UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 48 | Number 2 Article 7

2-1-1970

Constitutional Law -- First Amendment Rights -- Flag-Burning As Symbolic Expression

William M. Trott

permissible defense, and such an interpretation of the Code was probably unintended since an even stricter standard is normally required of attorneys than of others. The rule should be more explicit in its use of the word "knowingly."

Why did the justices in *Nadler* believe that the attorney's conduct was unethical? Mrs. Treptow was not harmed; she was financially unable to complete her purchase of the property in any event.[51] The answer is that such conduct causes injury to the integrity of the legal profession and judicial system. The essence of the fiduciary relationship is the trust and confidence a client places in his attorney. Such trust must be protected by the law, or the effectiveness of the judicial system declines. Given his unique access to information regarding a client's property, an attorney should not be allowed to use such information to his own advantage—if for no other reasons than basic notions of fairness and equity. If, as occurred in *Nadler*, the lawyer becomes his client's creditor, he can hardly be expected to conduct the client's affairs with the objective zeal demanded of the advocate—the lawyer's own pecuniary interests become bound with those of his client.

In summary, the American Bar Association recently has clarified and strengthened the fiduciary duties of the attorney wishing to deal in his client's property. Unfortunately, the revision of the ABA Canons probably would not aid a court in dealing effectively with the situation before the Iowa court in *Nadler*. The concept of breach of a fiduciary duty owed by an attorney to his client, however, should be used by courts in the future. Such a court-formed doctrine could be developed as a basis for allowing a defense seeking reduction or disallowance of an attorney's fee. Instead of passing lightly over the acts required for fulfillment of the attorney's fiduciary duty, the Iowa court in *Nadler* should have established an explicit precedent in fiduciary misconduct by penalizing the lawyer financially.

J. MICHAEL BROWN

Constitutional Law—First Amendment Rights—Flag-Burning As Symbolic Expression

In a period when the first amendment's[1] protection of the individual from governmental power is being challenged by new and bizarre methods

[51] —— Iowa at ——, 166 N.W.2d at 104.

[1] The first amendment binds the states through the fourteenth amendment. Stromberg v. California, 283 U.S. 359 (1931).

of communicating protests,[2] the Supreme Court in *Street v. New York*[3] declined to decide whether one such method—burning an American flag—is protected as symbolic free speech. The defendant Street[4] was found guilty under a New York law making it a misdemeanor "publicly [to] mutilate, deface, defile or defy, trample upon or cast contempt upon either by words or act . . ." any flag of the United States.[5] The majority, through Justice Harlan, held that since he might have been convicted for his *words*[6] and since such a conviction would be unconstitutional, the judgment must be reversed. By refusing to reach the flag-burning issue,[7] the majority failed to settle conclusively a nagging, emotional problem[8] and to clarify the relationship between symbolic conduct and the first amendment.

The dissenting opinions chastised the majority for construing the facts to find that Street's spoken words ever were in question. Chief Justice Warren emphasized that the defendant was not convicted for his words because the lower courts and both parties on appeal addressed themselves to the issue of the defendant's act of flag-burning.[9] Justice White went farther in stating that Street's alleged conviction for his words would not

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[2] The recent self-immolations by high school students to protest the Vietnam War were a form of symbolic communication.

[3] 394 U.S. 576 (1969).

[4] The defendant was a Negro who, having heard of the shooting of James Meredith in Mississippi, went to a street corner and burned a forty-eight star American flag that he formerly had displayed on national holidays.

[5] N.Y. PENAL LAW § 1425(16)(d) (McKinney 1944). This section was repealed in 1967, ch. 791, § 50 [1967] N.Y. LAWS 2151, and superseded by N.Y. GEN. BUS. LAW § 136 (McKinney 1968), which defines the offense in identical language. Flag desecration statutes have been enacted by all states and by Congress. 18 U.S.C. § 700 (Supp. IV, 1964). There is also a Uniform Flag Law covering flag desecration. 9B UNIFORM LAWS ANNOTATED 37-40 (1957).

[6] The policeman who arrested the defendant across the street from the burning flag overheard him say to a small crowd, "We don't need no damn flag." Then Street said to the policeman, "Yes, that is my flag; I burned it. If they let that happen to Meredith we don't need an American flag." 394 U.S. at 578-79.

