant burning the flag
17 and the defendant said, "This is an American flag," and suppose
18 that the defendant were then convicted. Now, remember, I am
19 talking to you about a statute which prohibits mentioning the
20 American flag in public. Would such a statute be constitu-
21 tional?

22 A No, it would not be constitutional. It would
23 be overbroad, because there is a Federal statute which permits
24 the dignified burning of the flag. And there is no way of
25 knowing whether the words of your statute, Mr. Justice Fortas,

1 whether the man was doing it in a dignified fashion or with
2 contempt. Therefore, the statute being overbroad would result
3 in arbitrary standards and prior restraint.

4 Q You think that there has to be some contemptuous
5 words upon the burning of the flag?

6 A No words at all are necessary. It is the
7 atmosphere of the contempt, the anger, the lack of a disarming
8 smile.

9 Q If you burn the flag publicly and don't say a
10 word, and you smile while you are doing it, you cannot be
11 punished under the laws of New York; but if you look angry you
12 can be?

13 A Well, Your Honor, one who honors a flag by burning
14 it in a proper manner will certainly have another attitude.

15 Q I am not talking about that. I am talking about
16 this kind of a situation. I am talking about a statute by the
17 State of New York.

18 A Well, under your statute, Your Honor, I would
19 say that the statute would be bad, because there should be some
20 language in the statute which would indicate contempt.

21 Q The point to which I am directing your attention--
22 let us forget about contempt, if you will assume that one way
23 or the other, whichever way you think necessary -- Suppose
24 that the statute says that it shall be a crime to burn an
25 American flag or to mention it in public and this fellow is

1 arrested for burning the American flag and saying this is an
2 American flag. Now, would such a statute on its face or as
3 applied in the particular case, in your judgment, be or run
4 afoul of the First Amendment of the United States Constitution?

5 A Mr. Justice Fortas, I would say that if there
6 were no Federal statute permitting respectful burning of the
7 flag, then that statute would be all right.

8 Q The State of New York, then, may prohibit
9 mentioning or discussing the American flag in public?

10 A Yes, it may, if there is no Federal statute which
11 permits respectful burning. But if there is a statute which
12 permits it, then the State cannot with that legal language create
13 a statute so overbroad that anyone burning the flag who might be
14 doing it with respect could be arrested and convicted for it.
15 The State is mindful of the fact that it may not enact any law
16 which will unconstitutionally abridge the freedom of speech
17 and expression.

18 Yet notwithstanding the sacrosanct nature of First
19 Amendment principles, a State may, in the interest of peace and
20 tranquillity within its borders, pass any statute, even though
21 it may abridge freedom of speech. It will be for this honorable
22 court to determine whether the United States flag, the object
23 of national piety, and patriotic adoration, can be a subject
24 of desecration, merely because one wants to use it in a symbolic
25 way, to dramatize dissatisfaction with conditions existing in

1 our country.

2 The need for such a statute was recognized by the
3 first --

4 Q From my point of view -- and I hope this is not
5 just my point of view, and I am not indulging myself only --
6 I cannot agree with that statement of this case. This is not
7 a case of a simple burning of an American flag. This is a case
8 where the information included words, and it included words
9 which may be an objectionable discussion of the American flag
10 and an objectionable reference. But it is not simply a case of
11 burning the American flag. Do you agree?

12 A Well, according to the complaint, you are right,
13 Mr. Justice Fortas.

14 Q Chief Judge Fuld did not go into that. Then do
15 you agree that the statute is not confined merely --

16 A The statute includes either words or acts.

17 Q Words or acts. So we have to face here a situa-
18 tion which is not confined to burning or desecration of the
19 American flag, but it is a situation which includes the very
20 troublesome aspect of words, speech.

21 A Mr. Justice Fortas, it is the state's contention
22 that the statute is divisible, that it can be separated, that the
23 appellant was convicted only for the act of desecration, not--
24 withstanding the fact that the officer in his complaint set
25 forth the words.

