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# Constitutional Law -- Fighting Words or Free Speech?

Joseph E. Wall

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tion. Hopefully, that retreat is only a temporary regrouping, and *James* may yet be considered as an aberration rather than the initiation of a trend.

JIM D. COOLEY

### Constitutional Law—Fighting Words or Free Speech?

During its history of roughly thirty years, the "fighting words" doctrine<sup>1</sup> has been an often cited but seldom controlling limitation in the area of first amendment freedom of speech. In the recent case of *Cohen v. California*,<sup>2</sup> the Supreme Court acknowledged the continuing vitality of the "fighting words" doctrine but rejected the contention of the State of California that it was controlling in that particular case. Paul Robert Cohen was convicted of violating a California statute which prohibits "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct."<sup>3</sup> His arrest resulted from his wearing a jacket inscribed with "Fuck the Draft" plainly visible while walking through the Los Angeles County Courthouse. Cohen claimed that the jacket stated his feelings about the war in Vietnam and the draft and that his expression was constitutionally protected. In affirming Cohen's conviction the California Court of Appeals interpreted "offensive conduct" to mean "behavior which has a tendency to provoke *others* to acts of violence or to in turn disturb the peace."<sup>4</sup> The

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<sup>1</sup>Under the "fighting words" doctrine inflammatory words that are used in a manner calculated to provoke a breach of the peace are excluded from the first amendment protection generally afforded speech. The term itself comes from the following passage: "The English language has a number of words and expressions which by general consent are "fighting words" when said without a disarming smile. . . . Such words, as ordinary men know, are likely to cause a fight. So are threatening, profane or obscene revilings." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942), quoting *State v. Chaplinsky*, 91 N.H. 310, 320, 18 A.2d 754, 762 (1941).

<sup>2</sup>403 U.S. 15 (1971).

<sup>3</sup>CAL. PENAL CODE § 415 (West 1970).

<sup>4</sup>*People v. Cohen*, 1 Cal. App. 3d 94, 100, 81 Cal. Rptr. 503, 506 (1969) (emphasis by the court). In explaining its interpretation, the court said: "As modified by case law the only 'offensive' conduct prohibited by section 415 is that which incites violence or has a tendency to incite others to violence or a breach of the peace. . . . This standard . . . eliminates prosecutions or convictions for conduct which is *merely offensive*." *Id.* at 102, 81 Cal. Rptr. at 508 (emphasis added). Recent Supreme Court holdings clearly establish that the exercise of constitutional rights may not be impinged upon merely because the exercise in some way offends the sensibilities of some individuals. In *Street v. New York*, 394 U.S. 576, 592 (1969) (the flag-burning case), the Court said, "It is

court found Cohen's behavior so potentially annoying that "it was certainly foreseeable that such conduct might cause others to rise up to commit a violent act against the person of the defendant or to attempt to forcibly remove his jacket."<sup>5</sup> The California Supreme Court, by a divided vote, refused to review the case.<sup>6</sup>

In attempting to analyze Cohen's conduct in terms of "speech" and "nonspeech" elements, the California Court of Appeals cited *United States v. O'Brien*,<sup>7</sup> a case in which the defendant had been convicted of burning his selective service card in protest against the Vietnam war but in violation of the Universal Military Training and Service Act.<sup>8</sup> The Supreme Court in *O'Brien* upheld the conviction, saying that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."<sup>9</sup> The nonspeech element of Cohen's conduct consisted of marching through a public building with the intent of attracting attention to the message on his jacket. Unlike the nonspeech element of O'Brien's conduct, however, the nonspeech element of Cohen's conduct was unquestionably legal. The California court failed to make this distinction, concluding that the expression was likely to produce violence from viewers and was therefore subject to regulation: "[N]o one has the

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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." In a case involving the distribution of highly critical leaflets in the home neighborhood of an Austin realtor, the Court said that "so long as the means are peaceful, the communication need not meet standards of acceptability." *Organization For a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). On the subject of freedom of assembly, the Court said: "The First and Fourteenth Amendments do not permit a State to make criminal the exercise of the right of assembly simply because its exercise may be 'annoying' to some people." *Coates v. Cincinnati*, 402 U.S. 611, 615 (1971). The Court considered, and rejected, the assertion in *Cohen* that California could censor the four-letter word Cohen used on the ground that it was "offensive" to the sensibilities of those who might inadvertently be exposed to it. 403 U.S. at 22-26.

