TOURO COLLEGE
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

Touro Law Review

Volume 26
Number 3 *Annual New York State Constitutional Issue*

Article 9

July 2012

Criminal Court of the City of New York, New York County - People v. Duran

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CRIMINAL COURT OF THE CITY OF NEW YORK, NEW YORK COUNTY

People v. Duran[1]
(decided October 7, 2009)

Claudia Duran was charged with twenty-six counts of aggravated harassment in the second degree for allegedly sending obscene text messages to her friend.[2] Prior to trial, Duran moved to dismiss the charges.[3] Duran claimed that the charges violated her right to free speech under both the United States Constitution[4] and the New York Constitution[5] because the content of the text messages constituted protected speech.[6] The Criminal Court of the City of New York, New York County denied Duran's motion to dismiss because the State was not prosecuting Duran for her speech.[7] Instead, the State was prosecuting Duran for her harassing conduct, which is not subject to constitutional protections.[8]

Duran's friend ("the deponent") filed a personal injury lawsuit against Duran and her insurance company.[9] In response to this lawsuit, Duran sent a total of fifty-two threatening and insulting text messages to the deponent.[10] Between September 2, 2008 and November 7, 2008, the deponent received eighteen text messages from Duran.[11] Two of the messages sent on September 2 stated that Duran

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[1] No. 2009NY007914, 2009 WL 3199214 (N.Y. City Crim. Ct. Oct. 7, 2009).

[2] *Id.* at *1.

[3] *Id.*

[4] U.S. CONST. amend. I, states in pertinent part: "Congress shall make no law . . . abridging the freedom of speech . . . ."

[5] N.Y. CONST. art. 1 § 8, states in pertinent part: "Every citizen may freely speak, . . . being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech . . . ."

[6] *Duran*, 2009 WL 3199214, at *3.

[7] *Id.* at *5.

[8] *Id.*

[9] *See id.* at *1-2.

[10] *Id.* at *5.

[11] *Duran*, 2009 WL 3199214, at *1.

was going to "get" the deponent and called her a "bad friend" and "whore."[12] According to the deponent, these text messages had been sent from Duran's phone because she recognized Duran's phone number.[13]

Furthermore, in the eight messages sent to the deponent on November 7, Duran told the deponent that she was going to pay for bringing about this lawsuit and she hoped that the deponent's injuries would prevent her from returning to work.[14] Duran also called the deponent an "ungrateful bitch" and a "ridiculous crippled fake ass fake bitch idiot."[15] Although these messages were sent from an anonymous email address, the deponent reasonably believed Duran had sent them because the content of these messages were similar to the content of previous messages sent from Duran's phone.[16]

In addition to these text messages, the deponent received a packet of papers in the mail on September 30.[17] The packet was addressed to the deponent's home address, and it contained "numerous magazine clippings and insulting handwritten notes."[18] Although the packet listed the return address of the deponent's personal injury lawyer, the deponent reasonably believed Duran had sent this packet because she recognized Duran's handwriting.[19]

As a result of these messages, Duran was charged with twen-

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[12] *Id.* at *1. In the text messages sent on September 2, Duran stated: "I'm gonna get you. What time you coming out? You're a bad friend. You should have told me to my face you were going to sue me. You're a whore." *Id.* (alteration to the original).

[13] *Id.*

[14] *Id.* at *2.

[15] *Duran*, 2009 WL 3199214, at *2. In the text messages sent on November 7, Duran stated:

> What an ungrateful bitch you are. You're going to burn in hell. You're gonna pay for this. I hope that your money from the lawsuit is gonna do well to buy you fake ass friends. Hopefully you don't get back to work because now you are crippled. Your money is gonna go with your crippled self and your crippled car. Hopefully you [don't] come back to work cuz you're gonna see what you're gonna pay for. Hopefully God forgives you for [what] you're doing. Now you're a ridiculous crippled fake ass fake bitch idiot.

Id. (alteration to the original).

[16] *Id.* at *2.

