

Per Curiam

SPENCE v. WASHINGTON

APPEAL FROM SUPREME COURT OF WASHINGTON

No. 72-1690. Argued January 9, 1974—Decided June 25, 1974

[REDACTED]

Peter Greenfield argued the cause for appellant. With him on the briefs were *Burt Neuborne*, *Melvin L. Wulf*, and *Joel M. Gora*.

James E. Warme argued the cause for appellee. With him on the brief was *Christopher T. Bayley*.

PER CURIAM.

Appellant displayed a United States flag, which he owned, out of the window of his apartment. Affixed to both surfaces of the flag was a large peace symbol fashioned of removable tape. Appellant was convicted under a Washington statute forbidding the exhibition of a United States flag to which is attached or superimposed figures, symbols, or other extraneous material. The Supreme Court of Washington affirmed appellant's

conviction. 81 Wash. 2d 788, 506 P. 2d 293 (1973). It rejected appellant's contentions that the statute under which he was charged, on its face and as applied, contravened the First Amendment, as incorporated by the Fourteenth Amendment, and was void for vagueness. We noted probable jurisdiction. 414 U. S. 815 (1973). We reverse on the ground that as applied to appellant's activity the Washington statute impermissibly infringed protected expression.

I

On May 10, 1970, appellant, a college student, hung his United States flag from the window of his apartment on private property in Seattle, Washington. The flag was upside down, and attached to the front and back was a peace symbol (*i. e.*, a circle enclosing a trident) made of removable black tape. The window was above the ground floor. The flag measured approximately three by five feet and was plainly visible to passersby. The peace symbol occupied roughly half of the surface of the flag.

Three Seattle police officers observed the flag and entered the apartment house. They were met at the main door by appellant, who said: "I suppose you are here about the flag. I didn't know there was anything wrong with it. I will take it down." Appellant permitted the officers to enter his apartment, where they seized the flag and arrested him. Appellant cooperated with the officers. There was no disruption or altercation.

Appellant was not charged under Washington's flag-desecration statute. See Wash. Rev. Code § 9.86.030, as amended.¹ Rather, the State relied on the so-called

¹ This statute provides in part:

"No person shall knowingly cast contempt upon any flag, standard, color, ensign or shield . . . by publicly mutilating; defacing, defiling,

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"improper use" statute, Wash. Rev. Code § 9.86.020. This statute provides, in pertinent part:

"No person shall, in any manner, for exhibition or display:

"(1) Place or cause to be placed any word, figure, mark, picture, design, drawing or advertisement of any nature upon any flag, standard, color, ensign or shield of the United States or of this state . . . or

"(2) Expose to public view any such flag, standard, color, ensign or shield upon which shall have been printed, painted or otherwise produced, or to which shall have been attached, appended, affixed or annexed any such word, figure, mark, picture, design, drawing or advertisement . . ."²

Appellant initially was tried to the bench in a local justice court, where he was found guilty and sentenced to 90 days' confinement, with 60 days suspended. Appellant exercised his right to be tried *de novo* in King County Superior Court, where he received a jury trial.

The State based its case on the flag itself and the testimony of the three arresting officers, who testified that they had observed the flag displayed from appellant's window and that on the flag was superimposed what they identified as a peace symbol. Appellant took

burning, or trampling upon said flag, standard, color, ensign or shield."

² Washington Rev. Code § 9.86.010 defines the flags and other symbols protected by the desecration and improper-use statutes as follows:

"The words flag, standard, color, ensign or shield, as used in this chapter, shall include any flag, standard, color, ensign or shield, or copy, picture or representation thereof, made of any substance or represented or produced thereon, and of any size, evidently purporting to be such flag, standard, color, ensign or shield of the United States or of this state, or a copy, picture or representation thereof."

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the stand in his own defense. He testified that he put a peace symbol on the flag and displayed it to public view as a protest against the invasion of Cambodia and the killings at Kent State University, events which occurred a few days prior to his arrest. He said that his purpose was to associate the American flag with peace instead of war and violence:

"I felt there had been so much killing and that this was not what America stood for. I felt that the flag stood for America and I wanted people to know that I thought America stood for peace."