[7] *Id.* at 576, 581, 594.

[8] Note Chief Justice Warren's dissent:

> In a time when the American flag has increasingly become an integral part of public protests. . . . [B]oth those who seek constitutional shelter for acts of flag desecration perpetrated in the course of a political protest and those who must enforce the law are entitled to know the scope of constitutional protection. The Court's explicit reservation of the constitutionality of flag burning prohibitions encourages others to test in the streets the power of our States and National Government to impose criminal sanctions upon those who would desecrate the flag.

Id. at 604-05.

[9] *Id.* at 595 (dissenting opinion).

matter because he was properly convicted for his acts.[10] The four dissenters were in agreement that flag-burning can be proscribed constitutionally.[11]

Had the majority dealt with the flag-burning issue, it would have found that Street's argument that such action is protected speech encounters serious obstacles. Before any communication can be protected, it must be in a form that is consistent with the first amendment. Although the Court has long defined the amendment's protection of free speech to encompass methods of communication other than traditionally recognized political oratory and distribution of pamphlets, it has made clear that an otherwise illegal act cannot be given first-amendment protection merely because the act was intended to express an idea.[12] And though the Court has recognized the communicative value of tangible symbols,[13] it has emphasized that communicative tendency is not alone sufficient to warrant first-amendment protection.[14] Nevertheless, such activities as the display of a red flag,[15] a forced flag salute,[16] a civil rights parade,[17] picketing by labor groups,[18] a lunch counter sit-in,[19] and the wearing of black armbands in opposition to the Vietnam war[20] have been held methods of expression[21] protected under the first amendment.

In cases in which the Court has decided to extend the free-speech concept to non-verbal means of expression, it has dealt with two basic and often competing concerns—a concern in avoiding disruption and a concern in assuring to all members and groups in society the ability to influence the government by appealing to the public conscience. The former touches traditional governmental police power; the latter is the basis of the first amendment. Street's contention that the first amendment

[10] *Id.* at 614-15 (dissenting opinion).

[11] Chief Justice Warren, Justice Black, Justice Fortas and Justice White dissented.

[12] United States v. O'Brien, 391 U.S. 367 (1968).

[13] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943): "Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind." *Id.* at 632.

[14] *See* United States v. O'Brien, 391 U.S. 367 (1968).

[15] Stromberg v. California, 283 U.S. 359 (1931).

[16] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[17] Cox v. Louisiana, 379 U.S. 536 (1965).

[18] Thornhill v. Alabama, 310 U.S. 88 (1940).

[19] Garner v. Louisiana, 368 U.S. 157, 201 (1961) (Harlan, J., concurring).

[20] Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969).

[21] *See also* NAACP v. Button, 371 U.S. 415 (1963) (litigation as free speech); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) (motion pictures as free speech).

should be extended to include flag-burning ultimately must be consistent with both considerations.

Stromberg v. California,[22] which held that an individual's display of a red flag in opposition to organized government was protected as free speech, was the first case extending the first amendment to cover symbolic activity. The Court in that decision expressed the underlying objective of the first amendment as "[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means. . . ."[23] With this objective in mind the Court has greatly expanded the definition of speech to meet the exigencies of society. From *Stromberg*'s original extension to include an individual's passive display of a tangible symbol, the Court expanded the definition to accommodate labor and civil rights protests when the mass human behavior is symbolic in itself.[24] Such group demonstrations have been called "the poor man's printing press"[25] because they provide a means of expression for groups in society that are often unable to exert pressure adequately through the normal channels of communication.[26] The Court's decisions to include such activities under the first amendment's protection have certainly been motivated at least in part by the deprivations that both labor and the Negro have struggled to overcome.[27]

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[22] 283 U.S. 359 (1931).

[23] *Id.* at 369.

[24] *E.g.*, Cox v. Louisiana, 379 U.S. 536 (1965). Garner v. Louisiana, 368 U.S. 157, 201 (1961) (Harlan, J., concurring): "Such a demonstration, in the circumstances . . . is as much a part of the free trade in ideas . . . as is verbal expression. . . . It, like speech, appeals to good sense and the power of reason as applied through public discussion just as much as, if not more than, a public oration delivered from a soapbox at a street corner."

[25] H. KALVEN, THE NEGRO AND THE FIRST AMENDMENT 133 (1965).

