IN THE SUPREME COURT OF THE UNITED STATES

STEPHEN RADICH,

Appellant, No. 169

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

Washington, DC

Monday, February 22, 1971

The above-entitled matter came on for argument

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

RICHARD G. GREEN, ESQ., 1270 Avenue of the Americas, New York, NY 10020, on behalf of the Appellant.

MICHAEL R. JUVILER, ESQ., Assistant District Attorneys of New York County, 155 Leonard Street, New York, NY 10013, on behalf of Appellee.

RADICH VS. NEW YORK

THE COURT: We'll hear arguments next in number 169, Radich vs. New York.

THE COURT: Mr. Green.

MR. GREEN: Mr. Chief Justice, and may it please the Court. This case involves the conviction of the appellant. It is an appeal by the appellant from his conviction in the New York courts for casting contempt on the flag of the United States by exhibiting in his art gallery certain sculptures. The issues involve the First Amendment, they involve the Fourteenth Amendment in terms in whether the statute is sufficiently clear and definate, they involve the equal protection clause under the Fourteenth Amendment, because of a situation where there is an exemption in the statute for the exhibition or for the portrayal of photographs of these same sculptures in newspapers or periodicals, and for the display of paintings using a flag motive in art galleries as well. The appellant was the proprietor of an art gallery on the second floor of a building on Madison Avenue in New York City. The gallery was recognized in the art world. It specialized in exhibits of sculpture. In the appellant's gallery, he exhibited certain sculptures or constructions as they are called, by an artist named Marc Morrel. The artist, Morrel, is not a defendant

in this case. The sculptures were made of fabric, some of which were of what appeared to be the American flag, or may have been actual flags. The record is not clear. One of the sculptures, what appeared to be a flag in the shape of a human body hanging from a yellow noose, was in the second floor window of the gallery. It was visible from within the gallery, and also to passersby, on Madison Avenue who happened to look up from the street to the second floor.

THE COURT: Is there a representation of that in the appendix anywhere?

MR. GREEN: Well, it's not in the appendix, it's in the exhibits, which have been submitted to the court, Your Honor.

THE COURT: It is the original? It hasn't been reproduced?

MR. GREEN: No, it has not, sir.

THE COURT: We have so many reproductions of items on the--

MR. GREEN: I'm sorry--I have another set of copies of them, but they're not exactly as the district attorney's originals.

THE COURT: Well, the originals have been in court, then.

MR. GREEN: That's right, sir. One of the sculptures that I've mentioned could have been seen from the street.

This was the noose figure. The figure, what appeared to be a human body, hanging from a noose. If anyone looked up to the second floor window. The other sculptures were visible only in the art gallery. The art gallery was open to the public. Seven of the sculptures of the subject of this prosecution--there are more than seven exhibits because there is a duplication of some of the sculptures in certain of the photographs. There were 13 works by Morrel in the exhibit, including three paintings. One of the noose figure, the same figure that was in the window, and two others using the flag motive. None of the paintings was mentioned in the complaint. Now the appellant here was not found guilty of defacing or mutilating the flag. He was convicted only and directly of casting contempt on the flag by exhibiting seven of Morrel's sculptures. The exhibition had been going on in the art gallery for two weeks when the summons was served. There was no evidence of any disorder, inside or outside the gallery, or of any circumstances that might lead to disorder, nor of any complaints of disorder. Only the defendant and one other person were in the art gallery when the police visited.

THE COURT: What sentence did he get?

MR. GREEN: He got a sentence of $550.00 fine or 60 days in jail. The courts below held that no showing of disorder was necessary for conviction. The circular

announcing the exhibition, which is the defendant's exhibit B, which is also with the exhibits, was sent to the defendant's regular mailing list of collectors, of museum people, the press, universities, and art departments. It announced simply an exhibition of constructions by Marc Morrel, and gave the dates and place of the exhibit. The same circular was also available in the gallery.

THE COURT: And these were all for sale, were they?

MR. GREEN: The paintings, the sculptures were all for sale. Yes sir. War protest songs were played on a tape recorder in the gallery while the works were on exhibition. The sale arrangement was the customary New York art gallery arrangement, whereby the dealer receives a commission of 33 and a third of the sale price. The appellant, who had been in the art gallery business for 14 years, and has a degree in fine arts from Columbia, and Hilton Kramer, who was the art news editor of the New York Times, and who reviewed the Morrel exhibit for that newspaper, testified. He testified that modern-day artists use various materials in their work. They use fabric, metal, wood, paint, pieces of junk, and that they mix them in the same work. And that today there is no longer a difference between two-dimensional and

three-dimensional work, between paintings, sculpture, or so-called mixed works. They testified also that they considered the Morrel constructions to be works of art, of the genre known generally as protest art. Kramer, the critic, said that he personally was more interested in the aesthetic qualtities of the work than the political protest. The defendant testified that he had no intent to cast contempt on the flag. He testified also that he thought the artist Morrel did not intend any contempt for the flag, but that actually what the artist was doing was questioning the behaviour of others who he thought were using the flag for aggressive purposes.