<sup>5</sup>1 Cal. App. 3d at 99-100, 81 Cal. Rptr. at 506.

<sup>6</sup>Subsequent to Cohen's conviction and prior to the Supreme Court decision in *Cohen*, the California Supreme Court in *In re Bushman*, 1 Cal. 3d 767, 83 Cal. Rptr. 375, 463 P.2d 727 (1970), construed § 415, under which Cohen was convicted, for the first time. Four dissenting United States Supreme Court justices in *Cohen* thought it proper to remand the *Cohen* case to the California Court of Appeals for reconsideration in light of the *Bushman* decision. The majority saw no substantial difference between the construction of § 415 by the California Supreme Court in *Bushman* and that of the Court of Appeals in *Cohen*.

<sup>7</sup>391 U.S. 367 (1968).

<sup>8</sup>50 U.S.C. § 462(b)(3) (1970).

<sup>9</sup>391 U.S. at 376.

right to express his views by means of printing lewd and vulgar language which is likely to cause others to breach the peace to protect women and children from such exposure."<sup>10</sup>

The Supreme Court quickly disposed of the argument that Cohen's conviction rested on permissible regulation of the nonspeech element of his conduct. The conviction, the Court found, rested clearly on the offensiveness of the *words* Cohen used to convey his message. The question left to be resolved, then, was whether the expression could be prohibited because its use was inherently likely to cause a violent reaction from viewers. This was the primary basis on which the California court had affirmed the conviction.

In view of the particular facts involved in *Cohen*, and the Court's reaffirmation of "fighting words" as a viable doctrine of constitutional law, it is instructive to examine *Cohen* in the context of the history of that doctrine. Unlike the epithets hurled in *Chaplinsky v. New Hampshire*,<sup>11</sup> the case in which the "fighting words" concept was given initial explicit recognition by the Supreme Court, Cohen's message lacked any element of personal abuse or immediate likelihood of retaliation. In discounting the inherently provocative nature of the message on Cohen's jacket, the Court pointed out that the message was not "directed to the person of the hearer"<sup>12</sup> and that no individual reasonably would have regarded the words as a direct personal insult. In *Chaplinsky*, a Jehovah's Witness was convicted of breaching the peace after calling a city marshal a "damned racketeer" and a "damned Fascist" when the marshal tried to warn him that the crowd to whom he had been speaking was becoming restless. The statute involved forbade addressing "any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place" or "call[ing] him by any offense or derisive name."<sup>13</sup> The statute had been interpreted by the New Hampshire Supreme Court as limited to the use in a public place of

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<sup>10</sup>1 Cal. App. 3d at 103, 81 Cal. Rptr. at 509.

<sup>11</sup>315 U.S. 568, 569 (1942).

<sup>12</sup>403 U.S. at 20, quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309 (1940). In *Cantwell* a Jehovah's Witness was convicted of breach of the peace after playing a phonograph record attacking the Catholic Church while soliciting contributions from two Catholics. The Court overturned his conviction, noting that although he offended the listeners and aroused their anger, there was "no assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, no personal abuse."<sup>310</sup> U.S. at 310.