[17] *Id.*

[18] *Id.*

[19] *Duran*, 2009 WL 3199214, at *2.

ty-six counts of aggravated harassment in the second degree.[20] Prior to trial, Duran moved to dismiss the charges on the grounds that New York Penal Law ("PL") section 240.30(1)(a)-(b)[21] was unconstitutional.[22] Relying on *People v. Shack*[23] and *People v. Dietze*,[24] Duran argued that her statements within the text messages were protected speech because they did not constitute "excessive profanity, fighting words, provocative words or threats."[25]

The court disagreed with Duran and held that PL section 240.30(1)(a)-(b) did not violate Duran's constitutional right to free speech.[26] Relying on *Shack*, the court reasoned that PL section 240.30(1)(a)-(b) did not criminalize Duran's speech.[27] Instead, the statute criminalized Duran's harassing conduct of repeatedly sending unwanted text messages to the deponent, which is not subject to constitutional protections.[28] Therefore, Duran's reliance on *Shack* had been misplaced. [29]

Furthermore, the court found that the State constitutionally applied PL section 240.30(1)(a)-(b).[30] The right to free speech has limits because an individual's right to free speech cannot intrude on

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[20] *Id.* at *1.

[21] N.Y. PENAL LAW § 240.30(1) (McKinney 2009) provides that:

> A person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy, threaten or alarm another person, he or she: . . . (a) communicates with a person, anonymously or otherwise, by telephone, by telegraph, or by mail or by transmitting or delivering any other form of written communication, in a manner likely to cause annoyance or alarm; or (b) causes a communication to be initiated by mechanical or electronic means or otherwise with a person, anonymously or otherwise, by telephone, by telegraph, or by mail, or by transmitting or delivering any other form of written communication, in a manner likely to cause annoyance or alarm.

[22] *Duran*, 2009 WL 3199214, at *3. Duran did not deny sending the text messages to the deponent. *Id.*

[23] 658 N.E.2d, 706, 711 (N.Y. 1995) (upholding the constitutionality of PL section 240.30).

[24] 549 N.E.2d 1166, 1167 (N.Y. 1989) (holding that calling the complainant a "bitch" and her son a "dog" on a public street constituted protected speech under the U.S. Constitution and the New York Constitution).

[25] *Duran*, 2009 WL 3199214, at *3.

[26] *Id.*

[27] *Id.* at *4-5 (citing *Shack*, 658 N.E.2d at 711).

[28] *Id.*

[29] *Id.* at *3.

[30] *Duran*, 2009 WL 3199214, at *5.

another individual's rights.[31] Therefore, the court had to balance Duran's right to free speech against the deponent's right to privacy.[32] Because Duran sent a total of fifty-two text messages to the deponent, the court found that Duran's conduct constituted harassing or, at least, an annoying intrusion on the deponent's right to be free from unwelcomed text messages.[33]

The court also rejected Duran's argument that her statements constituted protected speech.[34] Because Duran's statements did not impose an immediate threat to the deponent, the court would have concluded that these statements constituted protected free speech like in *Dietze* if it looked only at those statements.[35] But in addition to Duran's statements, the court looked at the place and circumstances surrounding them.[36] Because Duran communicated these statements in text messages sent to the deponent's phone, Duran's statement posed more of an intrusion on the deponent's right to privacy than under *Dietze*.[37] Therefore, Duran could not rely on *Dietze* for support.[38]

It is well established that the right to free speech under the First Amendment is not absolute.[39] Words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace" do not constitute protected free speech.[40] These words include those that are lewd and obscene, profane, libelous and insulting or fighting.[41] The United States Supreme Court delineated the scope

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[31] *Id.* at *3.

[32] *See id.* ("An individual's right to communicate must be balanced against the recipient's right 'to be let alone' in places in which the latter possesses a right to privacy." (quoting *Shack*, 658 N.E.2d at 710 (citing Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 736 (1970)))).

[33] *Id.* at *5.

[34] *Id.* at *3.

[35] *Duran*, 2009 WL 3199214, at *4.

[36] *Id.*

[37] *Id.*

[38] *Id.* at *3.

[39] Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942).

[40] *Id.* at 572. The Court further explained that these utterances are not essential to the expression of ideas, and they are of such little social value in the promotion of truth that "any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.*

[41] *Id.* Use of insults or personal abuse does not constitute communication of information or opinions protected under the Constitution, and its punishment as a criminal act would not raise any questions under the Constitution. *Id.* (citing Cantwell v. Connecticut, 310 U.S.

of this limit on protected free speech in *Chaplinsky v. New Hampshire*.