THE COURT: Was the artist a witness?

MR. GREEN: No, sir, he was not.

The New York Statute is subdivision 16D of 1425 of the old penal law of New York. It is now in 136 of the general business law. The statute is frequently been termed by the courts and others as a desecration statute, and it makes it a crime to publically mutilate, deface, defile, or defy, trample upon, or cast contempt by words or act--there is no object of the sentence, the flag is not mentioned, but presumably that is what's intended. This court, in the Street case, read the phrase "by words" out of the statute. Now, we contend first that appellant's conviction violates the first amendment guarentee of freedom of speech, that the First Amendment prohibits punishment for exhibition of

sculpture on the grounds that it is contemptuous of the flag. It is important, I think, for the Court to note here that so far as this appellant is concerned, the statute is directed soley at communication of an idea or an attitude casting contempt. He was convicted only of casting contempt Now, the lumping of the term, "casting contempt," in the statute with physical acts of mutilation and defacement may perhaps tend to obscure this as perhaps also does the existence of the legal concept of the contempt of court, which is a different concept. But the fundamental fact here is that this statute is directed entirely at communication and casting contempt. That being so, we do not believe it can stand under the first amendment.

THE COURT: That would be true of a contempt of court, too, would it not? Where the concept charted was based on utterances, or other expressions?

MR. GREEN: I think not, Your Honor, I think that in the case of contempt of court, the concept is a different one. The concept is one having to do with the administration of justice and it is directed toward the administration of justice, and is a function of the court--

THE COURT: I was refering to the act--the act of the person charged is alleged, at least, to be his utterance. In that respect you see a difference?

MR. GREEN: Yes, I see a difference, Your Honor. For example, in the Pennecamp case, and on the Bridges case,

the contempt of court thing is related directly to the process of the court, to the administration of justice. In Bridges and Pennecamp, for example, where their comments which could be held to be contemptuous in the sense of communication --of the court--nonetheless, there was no contempt of court in the legal sense. And, I think, therefore, that there is a difference.

Now, that being so, we don't believe that this conviction --this statute can stand under the First Amendment. We intend to show to the Court that this case involves pure speech under the First Amendment. But, even if these treat these sculptures as an act, as conduct, what we have here is a statute that prohibits not the act, but the communication. If we assume for the moment that these sculptures or their exhibition are conduct, this case is very different. It is quite the opposite of the ordinary so-called symbolic speech case. In the usual symbolic speech case, the statute on its face prohibits conduct which the state has a right to prohibit, and the defendant comes in and argues that since he employed that conduct for communicative purposes, then the First Amendment prohibits the application of the statute to him. That's not this case. In this case, the part of the statute under which the appellant has been convicted prohibits communication, communication of an idea, contempt. And if it's applied to symbolic conduct, it would be applied to the communicative aspect of the conduct. What the statute

prohibits here is the communicative aspect of the conduct, and not the conduct itself. Hence, even if we assume this is not pure speech, the question before the Court would therefore be not whether conduct prohibited by a statute is protected by the First Amendment, but whether the Constitution permits a statute to be directed entirely at communication solely because the means of communication could be an act subject to state control. Now, we do contend, however, that we are dealing here with speech, not with so-called symbolic speech, or with conduct akin to speech. And we contend further that this case is governed by this Court's holding in Street. We submit that painting and sculpture are speech as that term is used in the First Amendment as much as words. We submit, we point out to the Court, that the earliest form of writing was picture writing, cut or drawn on stone long before men could write words. Photographs and cartoons, for example, have always been considered writing in the law of defamation. It is our contention that works of art, whether they are books, motion pictures, cartoons, paintings or sculpture, are protected by the First Amendment. These sculptures, we say, are therefore entitled to the same protection as the words in Street. Now, works of art have traditionally been used to express political protest. In the instant case, the courts below have found that these sculptures were political protest. At the same time, we don't discount our contention that all works of art

whether or not they communicate a political message, are protected by the First Amendment. Now, it should be noted here that the statutory language which forbids casting contempt on the flag precludes punishment of the artist for using the flag to praise United States policy. On its face, the statute permits the artist to use the flag in support of United States policy, but forbids him to use it if he would condemn United States policy, whether he would condemn in the case of the Vietnam War as overly aggressive or insufficiently so. If he would condemn United States policy, he is forbidden to use the flag. Now this is essentially the same vice which this Court condemned in Schacht where the statute permitted the use of the United States military uniform in theatrical productions, only if it did not discredit the particular armed force. This prohibition of derogatory use clearly violates the First Amendment and First Amendment rights. We argue also that the only governmental interest furthered by this New York statute is compelling respect for the flag, an interest that cannot be furthered without violating the First Amendment. In Street, this Court suggested four possible interests which might support the state's prohibition of Street's contemptuous words. We believe that we have demonstrated in our briefs that none of these possible interests can support this conviction, just as they could not support the conviction of Street. Appellee