1 We reiterate that the words were set forth only to
2 indicate the intent and that the words were mere surplusage,
3 that they were not necessary --

4 Q What intent?

5 A The intent to cast contempt upon the flag of our
6 nation. That was the intent.

7 Q And so the significance of the act became evi-
8 dent from the words.

9 A No. The significance of the act became signifi-
10 cant by the act itself. His mannerisms. By waving his hands
11 at another corner. By leaving the flag at another place.

12 Q His intent became clear. What he intended to do.

13 A It became clear.

14 Q It became clear from the words, what he intended
15 to do. His intent became clear from the words.

16 A No. It became more clear, let us say. Not
17 clear. It became more clear, because had he said nothing, his
18 very demeanor -- burning a flag, running to another corner,
19 waving his arms in an agitated condition, those were --

20 Q Maybe that is right. But the statute certainly
21 doesn't seem to be phrased in those terms. The statute does not
22 confine itself to the act of burning or desecrating the United
23 States, together with such words or other conduct as would
24 indicate that this act is being done contemptuously of the flag.
25 Would you agree with that? The statute makes it a crime to use

1 the words, not merely as evidence of intent, of the intent with
2 which the action was done.

3 A I can't agree with that, Mr. Justice Fortas.

4 Q You do not.

5 A It is our opinion that the proscription of the
6 statute is directed at physical acts of mutilation, defacing,
7 defiling, trampling upon, and that also the statute proscribes
8 the use of language, which also defies or casts contempt upon
9 the flag. That the words "cast contempt" are the key words,
10 which direct all of the other language, that the language
11 indicates dishonor, something purposeful, a lively sense of
12 shaming. That it is either one or the other or both.

13 In this case, there was only one thing that the
14 appellant had done: Burned the flag. His statement was not
15 contemptuous. It was a statement, "If this could happen to
16 Meredith, we don't need an American flag." There is nothing
17 contemptuous about that statement, and that statement in the
18 complaint, although not contemptuous, as set forth by the
19 police officer only to indicate an intent. It was not neces-
20 sary to have it in the complaint itself. Because the appellant's
21 act was one of contempt. Not only did he set fire to the flag,
22 according to my adversary, he came down to the street, and put
23 a paper down on the ground. What was the purpose of the paper?
24 The officer testified that there was no paper. What good would
25 a paper do, if the appellant is burning a flag and drops a

1 burning flag on the paper? It is more likely that the paper
2 was there to induce greater burning. That was the purpose of
3 the paper.

4 And that the flag was folded: The flag had been
5 folded in his drawer, in his chest of drawers. He was a
6 veteran. The testimony indicates that he put the flag out on
7 every holiday. The flag was not folded because he showed
8 respect. He came down into the street, laid the flag down,
9 burned it, ran to another corner. Is that the conduct of a
10 person who shows respect?

11 When The American Legion has its ceremony, once a
12 year, to burn American flags, they don't run to other corners
13 while they are burning the flags on one corner. They stay
14 with the flag. That is considered respect. These words were
15 not even necessary in the complaint, they are mere surplusage.

16 Q Who proposed the Complaint?

17 A The officer, Your Honor, Generally, the
18 officer, with the assistance of the clerk in the court.

19 Q The policeman said this was in violation of
20 1425, Subsection 16(d)?

21 Q He put this language in there, the policeman?

22 A No, sir. I can tell from the little experience
23 I have had in the criminal court, watching the clerks do their
24 work, generally the clerk will pick up the penal law of the
25 State of New York, find the caption, and make an entry.

1 Incidentally, Mr. Justice Marshall, this is about the
2 first case in the history of our country where this statute was
3 even used. When Patrolman Copeland made his arrest, he did
4 not know that he had made the first arrest in the history of
5 the State of New York for public burning of a flag. Certainly
6 the clerk was not well aware of that, he was not experienced
7 with legal language.

8 Q That's why it is so strange to me. The only
9 thing I am talking about, you say the only reason the words
10 in quote are in this charge, which is a legal charge, on behalf
11 of the State of New York, was because the policeman insisted
12 that it be in there. I want to find out whether it was the
13 policeman, or the prosecutor, or the lawyer, or the judge, or
14 the magistrate, or who?

