**COHEN v. CALIFORNIA**
**SUPREME COURT OF THE UNITED STATES**
**403 U.S. 15**
**June 7, 1971**
**[5 to 4]**

Unfortunately, in these days, we "hear" the "F" word quite frequently and see it occasionally on a bumper sticker or shirt. I'll bet you have often wondered whether that form of expression is legal. So have I. Here is the answer and the fascinating constitutional reasoning. Do you agree?

**OPINION:** Justice Harlan/Douglas/Brennan/Stewart/Marshall...On April 26, 1968, the defendant was observed in the Los Angeles County Courthouse...wearing a jacket bearing the words 'Fuck the Draft' which were plainly visible. There were women and children present in the corridor. The defendant was arrested. The defendant testified that he wore the jacket...as a means of informing the public of the depth of his feelings against the Viet Nam War and the draft.

**The defendant did not engage in, nor threaten to engage in, nor did anyone as the result of his conduct in fact commit or threaten to commit any act of violence.** The defendant did not make any loud or unusual noise, nor was there any evidence that he uttered any sound prior to his arrest... [He was charged with violating the following statute]:

> Every person who maliciously and **willfully disturbs the peace** or quiet of any neighborhood or person, by loud or unusual noise, or by tumultuous or offensive conduct, or threatening, **traducing**, quarreling, challenging to fight, or fighting, or who, on the public streets of any unincorporated town, or upon the public highways

> in such unincorporated town, run any horse race, either for a wager or for amusement, or fire any gun or pistol in such unincorporated town, or use any **vulgar, profane, or indecent language within the presence or hearing of women or children**, in a loud and boisterous manner, is guilty of a misdemeanor...

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| *traduce:* to speak maliciously and falsely of; slander; defame: to traduce someone's character. |

In affirming the conviction the Court of Appeals held that "offensive conduct" means "behavior which has a tendency to provoke *others* to acts of violence or to...disturb the peace," and that the State had proved this element because, on the facts of this case, "**it was certainly reasonably foreseeable that such conduct might cause others to rise up to commit a violent act** against the person of the defendant or attempt to forceably remove his jacket."...We now reverse.

**...The conviction...rests upon the asserted offensiveness of the *words* Cohen used to convey his message to the public.** The only "conduct" which the State sought to punish is the fact of communication. Thus, we deal here with a conviction resting solely upon "speech," not upon any separately identifiable conduct which allegedly was intended by Cohen to be perceived by others as expressive of particular views but which, on its face, does not necessarily convey any message and hence arguably could be regulated without effectively repressing Cohen's ability to express himself. *United States v. O'Brien.* Further, **the State certainly lacks power to punish Cohen for the underlying content of the message the inscription conveyed. At least so long as there is no showing of an intent to incite disobedience to or disruption of the draft, Cohen could not, consistently with the First and Fourteenth Amendments, be punished for asserting the evident position on the inutility or immorality of the draft his jacket reflected**.

[The] conviction, then, rests squarely upon his exercise of the "freedom of speech" protected from arbitrary governmental interference by the Constitution and can be justified, if at all, only as a valid regulation of the manner in which he exercised that freedom, not as a permissible prohibition on the substantive message it conveys. This does not end the inquiry, of course, for the First and Fourteenth Amendments have never been thought to give absolute protection to every individual to speak whenever or wherever he pleases...[W]e think it important to note that several issues typically associated with such problems are not presented here.

In the first place, Cohen was tried under a statute applicable throughout the entire State. Any attempt to support this conviction on the ground that the statute seeks to preserve an appropriately decorous atmosphere in the courthouse where Cohen was arrested must fail in the absence of any language in the statute that would have put appellant on notice that certain kinds of otherwise permissible speech or conduct would nevertheless, under California law, not be tolerated in certain **places**. No fair reading of the phrase "offensive conduct" can be said sufficiently to inform the ordinary person that distinctions between certain **locations** are thereby created.

Although we do not yet know what is meant by "places," I am betting, for example, that this same jacket would not be constitutionally protected if worn into a church. We shall see.

In the second place,...this case cannot be said to fall within those relatively few categories of instances where prior decisions have established the power of government to deal more comprehensively with certain forms of individual expression simply upon a showing that such a form was employed. **This is not, for example, an obscenity case. Whatever else may be necessary to give rise to the States' broader power to prohibit obscene expression, such expression must be, in some significant way, erotic.** *Roth v. United States*[1]. It cannot plausibly be maintained that this vulgar allusion to the Selective Service System would conjure up such psychic stimulation in anyone likely to be confronted with Cohen's crudely defaced jacket.