and the New York Court of Appeals, nonetheless, have urged that the function of the statute is one, to assure respect for our national emblem, and two, to prevent breaches of the peace and that these are valid state interests. As to assuring respect for our national emblem, Street and Barnett have made it clear that compelling respect for our flag is an interest that has no place in a free society. It is extremely significant, I think, Your Honors, that this statute is commonly refered to as a desecration statute. Actually, the effect of the statute is really to create a crime of secular, or patriotic sacrilege. The statute, in effect, makes a religious object, a secular icon, out of the flag. But in our country, we submit, under our Constitution, we have no place for sacred items or totems. No one can be compelled to respect or pay obeisance to any symbol, religious or secular. That is something that is reserved for totalitarian states.

THE COURT: And do you suggest that it follows automatically that because respect cannot be compelled, desecration may not be forbidden?

MR. GREEN: Desecration under a statute which is intended at communication, Your Honor, was say cannot be forbidden.

THE COURT: But some forms of desecration can be?

MR. GREEN: I'm saying that under such a statute as this, which is directed at communication, no. I think that

conceivably, a statute sufficiently narrowly drawn might perhaps be able to achieve this, but not as desecration. In other words, I think desecration gets into the same problem as casting contempt. I don't mean to quibble about words; I think that conceivably there could be a narrowly drawn flag statute, that would be something that could be supportive. In that connection, Your Honor, I had intended to mention it later, last night there was brought to my attention additional three judge case--a North Carolina case on the subject of flag statutes, where again one was held unconstitutional. I'll submit the name of that case to the clerk afterwards. Now, the court below--

THE COURT: Is part of the statute from the flag burning--(unintelligible)--

MR. GREEN: I'm sorry, sir?

THE COURT: Do you distinguish this part of the statute from the flag burning part?

THE COURT: Well, in this case, our appellant was convicted only of casting contempt. He was not convicted of mutilation, he was not convicted of defacing. So what we have here, and I think I had assumed this was one reason the Court particularly was interested in this case, was that you have clearly and directly the communicative aspect, because the words of which--the thing he was convicted of was of

casting contempt on the flag. Now, the court below and the appellee also seek to justify the statute as one intended to prevent breaches of the peace. However, there is nothing in the design of the statute to suggest that as its purpose. Subdivision 16 is in a really--a great conglomeration of statutes which are all lumped in statute 1425 of the former penal law. They have to do with things as varied as skating on someone's commercial ice pond, of taking somebody's oysters. I think in one case there's a business of stealing firearms from a national guard armory. It is not a breach of the peace statute anymore than the statute in Stromberg was. Furthermore, the statute is neither phrased not has it been construed to require a finding of public disturbance or of immanent breach of the peace. In fact, it's been construed as to not require that. The court below simply assumes a possible breach of the peace. In effect, what the court below has done has been to create by fiat a hecklers veto even when, in this case, there are no hecklers. None in sight. None suggested. Now, New York, it should be noted, does have a breach of the peace statute. Now, we say also, that unlike, for example, the situtations in O'Brien and Adderly, there is no governmental interest here, which is entirely distinct from the suppression of the ideas expressed. Here, the statute's direct thrust is a communication. Preventing a breach of the peace is used only as a justification for supressing the communication of the idea of contempt. Not

as a governmental interest independent of the suppression of communication. Hence, since we are dealing with communication, with First Amendment rights, the state's first duty is to protect the communicator, and only as a last resort can it intervene against him, when it has demonstrated an actual danger of the breach of the peace. There was no such danger here, nor was there any attempt to show one. And the courts below have held that there is no need to show one. Now, appellee suggests for the first time in this court that the conviction can also be sustained on an assault theory. The theory of an assalt on a captive audience. But there was no captive audience here. No one had to climb the stairs to appellant's second floor gallery to see this exhibit. And as for the noose figure, in the second floor window, if a passerby happened to glance up to the second floor in the Madison Avenue traffic, all he had to do was redirect his eyes to the street level. Far less than he would have to do to avoid Mr. Street. Or to avoid the sidewalk speaker who is suggested in the appellee's brief. This case is not in any way like, for example, Rowan against The United States Post Office, which had to do with a householder's right to stop communications addressed to him in his home. The assault therefore is inappropriate to the facts of this case. This case was not and could not have been tired on that theory. No evidence of assault