15 A It would not be the judge, Your Honor.

16 Q Well, who?

17 A It would be the clerk and the officer.

18 Q You don't know?

19 A No, but I know from custom in New York court that
20 it is the clerk and the officer who do it. Then the case comes
21 before the judge.

22 Q Well, when did the prosecutor get involved?

23 A When the case reached its turn on the calendar,
24 the Assistant District Attorney came into the case and tried the
25 case. As we say --

1 Q Could he have taken that language out?

2 A Did he do what?

3 Q Could he have taken the language out of that
4 charge?

5 A He could have, but he need not.

6 Q But he didn't?

7 A He did not, Your Honor.

8 Q So the State of New York insisted that this
9 charge include both the act and the language. That was the
10 decision of the State of New York. Am I right?

11 A Well, that's the effect of it.

12 Q All right.

13 A But Your Honor, Mr. Justice Marshall, in every
14 case, when an officer, even in a bookmaking case, or in a policy
15 case, an officer will set forth inculpatory statements. The mere
16 fact that inculpatory statements are set forth does not mean
17 that that is part of the statute. The officer feels that it is
18 better for his case to set forth language. It explains the
19 intent. The mens rea.

20 Q I suppose the manner in which the Court of Appeals
21 decided it would have something to do with the State law con-
22 cerning the complaint, would it not?

23 A Yes, Mr. Chief Justice.

24 Q Chief Judge Fuld did say, as was pointed out
25 by one of the other Justices, "We are called upon to decide

1 whether the deliberate act of burning an American flag in public
2 as a protest may be punished as a crime." I suppose if the
3 rest of the text conforms to that, I suppose that we can
4 consider that that is all there is in the case for us.

5 A Yes, Mr. Chief Justice. And the word "deliberate"
6 is not only brought out by the conduct, but also by the words
7 set forth in the complaint, and I reiterate that the words are
8 not necessary. That the facts in the case indicate contemptuous
9 treatment of the flag by Mr. Sidney Street. That there was no
10 inadvertence or accidental occurrence. That this was planned.
11 That the people who collected around him did not collect around
12 him because he did an inadvertent act.

13 Q I would like, then, to hear, Mr. Brodbar, your
14 submission. Upon the hypothesis that you are entirely right,
15 that we can discard the reference in the statute to the word
16 "words", and we can equally disregard the reference in the
17 Complaint to the quotation of what the defendant allegedly said,
18 and that we are dealing here, therefore, simpliciter, with
19 the question as posed by Chief Judge Fuld in the very first
20 paragraph of his opinion to the Court of Appeals. Simply with
21 a State statute that makes it a criminal offense to publicly
22 burn an American flag.

23 A Yes, Mr. Justice Stewart.

24 Q And the claim is that, with which Chief Judge
25 Fuld had to deal for his court, that a State could not

1 constitutionally make that a criminal offense.

2 Q But while you are considering that, do you sug-
3 gest that, or do you agree that the only way that you would
4 know it as a protest was from the words that were used?

5 A No, from his conduct. From his agitated
6 condition, from his anger. One does not simply burn a flag
7 with intent gently. There is an atmosphere, there is an
8 emotionalism about an act like that. A deaf-mute can show
9 contempt for the flag by burning it. Can we say that a deaf-
10 mute would not be a subject of conviction because he can't
11 state with language what he means? It is what he does, and
12 how he does it that spells out the contempt for the flag that
13 is standing in this court room.

14 Q Well, then -- perhaps you haven't finished
15 answering my brother Marshall?

16 A I did answer. I did complete.

17 Q I meant to add to my question, to publicly burn
18 an American flag, in public, as a protest. The question that
19 Chief Judge Fuld puts, may that constitutionally be punished
20 as a criminal?

21 A Yes, it may, Mr. Justice Stewart.

22 Q Then why? Why? That is my question.

23 A Because it interferes with substantial State
24 interest. Just as in O'Brien against United States, there was
25 a substantial State interest, Government interest, that a man

1 have a draft card. There are substantial interests here.