<sup>13</sup>315 U.S. at 569.

words directly tending to cause a breach of the peace by provoking the person addressed to engage in acts of violence.<sup>14</sup> Mr. Justice Murphy, writing for a unanimous Court, said in *Chaplinsky*:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.<sup>15</sup>

Seven years after the *Chaplinsky* decision, the Court in *Terminiello v. Chicago*<sup>16</sup> clarified its position as to the kind of speech which would be excluded from the operation of the doctrine despite the provocative nature of the message. The case dealt with Terminiello's breach-of-the-peace conviction following an inflammatory speech he delivered at a meeting sponsored by the right-wing Christian Veterans of America. *Terminiello* differed from *Chaplinsky* in that Terminiello's speech was delivered in an auditorium and not on a public street.<sup>17</sup> A large, hostile group had gathered in protest outside the auditorium in which Terminiello was speaking, and the police were unable to prevent several disturbances from occurring. The trial court had instructed the jury that any behavior which "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance"<sup>18</sup> violated the ordinance. Seizing upon the trial court's interpretation of the ordinance, the Court reversed Terminiello's conviction on the ground that such an expansive interpretation of the ordinance would render it unconstitutionally broad. Although the argument before the Court had centered on the issue of whether Terminiello's speech contained "fighting words" which carried it outside the scope of first amendment protection, the Court never reached that issue.<sup>19</sup> Nonetheless, the majority opinion em-

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<sup>14</sup>State v. Chaplinsky, 91 N.H. 310, 18 A.2d 754 (1941).

<sup>15</sup>315 U.S. at 571-72.

<sup>16</sup>337 U.S. 1 (1949).

<sup>17</sup>*Id.* at 2.

<sup>18</sup>*Id.* at 3.

<sup>19</sup>*Id.*

phasized that it is often the unsettling effect of speech which gives it much of its value. The Court said:

Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger<sup>20</sup> of serious substantive evil that rises far above public inconvenience, annoyance, or unrest.<sup>21</sup>

The majority's opinion in *Terminiello* evoked a strong dissent from Mr. Justice Jackson, who felt that in freedom of speech matters the Court had gone too far in the individual's favor at the expense of the public interest in order. He contended that excessive efforts in that direction were self-defeating: "In the long run, maintenance of free speech will be more endangered if the population can have no protection from the abuses which lead to violence."<sup>22</sup>

Two years after the *Terminiello* decision was handed down, the Court took a rather drastic turn in the direction Mr. Justice Jackson had favored in that case. *Feiner v. New York*<sup>23</sup> involved a statute which, in effect, forbade incitement of a breach of the peace. Irving Feiner was arrested after making allegedly inflammatory statements to a group of Negroes and whites gathered on a street corner. Among other things, he urged the Negroes to rise up and fight for equal rights. The crowd became restless and there was some milling around. After asking Feiner three times to discontinue his speech, the police arrested him. In contrast

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<sup>20</sup>The "clear and present danger" test was originally enunciated by Mr. Justice Holmes in *Schenck v. United States*, 249 U.S. 47, 52 (1919): "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." One commentator says, "In limited areas the test may still be alive, but it has been conspicuous by its absence from opinions in the last decade." Kalven, "Uninhibited, Robust, and Wide-Open"—A Note on *Free Speech and the Warren Court*, 67 MICH. L. REV. 289, 297 (1968). See Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 910-912 (1963), for a history of the clear and present danger test.

<sup>21</sup>337 U.S. at 4.

<sup>22</sup>*Id.* at 36-37.

<sup>23</sup>340 U.S. 315 (1951).

to the *Terminiello* situation, no disturbances in fact resulted from Feiner's speaking. Nevertheless, the Supreme Court upheld Feiner's conviction after accepting the state court's findings that the arresting officers were motivated solely by a proper concern for the preservation of order and not simply by a desire to suppress Feiner's views and opinions.

The decision in *Feiner* took the Court quite a distance from the position stated in *Terminiello*, in which the Court had spoken approvingly of a function of free speech as being to invite dispute, create dissatisfaction, and stir people to anger.<sup>24</sup> Of course, the Court was referring to the peaceful dissemination of ideas, but implicit in the Court's language in *Terminiello* is the idea that a speaker should enjoy the protective efforts of the state while he is expressing his ideas, even though they may be unpopular. In *Feiner* the Court balanced the individual's interest in freedom of expression against the societal interest in order. The case was rightly or wrongly decided depending upon how one evaluates the facts.<sup>25</sup> The majority opinion equated Feiner's expression to an incitement to riot. The minority found it to be simply an exercise in soapbox oratory accompanied by the mutterings and unrest which commonly attend the public exposition of unpopular ideas.