was offered. The state did not raise this contention on prior appeals, no did the courts below base their holdings on such a finding. The trial courts simply found that the defendant cast contempt by exhibiting these seven sculptures of Morrel's. We state also that the New York statute is unclear, uncertain, and over-broad on its face, so much so as to violate this appellant's Fourteenth Amendment rights. I do not even want to repeat the detailed arguments on this point which is in our briefs. However, I think the Court need only to look at the recent history of the litigation in the various federal courts and the state courts involving this and similar statutes-- they're almost all pretty much the same in other states--to see how vague and imprecise the statute is and how it invites uneven application by local officials. The one fact that stands out clearly from all these various cases is that no one really knows what is legal and what is illegal under this statute. For example, it defines a flag--how many stars and how many stripes make a flag under the statute? What is casting contempt? Is thumbing one's nose, or making some other jesture at the flag? Is it painting stripes on an automobile? Or flying a flag at half mast in mourning over something a local district attorney or court does not find a cause for mourning? Or is it wrapping a flag around an oil can as in one of the editorial cartoons in the appendix to

our reply brief? The trial court here suggested that if the defendant approaches the brink of what is proscribed, he must gamble on an adverse finding by the court. We submit, Your Honors, that this does not meet the Constitutional standards that first he must know what is proscribed, that statute must provide the local officials with adequate standards for its enforcement, that the statute must not include Constitutionally protected conduct within its ambit, and that there can be no strict liability offence in the area of the First Amendment. We claim also, Your Honors, that this statute defies appellant equal protection in that it permits newspapers and magazine publishers to show photos of the same sculptures, to print cartoons and paintings on similar subjects, and it permits the exhibition of paintings that use the flag. The statute has an exemption for ornamental pictures, for newspapers and periodicals. Morrel's paintings were not included in this complaint. At the time of this sentencing, we called to the attention of the court a painting in the collection of Gov. Rockefeller, which was then in public exhibition in New York City, which consists--it's a colleage--it's a painting of the flag on which have been imposed the pictures of potatoes, the words "Iowa," "New York," "use fork," and a picture of Gov. Rockefeller. That painting was then on public display in New York City, it was used as the circular for the ad advertising the exhibit.

It was used as the cover of the New York Times Sunday Magazine during that period of time. As a matter of fact, it was hanging in the executive mansion in Albany when we argued this case in the court of appeals, and when I called that to the attention of the court, Judge Folg suggested we had enough trouble with this case without getting into Gov. Reockefeller's painting. But the point is that the flag is permitted to be used in paintings, it is permitted to be used in any way contemptuous or noncontemptuous, in magazines, in newspapers. We have all of these various uses, and we say such a distinction discriminates against sculpture. Now, appellees suggest that the statute permits only noncontemptuous use of the flag in paintings and periodicals. But there's nothing in the statute that limits the exemption to noncontemptuous use of the flag. And as the court of appeals on the second circuit pointed out, construing another subdivision to this statute and holding it invalid while the court would try to avoid Constitutional issues if it can--it just can't go out of its way to do it as would be required in this case. Now, in fact here at the trial, interestingly, appellee conceded that if the art work here had been painting rather than sculpture, it would have been exempt from the statute. Furthermore, to our knowledge, the statute has never been applied to paintings, newspapers, or periodicals despite the many, many examples of such use. May, Your Honor--I would like to save some of my time for

rebuttal, and I'll stop at this point.

THE COURT: Does the record show what triggered the issuance of the summons in this case?

MR. GREEN: No, sir, the records show only that the police officer had been on Madison Avenue at eight or eight thirty in the morning the day before he had the summons, and he saw the noose figure hanging in the window. And he apparently got a summons, and the next day he--I believe it was the next day, I'm not sure of that--he went to the art gallery and served it. There must have been a visit somewhere in between, because the complaint mentioned various things.

THE COURT: How long was the exhibition hung?

MR. GREEN: The exhibition was on for three weeks; the summons was served after it had been on for two weeks, or slightly more than two weeks.

THE COURT: Totally unimportant, I think--an historical error in your interesting collection in the appendix to the reply briefs--

MR. GREEN: Yes, sir?

THE COURT: I think that the conbination of Mr. Lincoln and Mr. Hamlin was not in the '64 campaign.

MR. GREEN: Well, thank you very much. I think you're quite right, sir. Thank you.

THE COURT: Mr. Juviler.