[26] Adderley v. Florida, 385 U.S. 39, 50-51 (1966) (Douglas, J., dissenting): Conventional methods of petitioning may be, and often have been, shut off to large groups of our citizens. Legislators may turn deaf ears; formal complaints may be routed endlessly through a bureaucratic maze; courts may let the wheels of justice grind very slowly. Those who do not control television and radio, those who cannot afford to advertise in newspapers or circulate elaborate pamphlets may have only a more limited type of access to public officials. Their methods should not be condemned as tactics of obstruction and harassment as long as the assembly and petition are peaceable. . . .

[27] Velvel, *Freedom of Speech and the Draft Card Burning Cases*, 16 KAN. L. REV. 149, 151 (1968), advances the idea that the growing strength of labor unions was a factor in the eventual cutback of protection given to picketing. *See also* Teamsters Local 695 v. Vogt, Inc., 354 U.S. 284 (1957). H. KALVEN, THE NEGRO AND THE FIRST AMENDMENT 6 (1965): "[A]s a thumbnail summary of the last two or three decades of speech issues in the Supreme Court, we may come to see the Negro as winning back for us the freedoms the Communists [in cases such as

Similar compensatory factors may be present in Street's case. His expression was aimed at racial intolerance, a cause having constitutional as well as ethical underpinnings. Furthermore, his protest was individual in character rather than associated with mass activity. In today's massive, bureaucratic society, the power of most individuals to communicate is indeed small. Bizarre, symbolic behavior may be the only way for an individual to make his beliefs heard.[28] Moreover, individual conduct is generally less likely to concern the police power, for it does not involve the mass coercion and intimidation that group behavior often does. Since fewer people are likely to be present, there are fewer problems with traffic control, litter, and permits, as well as less potential for violence.[29]

Even if the Court were to decide that flag burning should be incorporated as an avenue of expression encompassed by the first amendment, protection of such a method would not be automatic. Traditional oral methods of communication may be abridged if there are overriding governmental interests in doing so.[30] Justice Harlan's majority opinion in *Street* included four possible interests of the government in the defendant's oral activity:

> (1) an interest in deterring appellant from vocally inciting others to commit unlawful acts; (2) an interest in preventing appellant from uttering words so inflammatory that they would provoke others to retaliate physically against him, thereby causing a breach of the peace; (3) an interest in protecting the sensibilities of passers-by who might be shocked by appellant's words about the American flag; and (4) an interest in assuring that appellant, regardless of the impact of his words upon others, showed proper respect for our national emblem.[31]

Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961)] seemed to have lost for us."

[28] It might be argued that behavior such as flag desecration would be less bizarre and therefore would receive less publicity if there were no laws against it. Such an assertion, however, overlooks that contemporary attitudes of the majority are more relevant in determining whether an action is considered bizarre than is the illegality of the conduct.

[29] Justice Douglas seemed to recognize such a distinction between group behavior and individual behavior in his concurring opinion in Brandenburg v. Ohio, 395 U.S. 444, 450 (1969):

> Picketing can be regulated when it comes to the "plus" or "action" side of the protest. It can be regulated as to the number of pickets and the place and hours because traffic and other community problems would otherwise suffer. But none of these considerations are implicated in the symbolic protest to the Vietnam war in the burning of a draft card.

[30] *Cf.* State v. Peacock, 138 Me. 341, 25 A.2d 491 (1942), in which a conviction was said to be proper when based on oral criticism of the flag. The judgment was reversed on other grounds.

[31] 394 U.S. at 591.

The first three interests, the Court concluded, were not applicable to the facts in *Street*.[32] The fourth interest, while applicable to the facts, was the very type of governmental interest against which the first amendment offers protection. "[F]reedom to differ is not limited to things that do not matter much."[33]

Although the Court concluded that these interests were not sufficient to permit state action to abridge Street's oral exhortations, it does not necessarily follow that they are insufficient to prohibit flag-burning; the Court has said that the first amendment does not give the same protection to those who communicate by "conduct" as to those who communicate by "pure speech."[34] While there may be good reasons for not giving all forms of expression the same amount of protection,[35] such a dichotomy should not be over-emphasized; there can be no such thing as "pure speech." As a scholar in the field points out: "[A]ll speech is necessarily 'speech plus.' If it is oral, it is noise and may interrupt someone else; if it is written, it may be litter."[36] The only true line between what is and what is not subject to regulation lies between beliefs and ideas, on the one hand, and actions of any form, on the other.[37]