Appellant further testified that he chose to fashion the peace symbol from tape so that it could be removed without damaging the flag. The State made no effort to controvert any of appellant's testimony.

The trial court instructed the jury in essence that the mere act of displaying the flag with the peace symbol attached, if proved beyond a reasonable doubt, was sufficient to convict. There was no requirement of specific intent to do anything more than display the flag in that manner. The jury returned a verdict of guilty. The court sentenced appellant to 10 days in jail, suspended, and to a \$75 fine. The Washington Court of Appeals reversed the conviction. 5 Wash. App. 752, 490 P. 2d 1321 (1971). It held the improper-use statute overbroad and invalid on its face under the First and Fourteenth Amendments. With one justice dissenting and two concurring in the result, the Washington Supreme Court reversed and reinstated the conviction. 81 Wash. 2d 788, 506 P. 2d 293 (1973).

II

A number of factors are important in the instant case. First, this was a privately owned flag. In a technical property sense it was not the property of any govern-

ment. We have no doubt that the State or National Governments constitutionally may forbid anyone from mishandling in any manner a flag that is public property. But this is a different case. Second, appellant displayed his flag on private property. He engaged in no trespass or disorderly conduct. Nor is this a case that might be analyzed in terms of reasonable time, place, or manner restraints on access to a public area. Third, the record is devoid of proof of any risk of breach of the peace. It was not appellant's purpose to incite violence or even stimulate a public demonstration. There is no evidence that any crowd gathered or that appellant made any effort to attract attention beyond hanging the flag out of his own window. Indeed, on the facts stipulated by the parties there is no evidence that anyone other than the three police officers observed the flag.

Fourth, the State concedes, as did the Washington Supreme Court, that appellant engaged in a form of communication.³ Although the stipulated facts fail to show that any member of the general public viewed the flag, the State's concession is inevitable on this record. The undisputed facts are that appellant "wanted people to know that I thought America stood for peace." To be sure, appellant did not choose to articulate his views through printed or spoken words. It is therefore necessary to determine whether his activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments, for as the Court noted in *United States v. O'Brien*, 391 U. S. 367, 376 (1968), "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." But the nature of

³ Brief for Appellee 3; 81 Wash. 2d, at 799, 800, 506 P. 2d, at 300, 301.

appellant's activity, combined with the factual context and environment in which it was undertaken, lead to the conclusion that he engaged in a form of protected expression.

The Court for decades has recognized the communicative connotations of the use of flags. *E. g.*, *Stromberg v. California*, 283 U. S. 359 (1931). In many of their uses flags are a form of symbolism comprising a "primitive but effective way of communicating ideas . . .," and "a short cut from mind to mind." *Board of Education v. Barnette*, 319 U. S. 624, 632 (1943). On this record there can be little doubt that appellant communicated through the use of symbols. The symbolism included not only the flag but also the superimposed peace symbol.

Moreover, the context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol. See *Tinker v. Des Moines School District*, 393 U. S. 503 (1969). In *Tinker*, the wearing of black armbands in a school environment conveyed an unmistakable message about a contemporaneous issue of intense public concern—the Vietnam hostilities. *Id.*, at 505–514. In this case, appellant's activity was roughly simultaneous with and concededly triggered by the Cambodian incursion and the Kent State tragedy, also issues of great public moment. Cf. *Scheuer v. Rhodes*, 416 U. S. 232 (1974). A flag bearing a peace symbol and displayed upside down by a student today might be interpreted as nothing more than bizarre behavior, but it would have been difficult for the great majority of citizens to miss the drift of appellant's point at the time that he made it.

It may be noted, further, that this was not an act of mindless nihilism. Rather, it was a pointed expression of anguish by appellant about the then-current domestic and foreign affairs of his government. An intent to

convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.