MR. JUVILER: Mr. Chief Justice, and may it please the court. There was no seizure of the flag constructions and the proof of guilt was established by photographs taken at the gallery. These photographs are included in the original record, and Mr. Seever has been kind enough to obtain them here in court. I think it might be convenient if these are passed up to the Court because I'd like to refer to them, some of them, during my oral argument. The immediate question presented by this case is the extent to which the people, while preserving the liberties that the flag stands for, may also take steps to preserve the integrity of the flag as a national symbol of general use. Whatever place this case finds in Constitutional history will probably be attributable, however, to a broader question, which is the difficult balancing between pure speech and symbolic conduct that has attracted the attention of this Court in several cases in recent years Because the statute here in question involves casting contempt by act, and the trial court specifically found that the appellant's constructions cast contempt by act. Every state has a statute in some way prescribing the acts which may be addressed to the flag; Congress recently has enacted a statute which in many ways is similar to the New York law.

THE COURT: May I ask, was it essential or unavoidable for the trial court to hold that while the charges in the

language of the statute--namely mutilation or defilement or casting contempt--they came down only on casting contempt? Wasn't this also a mutilation?

MR. JUVILER: The defendant was charged with the general language of the subdivision D of the penal law. The court found only that he cast contempt by act. There was no evidence, and indeed, it was the people's theory, that appellant himself mutilated the flag. The evidence was that it was another person, the artist, who had used the flag.

THE COURT: So your answer is yes, this is the only part of the statute this particular defendant had committed?

MR. JUVILER: Yes.

THE COURT: What was the defendant's act?

MR. JUVILER: The act was the display of a physically altered, actual flag.

THE COURT: He had it in his gallery, yes?

MR. JUVILER: Yes.

THE COURT: And displaying them in public?

MR. JUVILER: Causing this display and permitting this display to continue, including the day on which the summons was issued.

THE COURT: You say that's an act?

MR. JUVILER: An act as opposed to words. Appellant was not prosecuted for anything he said or indeed for any belief that he may have had. We do not know in this record what appellant's beliefs are. Although he did testify as to

his opinion as to the artist's intention.

THE COURT: Suppose the artist made a statue of the American flag burning. Would that be covered?

MR. JUVILER: That would be an easier case, I think, to defend. And there is a case like that on its way to this Court, of New York where a person in public burned a flag. The way we analyze this--

THE COURT: But if he made a statue?

MR. JUVILER: Yes, but the way we analyze this problem of freedom of expression--there's a continuum between conduct --pure conduct--and pure speech, words. If--

THE COURT: Suppose he made a statue of a burning Uncle Sam?

MR. JUVILER: There would be no statute that I know that would prevent that, other than some law dealing with fire regulations.

THE COURT: Suppose this man kept this statue, the one involved here, in his home? Is the statute covered?

MR. JUVILER: No. This law deals only with--

THE COURT: What if he sold it to somebody? Is the statute covered?

MR. JUVILER: Not unless the act occurred in public,

there was some public act. Now, in this case--

THE COURT: Well, suppose he gave it to him on the street corner? Does the statute apply? In broad daylight?

MR. JUVILER: I doubt--I don't know. We'd have to have the facts as to whether this was deemed to cast contempt on the flag. In this particular case, there's no dispute that there was a public event. Indeed--

THE COURT: This has to be in public, then?

MR. JUVILER: Yes. This has to be public. The statute does not apply to acts in private. A person under this law and Congress's law could burn the flag on his own home, or at a private party.

THE COURT: As you've studied this case, do you find any reason these states had these statutes before the federal government got around to it?

MR. JUVILER: I think historically the impetus was the misuse of the flag in some political campaigns, and commerical advertising after the Civil War.

THE COURT: It's not the state flag. It's the federal flag.

MR. JUVILER: Yes.

THE COURT: The states all protect it, but Congress didn't get round to it til two, three years ago?

MR. JUVILER: Yes.

THE COURT: Is there any reason for that?

MR. JUVILER: Historically, I don't know what the reason

is, it may have been that Congress felt that the states were better equipped through local law enforcement to deal with this. In Halter against Nebraska in 1907, this Court said that the state does have an interest because the states derive their existence from the union, and the flag represents that union. Four members of this Court dissent in the Street case appear to have accepted the state interest in this area, and the recent Congressional law specifically leaves to the states the power to make these regulations. The ability of a state or federal government to regulate conduct that has expressive elements was recognized in the O'Brien case, the draft card burning case. And there are two main tests set forth in that case, which we contend were fullfilled here to justify the state regualtion. The first is that there be a sufficient governmental interest in regulating the conduct element. And if this interest exists, an indentical effect on some expressive element may be tolerated under the First Amendment. And the second principle requirement is that the regulation not be directed to suppression of expression. As we proceed to argue both of these tests were satisfied by the New York law. One governmental interest which was served by the New York law, the federal and the laws in all of the other states is the preservation of the integrity of the flag, as a viable national symbol for general use by the public. As was said in dissent in the