In *Chaplinsky*, the defendant, a Jehovah's Witness, was charged with violating a New Hampshire statute that prohibited the use of "offensive, derisive and annoying words and names" to any person in a public place.[42] The defendant had been distributing pamphlets for his sect on a public sidewalk in the City of Rochester when a riot broke out around him.[43] When the complainant, a city marshal, came to the scene, the defendant said to him, "You are a God damned racketeer" and "a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists."[44]

Before trial, the defendant moved to dismiss the charge against him.[45] He argued that the New Hampshire statute was unconstitutional because it placed an unreasonable restraint on his right to free speech.[46] However, the trial court denied the motion and the jury convicted the defendant of violating the New Hampshire statute.[47] The United States Supreme Court affirmed the conviction and held that the statute did not violate the right to free speech.[48]

The Court concluded that the statute was constitutional because it prohibited speech that would cause a breach of the public peace.[49] To cause a breach of the peace, the words must have a direct tendency to cause the person, to whom the words are addressed, to

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296, 309-10 (1940) (internal quotations omitted).

[42] *Chaplinsky*, 315 U.S. at 569. Chapter 378, section 2 of the Public Laws of New Hampshire provides:

> No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.

Id. (internal quotations omitted).

[43] *Id.* at 569-570.

[44] *Id.* at 569.

[45] *Id.*

[46] *Chaplinsky*, 315 U.S. at 569.

[47] *Id.*

[48] *Id.* at 574. The Supreme Court of New Hampshire divided the statute into two distinct provisions. *Id.* at 572. The first provision relates to word or names addressed to another in a public place while the second provision refers to noises and exclamations. *Id.* Because the defendant was only charged with violating the first provision, the Court only considers the constitutionality of that provision. *Chaplinsky*, 315 U.S. at 572 n.6.

[49] *Id.* at 573.

respond with violence.[50] The Court reasoned that offensive words almost always have this tendency to cause a fight.[51] To determine whether a word is offensive, a court does not look at what a particular addressee thinks.[52] Instead, the court considers what a person of average intelligence would understand as likely to cause the average addressee to fight.[53]

Furthermore, the Court noted that there are a number of words and expressions in the English language that constitute "fighting words."[54] To constitute "fighting words," an ordinary person must know that the word is likely to cause a fight when stated without a "disarming smile."[55] The Court also reasoned that derisive and annoying words may constitute fighting words, but only when they have "this characteristic of plainly tending to excite the addressee to a breach of the peace."[56] Because the defendant's words constituted insults likely to provoke the average person to respond with violence, they had the tendency to cause a breach of the peace.[57] Therefore, the New Hampshire court constitutionally applied the statute against the defendant.

Thirty years later, the Supreme Court expanded its limit on protected free speech in *Rowan v. United States Post Office Department*, where the Court held that the First Amendment does not protect speech that invades an individual's right to privacy.[58] In *Rowan*, the appellants—a group of publishers, distributors, owners and operators of mail service organizations—challenged the constitutionality of Title III of the Postal Revenue and Federal Salary Act of 1967.[59] Under this statute, "a person may require that a mailer remove his name from its mailing lists and stop all future mailing to the householder."[60] Pursuant to this statute, the appellants alleged that they re-

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[50] *Id.*

[51] *See id.*

[52] *Id.*

[53] *Chaplinsky*, 315 U.S. at 573.

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.* at 574.

[58] *Rowan*, 397 U.S. at 736.

[59] *Id.* at 729.

[60] *Id.* The Postal Revenue and Federal Salary Act of 1967, Pub. L. No. 91-275, 84 Stat. 748 (codified at 39 U.S.C.A. § 3008(a), 1970 (2009)) provides that: an addressee may request an order prohibiting the mailing of any advertisements, which he believes to be "eroti-

ceived a large number of prohibitory orders from the Postmaster General, and they argued that this statute violated their right to free speech.[61]

The Supreme Court rejected the appellants' argument and upheld the constitutionality of the statute.[62] Although the public postal system is an important part of a civilized society and communication is necessary for a healthy society, the Court reasoned that the right to communicate must be balanced against the right to be left alone.[63] Because there is nothing in the Constitution that requires us to listen or view any unwanted communication, the Court did not find any reason to give the appellants' printed advertisements any preference just because they were sent by mail.[64] Therefore, a mailer's right to communicate must stop at an unreceptive addressee.[65]