Underlying this dichotomy between "pure speech" and "speech plus" seems to be the assumption that "speech plus" is potentially more disruptive than "pure speech." In *Tinker v. Des Moines Independent Community School District*,[38] the Court held that school children wearing black armbands to protest the Vietnam War were engaging in a symbolic act protected by the first amendment. Terming the activity "closely akin to 'pure speech,' "[39] Justice Fortas emphasized the silent and passive nature of these protests and the absence of any fear of a disturbance. Soon after his *Tinker* decision, he concurred in upholding the suspension from college of students who engaged in an "aggressive and violent demonstra-

[32] *Id.* at 591-92.

[33] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943), *quoted in* Street v. New York, 394 U.S. 576, 593 (1968).

[34] Cox v. Louisiana, 379 U.S. 536, 555 (1965).

[35] Kovacs v. Cooper, 336 U.S. 77, 97 (Jackson, J., concurring):

"The moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each, in my view, is a law unto itself."

[36] H. KALVEN, THE NEGRO AND THE FIRST AMENDMENT 201 (1965).

[37] Brandenburg v. Ohio, 395 U.S. 444, 450 (1969) (Douglas, J., concurring); Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940): "[This] Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute, but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."

[38] 393 U.S. 503 (1969).

[39] *Id.* at 505-06.

tion, and not in a peaceful, nondisruptive expression, such as was involved in *Tinker*."[40] There have been similarly distinguishable results in civil rights demonstration cases[41] and in picketing cases[42] in which certain activity was labeled within the scope of the first amendment while similar but potentially more disruptive activity was not.

The New York Court of Appeals relied on the disruption factor in sustaining Street's conviction.[43] Terming Street's activity "incendiary,"[44] Judge Fuld quoted the Supreme Court's language in *Halter v. Nebraska*:[45] "Insults to [the] flag have been the cause of war, and indignities put upon it . . . have often been resented and sometimes punished on the spot."[46] Furthermore, the New York court likened flag-burning to an abusive epithet, a category of communication that receives no first-amendment protection because of its offensive nature and because its content is not of public importance.[47]

However, in *United States v. O'Brien*,[48] the case most similar to *Street* on its facts, the Supreme Court made clear that governmental interests less primary than the maintenance of order may be sufficient to foreclose expressions such as Street's. In holding that burning of draft cards is not within the first amendment's protection, the Court said that even if such activity was a form of expression protected by the first amendment, a "substantial"[49] state interest would warrant an incidental abridgement of that expression. Although the Court in *O'Brien* possibly could have relied on the disruptive potential of public draft card burning, it did

[40] Barker v. Hardway, 394 U.S. 905 (1969) (concurring opinion).

[41] *Compare* Brown v. Louisiana, 383 U.S. 131 (1966) *with* Adderley v. Florida, 385 U.S. 39 (1966).

[42] *Compare* Thornhill v. Alabama, 310 U.S. 88 (1940) *with* Milk Wagon Drivers Local 753 v. Meadowmoor Dairies Inc., 312 U.S. 287 (1941).

[43] People v. Street, 20 N.Y.2d 231, 229 N.E.2d 187, 282 N.Y.S.2d 491 (1967).

[44] *Id.* at 237, 229 N.E.2d at 191, 282 N.Y.S.2d at 496.

[45] 205 U.S. 34 (1907).

[46] *Id.* at 41.

[47] Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1941).

[48] 391 U.S. 367 (1968).

[49] *Id.* at 377. Such a governmental regulation is justified

> if it is within the constitutional power of the government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest.

Id. In his concurring opinion Justice Harlan added the caveat that these interests must not "foreclose considerations of First Amendment claims in those rare instances when an 'incidental' restriction upon expression . . . has the effect of entirely preventing a 'speaker' from reaching a significant audience with whom he could not otherwise lawfully communicate." *Id.* at 388-89 (concurring opinion).

not do so. Rather, it found that the governmental interest in the administrative efficiency of the Selective Service was sufficiently compelling to deny this avenue of communication.