2 Q What is the equivalent interest here, or the
3 comparable interest here?

4 A The interest here that Americans love their flag,
5 and anyone seeing a flag defiled.

6 Q That is not comparable. I don't believe Americans
7 love their draft cards, do they?

8 A A draft card does not have the significance of
9 a flag. The flag has great meaning. If the flag has no meaning
10 at all, it means that every man who died for this flag was not
11 only duped by the flag, but it made a mockery out of patriotism.
12 That every man who lies in Arlington Cemetery died for some-
13 thing that was just a cloth, a piece of cloth, which had no
14 meaning at all to them, and now we say the flag has no meaning.
15 It is greater than a draft card. We are inculcated with the
16 spirit of a flag from early childhood. A card is nothing, in
17 reality. It does not send me to retaliation if one were to
18 burn his draft card. I might be annoyed with the infantile
19 conduct.

20 Q I take it you have read the Court's opinion on
21 O'Brien against the United States?

22 A Yes, I have, Your Honor.

23 Q I take it, then, that you have seen that the
24 many pages of that opinion were devoted to the showing of the
25 public interest, the national interest, in the possession by

1 young men of their draft cards.

2 A Yes, Mr. Justice Stewart.

3 Q Well, what is the equivalent or comparable
4 interest here?

5 A There is a national interest in the American flag.

6 Q First of all, you of course have to argue what
7 the State interest is.

8 A The State interest is to protect a national
9 symbol, because a State is part of a Nation. If a Nation does
10 not exist, a State will not exist. In Halter against Nebraska,
11 the first Mr. Justice Harlan said that the State has the same
12 interest to cause respect -- not to mandate respect, as in
13 Barnett, but to prevent desecration of the flag.

14 Q That case, of course, was decided long before
15 it had been held that the Fourteenth Amendment incorporates
16 the First Amendment?

17 A Yes, Mr. Justice Stewart, but the case still has
18 great significance today.

19 Q Mr. Brodbar, let us pose that you had a case
20 involving only words, words expressing the utmost contempt
21 and hatred for the American flag. Now would those words,
22 standing alone, fall within the condemnation of the statute?

23 A Yes, Your Honor.

24 Q Then that's the nub of the trouble here. I
25 agree with you that the literal reading of this statute would

1 catch words standing alone, because subsection (d) of the
2 statute makes it a crime publicly to defile or defy or -- let
3 me withdraw that. "Publicly to cast contempt upon the American
4 flag by words."

5 A Well, Mr. Justice --

6 Q That's what the statute says, doesn't it?

7 A Yes, Your Honor.

8 Q And my question is whether we can, or whether
9 we are at liberty to ignore that, in effect, for purpose of this
10 particular case.

11 A Mr. Justice Fortas, we maintain that the statute
12 is divisible; that this court may ignore the language of the
13 statute which speaks of words, because the appellant was
14 convicted for action.

15 Q All right, now do you attempt to defend?
16 Suppose it is not divisible? Would you attempt to defend the
17 constitutionality of a New York statute that said only that
18 it shall be a crime to cast contempt upon the flag by words?

19 A Yes, I do. I defend it, because the words of
20 contempt give the same result as the acts of contempt.

21 Q I see.

22 A Words are just the same words as we have here.
23 They are fighting words, they are the words that we had in
24 Chaplinsky against New Hampshire. When a man's flag is defiled,
25 do we not degrade the man himself? Do we not say, "You are a

1 citizen of a country that is worth knowing"?

2 Q Right. Why do you say, then, why do you argue
3 that the statute is divisible?

4 A Well, in the event that this court should in its
5 wisdom feel that the words are unconstitutional, we would be
6 left with some statute. That is the only purpose I say that.

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1 Q We have to read Judge Fuld's opinion as being
2 broad enough to include what you say?

3 A Yes, your Honor.

4 Q You think it does go that far?

5 A It appears that way, because Chief Judge Fuld
6 makes this statement: "Subdivision 16 of Section 1425 is
7 designed to prevent the outbreak of such violence by
8 discouraging" ---

9 Q Where are you?

10 A That is on page 8A of the record.

11 "... is designed to prevent the outbreak of such
12 violence by discouraging contemptuous and insulting treatment
13 of the flag in public."