Narrowly construed to cover only incitement to riot when the danger is real and imminent, *Feiner* seems to strike a reasonable balance between individual and societal interests. However, if the rationale for suppression to preserve order is applied when the danger is not so real and the disorder not so imminent, "cities and states can with impunity subject all speeches, political and otherwise, on streets or elsewhere, to the supervision and censorship of the local police."<sup>26</sup> Although the Court did not expressly refer to "fighting words" in *Feiner*, clearly the Court balanced the societal interest in order against Feiner's interest in free expression just as it had balanced similar interests in *Chaplinsky*. Since *Feiner* the Court has consistently protected the public expression of ideas despite the fact that disturbances might thereby be engendered.

In *Cox v. Louisiana*,<sup>27</sup> the Court overturned the conviction of Reverend Elton Cox for disturbing the peace in connection with a civil rights march he led in Louisiana. He had urged the marchers to demand service

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<sup>24</sup>337 U.S. at 4.

<sup>25</sup>There was a difference of opinion among the Justices as to what "facts" were revealed by the record. 340 U.S. at 321-29 (Black, J., dissenting).

<sup>26</sup>*Id.* at 323.

<sup>27</sup>379 U.S. 536 (1965).

at segregated lunch counters. This exhortation was deemed inflammatory by the local sheriff, who attempted thereafter to break up the demonstration. The trial judge stated that bringing 1,500 Negroes into the business district of Baton Rouge and urging them "to descend upon our lunch counters and sit there until they are served"<sup>28</sup> was an inherent breach of the peace. The Supreme Court, however, found that the evidence showed only that the opinions and ideas peacefully expressed were sufficiently opposed to those of the majority of the community to attract a crowd and necessitate police protection. Quoting an earlier decision, the Court said, "[C]onstitutional rights may not be denied simply because of hostility to their assertion or exercise."<sup>29</sup> The decision in *Cox* is difficult to reconcile with *Feiner* despite the Court's assertion that "this situation . . . is 'a far cry from the situation in *Feiner* . . .'"<sup>30</sup> In a racially charged situation, *Feiner* had made unpopular remarks about the need for Negroes to take action to obtain equal rights, and his conviction for breaching the peace was affirmed. *Cox*'s remarks were made in a much more explosive situation, but the Court overturned his conviction and expressly recognized his right to police protection while expressing his views in a hostile community.<sup>31</sup>

A recent case touching on the "fighting words" doctrine is *Street v. New York*.<sup>32</sup> *Street* was convicted of violating the New York flag—desecration statute after he had burned an American flag to protest the shooting of James Meredith. *Street* had said at the time, "If they did that to Meredith, we don't need an American flag" and "We don't need no damn flag."<sup>33</sup> The Supreme Court rejected the state's contention that these statements constituted "fighting words." The Court said:

Nor could such a conviction be justified on the . . . ground mentioned above: the possible tendency of appellant's words to provoke violent retaliation. Though it is conceivable that some listeners might have been moved to retaliate upon hearing appellant's disrespectful words, we cannot say that appellant's remarks were so inherently inflammatory as to come within that small class of "fighting words" which are

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<sup>28</sup>*Id.* at 550.

<sup>29</sup>379 U.S. at 551, quoting *Watson v. Memphis*, 373 U.S. 526, 535 (1963).

<sup>30</sup>379 U.S. at 551, quoting *Edwards v. South Carolina*, 372 U.S. 229, 236 (1963).

<sup>31</sup>*Accord*, *Edwards v. South Carolina*, 372 U.S. 229 (1963).

<sup>32</sup>394 U.S. 576 (1969).