We are confronted then with a case of prosecution for the expression of an idea through activity. Moreover, the activity occurred on private property, rather than in an environment over which the State by necessity must have certain supervisory powers unrelated to expression. Cf. *Procunier v. Martinez*, 416 U. S. 396 (1974); *Healy v. James*, 408 U. S. 169 (1972); *Tinker v. Des Moines School District*, *supra*. Accordingly, we must examine with particular care the interests advanced by appellee to support its prosecution.

We are met at the outset with something of an enigma in the manner in which the case was presented to us. The Washington Supreme Court rejected any reliance on a breach-of-the-peace rationale. 81 Wash. 2d, at 796 n. 1, 506 P. 2d, at 299 n. 1. It based its result primarily on the ground that "the nation and state both have a recognizable interest in preserving the flag as a symbol of the nation" ⁴ Yet counsel for the State declined to support the highest state court's principal rationale in argument before us. ⁵ He pursued instead the breach-of-the-peace theory discarded by the state court. Indeed, that was the only basis on which he chose to support the constitutionality of the state statute.

⁴ 81 Wash. 2d, at 799, 506 P. 2d, at 300. A subsidiary ground relied on by the Washington Supreme Court must be rejected summarily. It found the inhibition on appellant's freedom of expression "minuscule and trifling" because there are "thousands of other means available to [him] for the dissemination of his personal views" *Id.*, at 799, 800, 506 P. 2d, at 300, 301. As the Court noted in, e. g., *Schneider v. State*, 308 U. S. 147, 163 (1939), "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."

⁵ Brief for Appellee 6; Tr. of Oral Arg. 31-32.

Despite counsel's approach, we think it appropriate to review briefly the range of various state interests that might be thought to support the challenged conviction, drawing upon the arguments before us, the opinions below, and the Court's opinion in *Street v. New York*, 394 U. S. 576, 590-594 (1969). The first interest at issue is prevention of breach of the peace. In our view, the Washington Supreme Court correctly rejected this notion. It is totally without support in the record.

We are also unable to affirm the judgment below on the ground that the State may have desired to protect the sensibilities of passersby. "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street v. New York*, *supra*, at 592. Moreover, appellant did not impose his ideas upon a captive audience. Anyone who might have been offended could easily have avoided the display. See *Cohen v. California*, 403 U. S. 15 (1971). Nor may appellant be punished for failing to show proper respect for our national emblem. *Street v. New York*, *supra*, at 593; *Board of Education v. Barnette*, *supra*.⁶

We are brought, then, to the state court's thesis that Washington has an interest in preserving the national flag as an unalloyed symbol of our country. The court did not define this interest; it simply asserted it. See 81 Wash. 2d, at 799, 506 P. 2d, at 300. MR. JUSTICE REHNQUIST's dissenting opinion today, see *post*, at 420-422, adopts essentially the same approach. Presumably, this interest might be seen as an effort to prevent the appropriation of a revered national symbol by an individual, interest group, or enterprise where there was a risk that association of the symbol with a particular

⁶ Counsel for the State conceded that promoting respect for the flag is not a legitimate state interest. Tr. of Oral Arg. 30.

product or viewpoint might be taken erroneously as evidence of governmental endorsement.⁷ Alternatively, it might be argued that the interest asserted by the state court is based on the uniquely universal character of the national flag as a symbol. For the great majority of us, the flag is a symbol of patriotism, of pride in the history of our country, and of the service, sacrifice, and valor of the millions of Americans who in peace and war have joined together to build and to defend a Nation in which self-government and personal liberty endure. It evidences both the unity and diversity which are America. For others the flag carries in varying degrees a different message. "A person gets' from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn." *Board of Education v. Barnette*, 319 U. S., at 632-633. It might be said that we all draw something from our national symbol, for it is capable of conveying simultaneously a spectrum of meanings. If it may be destroyed or permanently disfigured, it could be argued that it will lose its capability of mirroring the sentiments of all who view it.