Street case, the flag is a special kind of personalty. It is dedicated to a certain use by public action. And, as such it is off limits for certain physical acts of destruction or contemptuous desecration in public, just as the walls of a federal building are off limits for the inscription of political or social commentary. Appellant would dismiss this vital area of human experience, the symbolic area, the symbolic interest. And yet, his case is based on his assertion of his own right to assert symbolic values as an exhibitor of art. There seems to be no basis presented by appellant on which this Court can say, and indeed this Court has never suggested, that there is no valid public interest in preserving this general symbolic use of the flag as a national symbol. The more difficult issue here is whether the New York law is unrelated to the suppression of free expression. I'm talking now of the specific provision that is an issue here, the provision preventing casting contempt on the flag by an act. Because contempt is, in a sense, expression, and that expression is specifically the corpus of the crime that is defined by this statute. But this contempt is not a view on an issue. The flag is neutral on political and social questions and the statutes aimed at protecting the flag by the same token are also neutral in terms of expressing views of the type that are recognized as having value in the free marketplace of ideas.

The flag has its place at the head of a parade of hard hats, and it has its place at the head of a procession of peace marchers, so that the legislation dealing with the flag takes no position on political questions. The law does not say you may not cast contempt on the government. Unlike the Congressional enactment at issue in the Schacht case, it does not say that you may not discredit the armed forces. The armed forces--discrediting the armed forces is not a neutral position. It is a very vital heart of political controversy. The flag is unique. It is the kind of personalty that extends beyond the ownership of the particular actor, and it is a neutral personalty. As the statute was applied in this particular case, there is another interest which is certainly as important as the interest in permitting free-floating, abstract contempt by acts toward the flag. And that is the interst in freedom of choice of the citizens as to whether they shall have in their community publically displayed uses of tne flag that are offensive to a large part of the community. Your Honors will note that in People's exhibit one, a black and white photograph taken from the street facing the appellant's gallery, one of these constructions haging the flag in effigy by the neck like corpse was exhibited for three weeks in a prominent position facing a major New York City throroughfare, Madsion Avenue. It is absurd to suggest that there is no evidence that this

was visible to persons passing on Madison Avenue. And the question here is: the ability to rent space in a prominent display position gives the right to put in there any visual materials for any amount of time regardless of other means of presenting the same expression in manners which are less of an assault on the citizens. The very basic right to be free from sights and tangible matter that we do not want was the language recently used by this Court in the Rowan against Post Office. That involves privacy in the home. But there is privacy, some interest in privacy and freedom of choice in the public streets. If this law is applied in such a context, there is not substantial question of the subject's rights under the First Amendment. The sidewalk speaker is not comparable to the renter of space, because the sidewalk speaker really has little alternative to present his discourse to the public. And he is not there, generally, for three weeks. Presumably, if the speaker uses electronic equipment which broadcasts his utterance loudly and raucously into the street and into the home in the neighborhood, there would be a right to regulate that. So long as the regulation is not directed to the ideas or the context, in that sense, of his utterances. And we ask the court not to say, not to create, by a decision here, another example of a captive audience. There are alternatives for expressing the view which appellant ascribes to the artist of this case.

THE COURT: Well, are you implying by that, Mr. Juviler, that if he didn't have it in the window but had it only in his studio for sale, something that would be observed only by people who sought out the studio, there would be no criminal act?

MR. JUVILER: It would become much harder to defend such a prosecution. The statute as written would apply, I would say, and it has been so held in this case, if the voluntary audience is still a public audience. In terms of the interest that I've discussed in the validity of the flag as a symbol, there is more to say for that interest if the flag is, in a sense, misused in the public street than in a private, public gallery. But that is the facts--those are the facts presented by this record and the trial court and the court of appeals specifically made clear that this display in the window was as separable and sufficient ground for finding a violation of this statute. Even though they also said that the other construction, particularly the one using the actual flag as a penis inside the gallery, also violated the statute and cast contempt by act. Contrary to the appellant's argument there was evidence from appellant himself that that construction used part of the American flag, the actual American flag. And there is other testimony that this was not a homemade flag. This was an actual three-dimensional American flag. The photographs show that beyond any doubt.

THE COURT: Where it defines the statutes, does it make

any difference if it's an official flag or a homemade flag?

MR. JUVILER: By homemade, I mean something that is not a cloth banner.

THE COURT: Is there any difference between a five and ten cent store American flag and the silver, gold tipped flag?

MR. JUVILER: No, no difference. But what we have in this particular case is an actual American flag. The relevancy of that--

THE COURT: Well, suppose it were a 48-star flag. Would that be all right?

MR. JUVILER: Yes, that would violate the statute as it did in the Street case. As it could have done in the Street case.

THE COURT: Well, how about a 13-star one? And then when I get done I'll ask you about a 53-star one.