<sup>33</sup>*Id.* at 579.



likely to provoke the average person to retaliation, and thereby cause a breach of the peace.<sup>34</sup>

In *Chaplinsky* the Court suggested three possible reasons for holding Chaplinsky's words to be outside the protection of the first amendment: (1) they "inflict injury," (2) they "tend to create a breach of the peace," and (3) they "are no essential part of the exposition of ideas."<sup>35</sup> In judging *Cohen* by these standards, it is apparent that only the second could possibly apply. The Court correctly noted that Cohen's message was not directed at anyone; it clearly was not personal abuse hurled at a particular individual. Thus it is impossible to maintain that anyone could be "injured" by Cohen's message in the manner in which one is injured when subjected to personal abuse of such nature as to be akin to a physical assault. Furthermore, the words Cohen used were clearly an "essential part of the exposition of ideas"; there was no exposition of ideas apart from the display of words on Cohen's jacket. While it is clear that Cohen could have utilized a less offensive phrase to convey his message, it is also clear that the words succinctly expressed the idea Cohen sought to convey. The Court noted that "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."<sup>36</sup>

To allow the suppression of speech because it may tend to create a breach of the peace is to open the door to censorship of unpopular views by those ready and willing to create a disturbance to silence speakers with whom they disagree.<sup>37</sup> The Court came perilously close to this in *Feiner* but since that holding has consistently held that constitutional rights may not be denied simply because of hostility to their exercise.<sup>38</sup> In *Cohen* there was no evidence that anyone had even threatened a

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<sup>34</sup>*Id.* at 592, quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942).

<sup>35</sup>315 U.S. at 571-72. See Lowey, *Punishing Flag Desecrators: The Ultimate In Flag Desecration*, 49 N.C.L. REV. 48, 82 (1970), for a discussion of whether flag desecration can constitute "fighting words" for any of these three reasons.

<sup>36</sup>403 U.S. at 26.

<sup>37</sup>This fear is expressed by Mr. Justice Black in *Feiner v. New York*, 340 U.S. 315, 321 (1951) (dissenting opinion).

<sup>38</sup>See, e.g., *Cox v. Louisiana*, 379 U.S. 536 (1965). For a discussion of the need for tolerance of unpopular views, see Pollitt, *Free Speech For Mustangs and Mavericks*, 46 N.C.L. REV. 39 (1967).

disturbance. In reversing the conviction, the Court reiterated that "an undifferentiated fear or apprehension of disturbance . . . is not enough to overcome the right to freedom of expression."<sup>39</sup>

What then distinguishes "fighting words" from ordinary words? Fighting words "inflict injury" and "tend to create a breach of the peace." Clearly, the Court in *Chaplinsky* had reference to terms so strongly abusive as to be analogous to a physical assault. In *Cohen* no epithets were employed, and the message was not directed at any particular individual. Thus the message lacked the highly personal nature which characterized the insult in *Chaplinsky*. The highly personal nature of the insult, the degree of abusiveness in the insult, and the immediacy of the probable retaliation distinguish fighting words from other words. It is impossible to list the words which might constitute fighting words when hurled as an insult; they vary with the times and with the local customs of people. In the 1940's "Fascist" was a highly abusive term, and in the 1950's and 1960's "Communist" was often used in name-calling. The determinative factor is the manner in which the words are used. When highly abusive words are used in a manner so provocative as to virtually assure retaliation, the "fighting words" doctrine operates to exclude such expression from first amendment protection. As *Cox*, *Street*, and *Cohen* indicate, the societal interest in order must clearly outweigh the individual interest in expression to justify application of the narrow doctrine of "fighting words."

JOSEPH E. WALL

### Constitutional Law—Torts—Defamation and the First Amendment: The Elements and Application of the Reckless-Disregard Test

On June 7, 1971, the United States Supreme Court handed down its latest decision concerning the conflicting interests of state libel law and the first amendment. *Rosenbloom v. Metromedia*<sup>4</sup> was a libel action brought by a distributor of a nudist magazine against a radio station for broadcasting defamatory news bulletins concerning his arrest for

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<sup>39</sup>403 U.S. at 23, quoting *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 508 (1969).

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<sup>4</sup>403 U.S. 29 (1971).