But we need not decide in this case whether the interest

⁷ Undoubtedly such a concern underlies that portion of the improper-use statute forbidding the utilization of representations of the flag in a commercial context. Indeed, the third subparagraph of the improper-use statute, Wash. Rev. Code § 9.86.020 (3), which is not at issue here, is aimed directly at commercial exploitation of our national symbol. There is no occasion in this case to address the application of the challenged statute to commercial behavior. Cf. *Halter v. Nebraska*, 205 U. S. 34 (1907). Mr. JUSTICE REHNQUIST's dissent places major reliance on *Halter*, see *post*, at 418-420, despite the fact that *Halter* was decided nearly 20 years before the Court concluded that the First Amendment applies to the States by virtue of the Fourteenth Amendment. See *Gitlow v. New York*, 268 U. S. 652 (1925).

advanced by the court below is valid.⁸ We assume, *arguendo*, that it is. The statute is nonetheless unconstitutional as applied to appellant's activity.⁹ There was no risk that appellant's acts would mislead viewers into assuming that the Government endorsed his viewpoint. To the contrary, he was plainly and peacefully¹⁰

⁸ If this interest is valid, we note that it is directly related to expression in the context of activity like that undertaken by appellant. For that reason and because no other governmental interest unrelated to expression has been advanced or can be supported on this record, the four-step analysis of *United States v. O'Brien*, 391 U. S. 367, 377 (1968), is inapplicable.

⁹ Because we agree with appellant's as-applied argument, we do not reach the more comprehensive overbreadth contention he also advances. But it is worth noting the nearly limitless sweep of the Washington improper-use flag statute. Read literally, it forbids a veteran's group from attaching, *e. g.*, battalion commendations to a United States flag. It proscribes photographs of war heroes standing in front of the flag. It outlaws newspaper mastheads composed of the national flag with superimposed print. Other examples could easily be listed.

Statutes of such sweep suggest problems of selective enforcement. We are, however, unable to agree with appellant's void-for-vagueness argument. The statute's application is quite mechanical, particularly when implemented with jury instructions like the ones given in this case. The law in Washington, simply put, is that *nothing* may be affixed to or superimposed on a United States flag or a representation thereof. Thus, if selective enforcement has occurred, it has been a result of prosecutorial discretion, not the language of the statute. Accordingly, this case is unlike *Smith v. Goguen*, 415 U. S. 566 (1974), where the words of the statute at issue ("publicly . . . treats contemptuously") were themselves sufficiently indefinite to prompt subjective treatment by prosecutorial authorities.

¹⁰ Appellant's activity occurred at a time of national turmoil over the introduction of United States forces into Cambodia and the deaths at Kent State University. It is difficult now, more than four years later, to recall vividly the depth of emotion that pervaded most colleges and universities at the time, and that was widely shared by young Americans everywhere. A spontaneous outpouring of feeling resulted in widespread action, not all of it rational

protesting the fact that it did not. Appellant was not charged under the desecration statute, see n. 1, *supra*, nor did he permanently disfigure the flag or destroy it. He displayed it as a flag of his country in a way closely analogous to the manner in which flags have always been used to convey ideas. Moreover, his message was direct, likely to be understood, and within the contours of the First Amendment. Given the protected character of his expression and in light of the fact that no interest the State may have in preserving the physical integrity of a privately owned flag was significantly impaired on these facts, the conviction must be invalidated.¹¹

The judgment is reversed.

It is so ordered.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

when viewed in retrospect. This included the closing down of some schools, as well as other disruptions of many centers of education. It was against this highly inflamed background that appellant chose to express his own views in a manner that can fairly be described as gentle and restrained as compared to the actions undertaken by a number of his peers.

¹¹ The similarity of our holding to that of the Iowa Supreme Court in *State v. Kool*, 212 N. W. 2d 518 (1973), merits note. In that case, the defendant displayed a replica of the United States flag upside down in his window, superimposing a peace symbol to create an effect identical to that achieved by Spence. Recognizing the communicative character of the defendant's activity, the Iowa Supreme Court reversed his conviction for flag misuse and held the statute unconstitutional as applied. The court eschewed an overbreadth analysis, and it rejected a number of the state interests we have found unavailing in the instant case.