MR. JUVILER: Yes. I suppose that one has to say that if this is reasonably considered to be a contemporary American flag, the present symbol of government in essense as a question of fact, then the statute could apply, and if it does apply, when it is so held to apply by the state court as a question of fact, there is no First Amendment question.

THE COURT: What's your position--perhaps you've already stated it--on contempt by speech by words rather than by act? The statute surely covers that.

MR. JUVILER: As written, it covers that, but in essense, that part of the statute has been written off as a result of this Court's decision in the Street case, and the court of appeals so held in this case.

THE COURT: And so if you deliver the same message by an act, namely if you cast contempt by an act, you say the statute is valid if you do so by an act, rather than by words?

THE COURT: Yes. Because of this now-settled distinction drawn by this Court between symbolic conduct that has comic element, and pure speech. On the one hand--

THE COURT: What does the state--what interests--what more interest does the state have in preserving the message delivered by an act than the message delivered by words?

MR. JUVILER: It's probably the--it might well be the same interest, but in the one sense dealing with words, that interest has been deemed subordinate to the First Amendment. That hasn't been the case--

THE COURT: Well, why is that? The lower court--your state court certainly stated another ground for this. Didn't they?

MR. JUVILER: Yes. That is the second major public interest, if that's what Your Honor is refering to. The interest in preserving order and preventing a breach of the peace. In the Street case, that was argued, and in defence of the statute, and the majority of this Court felt that on that record,

there was insufficient evidence to justify that interest dealing with words. And the Court of Appeals of New York, as we here are bound by the majority of opinions in the Street case--

THE COURT: Mr. Juviler, am I wrong in my understanding that the cases on which you rely distinguishing verbal communication from commmunication by act all involve--all involve--cases where the act itself, the conduct, could be made, could Constitutionally be made illegal for some other reason. That is, let's assume, a fellow sets fire to the White House to express his views. Obviously, setting fire to the White House for various reasons can be made criminal. And that--even though he may say that's symbolic speech--let's say he blows the nose off the Statue of Liberty. It's destruction of public property, and that can be made for various state interests. Or, let's say the O'Brien case, because of the interests of the Selective Service System, it could be made a federal offence to destroy draft cards even against the defence that is was symbolic speech. All of those cases involve conduct, which otherwise could be made illegal. I don't understand that this case involves any conduct whatsoever that could be made illegal. Conduct, as I understand it, is exhibiting something. That's the only act you're talking about, isn't it?

MR. JUVILER: Yes.

THE COURT: What interest does the state have to prevent the exhibition of something as contrasted to prevent verbal expression of something in this case?

MR. JUVILER: The two interests are the interest in preserving this national symbol when the display involves particularly the actual flag, and secondly the interest refered to by the court of appeals, and that is the interest in perserving order, preventing disturbance through, in effect, fighting acts, as opposed to fighting words.

THE COURT: Well, what is the difference? That is, I should think if those are valid, they would be equally valid against verbal expression, casting contempt upon the flag. Would they not?

MR. JUVILER: In terms of the fighting act? The fighting word?

THE COURT: In terms of either one of those purported justifications.

MR. JUVILER: Well, the Court has--perhaps you're right--but the Court has taken a tougher position.

THE COURT: Well, just give me a case.

MR. JUVILER: In the Street case, for example, when the majority of this Court felt that the conviction of Street may have rested on his utterance.

THE COURT: Yes, on his expressions, rather than his mutilization--

MR. JUVILER: --burning--

THE COURT: --or his mutilization, or defacement or destruction of the flag. And, in this case, there is no conviction for mutilating, defacing or destruction of a flag, but merely for casting contempt upon it.

MR. JUVILER: Yes. I presume if the manufacturing of these constructions had gone on in the window of the gallery, there would be a more direct, observable application of this concept of conduct. But a display is conduct, in a sense.

THE COURT: It is the only act, if I understand.

MR. JUVILER: Yes. But display can be conduct if the statute that deals with display is addressed to the non-speech elements of that conduct.

THE COURT: What is the nonspeech element?

MR. JUVILER: The use of the actual flag, a physical object. There was a case that came to this Court in which no substantial federal question was found, and the appeal was dismissed.

THE COURT: Cogswell, or Cowgill?

MR. JUVILER: Well, that's one. I'm talking of the Stover case, that arose in New York, where to protest taxes in a town, the defendant flew dirty laundry. Now Chief Judge Fuld, then Judge Fuld, writing of the court of appeals, found that there was a conduct element even though this was merely a display.

THE CCURT: A common law nuisance. But there was no such finding here, was there?

MR. JUVILER: Yes, indeed there was, by the majority of the court of appeals. And, the legislature itself made a finding that a public display of a physical flag that casts contempt on the flag is a nuisance in this case. It is an act. It has a conduct element, unconnected to the political or social views expressed that can be regulated.