14 It is our opinion that this was mere dictum in a case,
15 but it shows the inherent feeling of Chief Judge Fuld in
16 speaking for the entire court, that even if this case had just
17 words in it, that the decision might be the same.

18 Q Does treatment necessarily include words?

19 A Yes, treatment is a broad term that includes
20 conduct, it includes words, it is an attitude, it is a behavior.

21 Q May I say something? Suppose there was no
22 burning at all and I just say something contemptuous of the
23 flag, is that treatment of the flag?

24 A Yes.

25 Q In common parlance?

1 A Yes, Mr. Chief Justice Warren.

2 Treatment of the flag is when one insults another,
3 he treats it wrongly, does he not? The word "treatment" is
4 a general word.

5 What I say to the court was not concerned at that
6 particular time of the decision with any words, but just with
7 the act.

8 Q Then why do you say it includes words if it
9 wasn't considering anything but actions?

10 A I would say this was an observation made by
11 Chief Judge Fuld, by way of passing. He may have meant ---

12 Q You told me a moment ago that you thought it
13 was broad enough, his opinion was broad enough, so that we
14 would be obliged to include words as well as actions, conduct.

15 A No, Mr. Chief Justice Warren, the way Chief Judge
16 Fuld starts a case, we are concerned with the act.

17 Well, he says thereafter, is not part of his determi-
18 nation that he started out to say, when he said we are called
19 upon to decide whether a deliberate act of burning.

20 Q Well, that is what I was trying to get at, sir.
21 I understood you departed from that

22 A Well, I would ---

23 Q And said that this opinion was broad enough to
24 include language, if there was no burning, and you cited the
25 word "treatment" to show that.

1 A My point is this: That the court was concerned
2 primarily with the conduct. The court was not considering the
3 word itself. The language used by Judge Fuld later on is
4 dicta. That is the opinion I have and it is also my belief that
5 if the defendant had been charged with words only, and no act
6 at all, that the decision would have been the same.

7 But the court was concerned only with the act. It
8 prefaces its opinion with that statement.

9 Q You say that is your opinion that the decision
10 would be the same?

11 A Well, it is my respectful opinion, your Honor.

12 Q Your opinion that that judge, and those judges
13 would have sustained the statute which did nothing in the world
14 but make it unlawful for a man to speak his views about the
15 flag.

16 Is that right?

17 A Well, speaking the views about a flag may convey
18 a message. What message is there in contempt?

19 Q Well, there is their language, the speech, that
20 you have here. Speech mixed with conduct.

21 Why do you have to defend the idea that New York has
22 power to make it a crime for a man to speak and say something
23 bad about the flag?

24 A No, I am not saying that, Mr. Justice Black.

25 I am saying that criticizing the flag is one thing ---

1 Q But why are you meaning -- do you have to go
2 that far in this case?

3 A No, I don't. No, I don't, Mr. Justice Black.

4 Q Why do you get into it say at such lengths?
5 You have conduct ---

6 A I am concerned about this court's attitude with
7 regard to words, and perhaps that this court may decide that
8 part of the statute is bad. I am here not to defend my flag
9 in quiet whispers, but to try to defend the entire statute and
10 not leave open the door to contempt by use of words, should this
11 court find that the act is proper, the act is actionable.
12 That is my purpose.

13 Q Your view, I judge is, if a man says something
14 makes a speech about his views he has committed a crime and
15 that the First Amendment doesn't excuse it?

16 A No, I did not say that. He can express his views
17 but contempt, profanity, obscenities hurled at a flag is not a
18 message.

19 Q But this is not obscenity. Or, maybe it is
20 but I have never known it.

21 A How else can one show contempt for the flag by
22 way of words, except by the use of epithets, obscenity or
23 profanity? And if he does it that way, what is the message
24 he is conveying?

25 Is he trying to change government? There is no

1 message at all. He recognizes nothing good in America when
2 he says that. He has consigned America to the flames of
3 obscurity. That is not the message.

4 If he says that our country is not giving me the
5 proper rights, that is a message that deserves the respect under
6 the First Amendment, because it leads the Government to self-
7 improvement.

8 But to desecrate a flag by words leaves no message.
9 What are you trying to say? That our Government is bad?
10 Because of this, because of that?