By similar analysis the Court in *Street* would have had to make the determination whether the government's interest in prohibiting flag-burning is "substantial." Divested of its symbolic value, the flag is merely a piece of cloth and does not serve a substantial purpose as was found for draft cards in *O'Brien*. The government's interest in preventing breaches of the peace, which the New York Court of Appeals stated was the traditional basis for flag-desecration statutes,[50] should not be sufficient to foreclose completely this form of expression. Such an interest can be served more adequately by other statutes directly aimed at preventing breaches of the peace[51] or by regulation of the time, place, and manner of such communication.[52] Thus the question remains whether the government's interest in protecting its national symbols is sufficiently substantial to prohibit the use of these symbols in a desecrating, but communicative, manner.[53]

By striking down statutes requiring flag salutes and pledges of allegiance in schools, the Court in *West Virginia State Board of Education v. Barnette*[54] seemed to negative the assertion that the government can compel conformity and patriotism for the purpose of promoting national unity.[55] National unity is a legitimate end, but it must be promoted "by persuasion and example"[56] rather than by means of compulsion.

[50] People v. Street, 20 N.Y.2d 231, 236, 229 N.E.2d 187, 190, 282 N.Y.S.2d 491, 495 (1967). *But see* Halter v. Nebraska, 205 U.S. 34, 43 (1907), for the assertion that the flag-desecration statute also "had its origin in a purpose to cultivate a feeling of patriotism."

[51] Such statutes as breach of the peace and disorderly conduct could serve to punish the defendant if he causes disruptive activity.

[52] Cox v. New Hampshire, 312 U.S. 569, 576 (1941) (picketing).

[53] There seems to be governmental acceptance of the use of such symbols in a manner that supports the government, *e.g.*, the widespread use of flag decals on automobile windshields.

[54] 319 U.S. 624 (1943).

[55] *Barnette* expressly overruled Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940). Note Justice Frankfurter's statement in *Gobitis* concerning the public policy behind compulsory flag-saluting:

> [T]he ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people. . . . The flag is the symbol of our national unity, transcending all internal differences.

310 U.S. at 596. *See* Halter v. Nebraska, 205 U.S. 34 (1907), in which the Court speaks of the "object of maintaining the flag as an emblem of National Power and National honor." *Id.* at 42.

[56] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 640 (1943).

Although the prohibition of the desecration of national symbols is not the same as compelling acts of allegiance, such a prohibition may be going beyond the limits of persuasion and example.

Despite *Barnette*, however, the dissenters in *Street* seem to have asserted that there is a legitimate and substantial governmental interest in promoting patriotism by means of national symbols. In saying that desecration of the flag can be proscribed, Chief Justice Warren spoke of the "power to protect the flag from acts of desecration and disgrace"[57] rather than a power to avoid the disruption attendant an act of abusing the flag. Justice Fortas, moreover, termed the flag "a special kind of personalty . . . burdened with peculiar obligations and restrictions."[58]

From the emphatic nature of the dissenting opinions, from lower court decisions sustaining flag-desecration statutes and from the lack of any strong precedent upholding such activity, the majority's refusal to meet the issue of flag-burning should be taken as a rejection of Street's contention that such an avenue of expression is protected by the first amendment. Nevertheless, the Court should realize that there are many factors in favor of expanding the first amendment's protection to include peaceful symbolic communication of any kind. Moreover, the recognition of an interest in promoting patriotic values should be a very limited one, for such an interest could lead to the kind of enforced conformity that is abhorrent to a system of government founded upon individual rights.

WILLIAM M. TROTT

Corporations—Voting Trusts—Should Trust Principles Apply to Close Corporations?

Ever since the corporate form of doing business became prevalent around the turn of the century, the attorney for the close corporation has been troubled by many difficult problems; and in trying to solve them, he has been "hampered by doctrines which are meaningful only in the context of the large, publicly held company."[1] One of these problems is that of providing some method for ensuring continuity and stability of management when no one stockholder, or faction of stockholders, owns a majority of voting stock. Another is that of providing means for resolving

[57] Street v. New York, 394 U.S. 576, 605 (1968).
[58] *Id.* at 616-17.

[1] Note, *Close Corporations: Voting Trust Legislation and Resolution of Deadlocks*, 67 COLUM. L. REV. 590 (1967).