THE COURT: The words of the statute in issue here, as I understand it, are those words that make it an offence for anyone who shall publically cast contempt upon a flag by act. It doesn't say anything about displaying, nothing about a nuisance.

MR. JUVILER: Well, we have--that statute has been applied in this case, to a display. That becomes the law of this case. And, I think the question now is not what the statute means, in terms of state law, but whether the First Amendment permits such an application of the statute.

THE COURT: I jsut wondered if you had any case in which the distinction was made between verbal communication and commmunication by conduct, where the conduct was not conduct of a kind that could be proscribed.

THE JUVILER: No, I know of no such case. We say this is a case where the conduct can be proscribed.

THE COURT: Simply because of what it communicates?

MR. JUVILER: Yes. No.

THE COURT: Is that what you're saying?

MR. JUVILER: No. Not because of what it communicates because of views, but because it uses the flag, just as though one were to use the walls of this building for writing a peace symbol.

THE COURT: Just a minute. This man who has been convicted simply exhibited this sculpture. Right?

MR. JUVILER: Yes.

THE COURT: That was his conduct?

MR. JUVILER: Right.

THE COURT: That's the only act, to use--

MR. JUVILER: That's correct.

THE COURT: His exhibition of the sculpture?

MR. JUVILER: He was not prosecuted for his beliefs, for his verbal utterances.

THE COURT: Nor for defacing a flag, or for mutilating a flag.

MR. JUVILER: No, no.

THE COURT: Do you rely, to any extent, or to put it this way: How much do you rely on the provocative nature of this act that may lead a group of soldiers home on leave to pick up some stones and throw them through the windows--if they could throw that high or far?

MR. JUVILER: Yes, we do stand by the opinion of the court

in that respect, that under the circumstances of that display, there was a risk that a breach of the peace or disorder could occur. There was no specific finding to that effect, quite frankly. As appellant says, in the trial court, or in the appellant court because the law as written does not require a tendency to breach the peace as an element. But, historically, that has been one of the motivating factors behind the enactment of these laws, and in terms of applying this law and defending it in a federal court, if that interest can be presented on the record before the Court, then that First Amendment issue recedes.

THE COURT: I suppose the analysis along those lines by the Court of Appeals of New York would be strengthened somewhat if there were evidence in this case that on seven particular days because a group of soldiers or others were demonstrating in the street and throwing stones at the windows and etcetera. But we don't have that here, do we?

MR. JUVILER: No. It may be that if this had happened somewhere else, even in New York State--I'm told that by colleagues of mine up-state--they can't understand why there wasn't such an outbreak. Subsequent events in New York City involving displays of the flag bare out the provocative tendency of certain acts toward the flag and displays of the flag. I don't know whether the appellant should prevail because New Yorkers, at least in this instance,

perhaps, are more jaded than the average citizen in the United States. There is a recent law review article which has a history of flag desecration and shows constantly over the years the provocative quality of certain displays, which I think is inherent in the legislative purpose. That is in volume three of the Indiana Legal Forum.

THE COURT: Your time is up, now, Mr. Juviler. You'll have five minutes after lunch, Mr. Green.

MR. GREEN: Oh. Thank you, sir.

THE COURT: Mr. Green, you have five minutes left.

MR. GREEN: Thank you. Mr. Chief Justice, and may it please the Court. There was a mention in the argument of the appellee of the Stover case in New York, the rags on the clothes line. I would like to point out to the Court that there was no question of a valid statutory purpose apart from communication. What we had was a statute which forbad clotheslines in any yard abutting on a public street, and the statute was upheld under the general zoning and police powers of the state. Here, of course, the statute is addressed entirely to communication.

On the subject of provocation, there was a question asked about the possibility of soldiers throwing stones through the second floor window of this gallery. Of course, there was no evidence at all of any disorder or any threat of disorder, however, if there were, we would

respectfully suggest to this Court that the state's first duty in that case would be to attempt to quell the disorder. That undifferentiated fear of potential disorder this Court has repeatedly held can never justify the suppression of expression.

Now, appellee concedes that one can be disrespectful of the government, but he says that the flag is something different. And , in this regard, I should like to quote to the Court S.I. Hayakawa, who was president of one of the California state colleges, and renowned semanticist. Speaking of the flag very recently, he said, and I am quoting now, "When a symbol becomes a fetish, then you make the semantic error of confusing the symbol with what it is supposed to symbolize." We submit, Your Honors, that the issue before this Court today really is a very direct one. It is whether our flag originally designed to symbolize our heritage of freedom has now become a fetish, as Mr. Hayakawa called it, whose worship can curb the very freedom it is supposed to represent.

THE COURT: Mr. Green, thank you. The case is submitted.