11 He says nothing.

12 Q Well, suppose he did say the Government was bad,
13 that is the object of the First Amendment is to permit people
14 to criticize the Government in its institution.

15 A But the statute does not cover criticism in pure
16 language. It covers contempt, defiance.

17 Q Well, that is criticism.

18 A Criticism is a lesser term.

19 Q As I read your statute it prohibits two things,
20 one is the conduct of burning a flag. That is what I under-
21 stand Judge Fuld took. The other is an attempt to convict, to
22 condemn a man for making a speech that is critical or as you say,
23 contemptuous of the Government.

24 Q No, of the flag. Of the flag.

25 A Of the flag, not the Government.

1 Q Of the flag, you mean as a Government insti-
2 tution.

3 A But when he talks about the flag he is not
4 talking about -- he is talking about disaster, it is anarchy,
5 its ---

6 Q Well, as I understand your statute, it would
7 cover this kind of a statement. I am a very loyal American.
8 As a matter of fact, I think there is nothing wrong with our
9 nation. I think it is just perfect, but frankly, I think our
10 flag is one of the homliest, ugliest flags I have ever seen.

11 (Laughter.)

12 A There is nothing wrong with that. When a parent
13 says that my friend's daughter is prettier than mine, does he
14 show less love for his daughter?

15 Q No, now wouldn't your statute cover my hypo-
16 thetical case?

17 A No, it would not.

18 Q Why not?

19 A Because that is not the contempt that is meant.
20 Unfavorable criticism, an artist's point of view, someone who
21 may be partial to certain colors, that is not the contempt
22 meant.

23 Q It talks about contempt for the flag, not upon
24 the country.

25 A That is not contempt. That is criticism.

1 Criticism is not contempt. If my adversary is shorter than I
2 am I show no contempt by saying that.

3 Mere criticism of a flag as to its color scheme or
4 design is not contempt.

5 Q Well, what do you say, I am very contemptuous
6 of its color scheme?

7 A Well, if you were serious, I would still think
8 it was not contempt.

9 Q You can't test a statute out by what it might
10 cover, don't you?

11 When you have a constitutional question?

12 A The point is, the defendant was charged and
13 convicted of the act of burning. So this talk about words may
14 not be before this court.

15 Q But you insist on arguing at length.

16 A But I hope it stays before the court.

17 Q But you insist on arguing it at length as though
18 that were your whole case.

19 A The whole case ---

20 Q In other words, contempt.

21 A If the case deals with only the appellant's act
22 of burning the flag, but it is our wish, the wish of the State
23 of New York that this court would determine the entire statute,
24 and if it should hold that the words are in violation of the
25 First Amendment, that the act be divisible, that the statute

1 be divisible, and that there be left for the State of New York
2 to enforce desecration by act.

3 Q Does it contain a separability clause?

4 A It does not, but the logical reading of it, the
5 Federal Statute just passed does not have words, though it
6 could stand alone.

7 Q I am not talking about the Federal Statute, I am
8 talking about yours.

9 A There is no language in the statute.

10 Q Do you have any general rules that courts con-
11 struing things as separable, that they are two separable trials
12 in New York?

13 A No, but there is a strong presumption of
14 constitutionality and there is also a presumption that if a
15 part of the statute falls, that the rest may remain, unless it
16 is impossible to keep the remaining part of the statute.

17 Q What is that, you say that is a presumption?

18 A Presumption of constitutionality is the strongest
19 presumption. However, if the court should feel that part of
20 the statute is bad, then there is also presumption that the
21 remaining part of the statute could stand, unless it is im-
22 possible to consider it so.

23 Q That is the law of New York?

24 A That is the law of the nation.

25 Q I am talking about New York.

1 A Yes, we have a construction statute in New York
2 that give the meanings to our statutes, that if part of a
3 statute is bad, the court will try to uphold the balance,
4 unless it is impossible for it to stand alone.

5 Q Very well.

6 A Thank you.

7 A Just one point, Mr. Chief Justice.

8 Q No, I think you have finished your argument.

9 A Thank you.

10 (Whereupon, the above-entitled matter was
11 concluded.)

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