This Court has also held that the States are free to ban the simple use...of so-called "fighting words," those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction. *Chaplinsky v. New Hampshire.*[2] While the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not "directed to the person of the hearer." *Cantwell v. Connecticut.*[3] **No individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult.** Nor do we have here an instance of the exercise of the State's police power to prevent a speaker from intentionally provoking a given group to hostile reaction. *Feiner v. New York; Terminiello v. Chicago.* There is, as noted above, no showing that anyone who saw Cohen was in fact violently aroused or that appellant intended such a result.

Finally,...much has been made of the claim that Cohen's distasteful mode of expression was **thrust upon unwilling or unsuspecting viewers, and that the State might therefore legitimately act as it did in order to protect the sensitive from otherwise unavoidable exposure to appellant's crude form of protest**. Of course, **the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense**. *Organization for a Better Austin v. Keefe*. While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue (*Rowan v. Post Office Dept.*[4]), we have at the same time consistently stressed that "we are often 'captives' outside the sanctuary of the home and subject to objectionable speech." **The ability of government, consonant**

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[1]Case 1A-S-10 on this website.

[2]Case 1A-S-8 on this website.

[3]Case 1A-R-3 on this website.

[4]Case 1A-S-19 on this website.

**with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.** Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.

**In this regard, persons confronted with Cohen's jacket were in a quite different posture than, say, those subjected to the raucous emissions of sound trucks blaring outside their residences.** Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes. And, while it may be that one has a more substantial claim to a recognizable privacy interest when walking through a courthouse corridor than, for example, strolling through Central Park, surely it is nothing like the interest in being free from unwanted expression in the confines of one's own home. Given the subtlety and complexity of the factors involved, **if Cohen's "speech" was otherwise entitled to constitutional protection, we do not think the fact that some unwilling "listeners" in a public building may have been briefly exposed to it can serve to justify this breach of the peace conviction where, as here, there was no evidence that persons powerless to avoid appellant's conduct did in fact object to it, and where that portion of the statute upon which Cohen's conviction rests evinces no concern, either on its face or as construed by the California courts, with the special plight of the captive auditor, but, instead, indiscriminately sweeps within its prohibitions all "offensive conduct" that disturbs "any neighborhood or person."** *Edwards v. South Carolina*.

...**[T]he issue...[is] whether California can excise, as "offensive conduct," one particular scurrilous epithet from the public discourse, either upon the theory of the court below that its use is inherently likely to cause violent reaction or upon a more general assertion that the States, acting as guardians of public morality, may properly remove this offensive word from the public vocabulary.**

The rationale of the California court is plainly untenable. At most it reflects an "undifferentiated fear or apprehension of disturbance which is not enough to overcome the right to freedom of expression." *Tinker v. Des Moines Indep. Community School Dist.*[5] We have been shown no evidence that substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities with execrations like that uttered by Cohen. There may be some persons about with such lawless and violent proclivities, but that is an insufficient base upon which to erect, consistently with constitutional values, a governmental power to force persons who wish to ventilate their dissident views into avoiding particular forms of expression...

**The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would**

[5]Case 1A-S-18 on this website.

**comport with the premise of individual dignity and choice upon which our political system rests. *Whitney v. California*.[6]**

To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. **That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength.** We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated. That is why "wholly neutral futilities...come under the protection of free speech as fully as do Keats' poems or Donne's sermons" and why "so long as the means are peaceful, the communication need not meet standards of acceptability." *Organization for a Better Austin v. Keefe*...**The principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive word?**

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| When you put it that way, it would really be tough to come up with a "list of forbidden words," would it not? |

**Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below.** For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that **one man's vulgarity is another's lyric**. Indeed, **we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual**.

Additionally,...much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated. Indeed, as Justice Frankfurter has said, "**one of the prerogatives of American citizenship is the right to criticize public men and measures -- and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation.**" *Baumgartner v. United States*.

Finally,...we cannot indulge the...assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views. We have been able, as noted above, to discern little social benefit that might result

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[6]Case 1A-S-4 on this website.

from running the risk of opening the door to such grave results.

**It is, in sum, our judgment that, absent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourteenth Amendments, make the simple public display here involved of this single four-letter expletive a criminal offense. Because that is the only arguably sustainable rationale for the conviction here at issue, the judgment below must be Reversed.**

**DISSENT:** Justice Blackmun...Cohen's absurd and immature antic, in my view, was mainly conduct and little speech. Further, the case appears to me to be well within the sphere of *Chaplinsky v. New Hampshire...*As a consequence, this Court's agonizing over First Amendment values seems misplaced and unnecessary...

In Blackmun's view, this display represents "fighting words" not protected by the 1st Amendment.