Furthermore, the Court reasoned that every household must have a sufficient amount of autonomy to exercise control over unwanted mail.[66] To provide the householder with this control, it is inevitable that the flow of ideas, information and arguments that, "ideally, [the householder] should receive and consider" will be prohibited.[67] Therefore, no one has the right to impose even "good" ideas on an unwilling addressee.[68]

Subsequently, the Supreme Court applied *Chaplinsky* and *Rowan* in *Cohen v. California*.[69] In *Cohen*, the defendant was charged with violating California Penal Code section 415,[70] which

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cally arousing or sexually provocative," to his home; The Postal Revenue and Federal Salary Act of 1967, Pub. L. No. 91-275, 84 Stat. 748 (codified at 39 U.S.C.A. § 3008(b), 1970 (2009)) provides that: Upon the receipt of such a request, the Postmaster General must direct the sender and his agents to refrain from further mailings to the particular addressee.

[61] *Rowan*, 397 U.S. at 731.

[62] *Id.* at 738.

[63] *Id.* at 736.

[64] *Id.* at 737.

[65] *Id.* at 736-37.

[66] *Rowan*, 397 U.S. at 736. The Court further explained that just because "we are often captives outside the sanctuary of the home and subject to objectionable speech and other sounds does not mean we must be captives everywhere." *Id.* at 738 (internal quotations omitted).

[67] *Id.* Because the statute places sole discretion in the householder, an individual may find a piece of mailing provocative while another individual may find that same piece of mailing not provocative. *Id.* at 737.

[68] *Id.* at 738.

[69] 403 U.S. 15 (1971).

[70] Cal. Penal Code § 415(2) (West 2009) provides that: "Any person who maliciously and

prohibits an individual from causing a breach of the peace by offensive conduct.[71] The defendant was arrested while he was standing in a corridor of the Los Angeles County courthouse wearing a jacket with the words, "Fuck the Draft."[72] These words were plainly visible to all bystanders, including women and children.[73]

At trial, the defendant argued that the California statute violated his right to free speech.[74] However, the Los Angeles Municipal Court convicted him of violating the statute,[75] and the California Court of Appeals affirmed the conviction.[76] The Supreme Court disagreed and held that the State could not make the defendant's public display of the four-letter expletive a criminal offense.[77]

The Court reasoned that the four-letter expletive was not directed towards any particular individual.[78] There was no evidence that any individual who saw the defendant's jacket perceived the message as a direct personal insult.[79] Furthermore, there was no evidence that the State had to act to prevent the defendant from provoking a particular group to a hostile reaction.[80] Therefore, the defendant's public display of the four-letter expletive on his jacket did not cause a breach of the peace.[81]

Furthermore, the Court reasoned that the mere presence of unreceptive listeners or viewers does not automatically justify a limitation on free protected speech.[82] Instead, the government's ability to limit speech depends on whether the right to privacy has been invaded "in an essentially intolerable manner."[83] Although individuals

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willfully disturbs another person by loud and unreasonable noise" is guilty of a misdemeanor; Cal. Penal Code § 415(3) (West 2009) provides that: "Any person who uses offensive words in a public place which are inherently likely to provoke an immediate violent reaction" is guilty of a misdemeanor.

[71] *Cohen*, 403 U.S. at 16.

[72] *Id.* The defendant later testified that he wore the jacket knowing that the words were on the jacket, and that he wanted to publicly display his opposition to the Vietnam War. *Id.*

[73] *Id.*

[74] *Id.* at 17-18.

[75] *Cohen*, 403 U.S. at 16.

[76] People v. Cohen, 81 Cal.Rptr. 503, 509-10 (Cal. Ct. App. 1969).

[77] *Cohen*, 403 U.S. at 26.

[78] *Id.* at 20 (citing *Cantwell*, 310 U.S. at 309) (internal quotations omitted).

[79] *Id.*

[80] *Id.*

[81] *See id.* at 20.

[82] *Cohen*, 403 U.S. at 21.

[83] *Id.*

in the courthouse may have had a more substantial claim to privacy than those standing on a public sidewalk in *Chaplinsky*, this claim was not as substantial as one's interest to be free from unwanted speech in one's home, which the Court recognized in *Rowan*.[84] The Court concluded that bystanders in the courthouse could have simply avoided the defendant's public display of the four-letter expletive by averting their eyes.[85]

Similarly, the New York Court of Appeals delineated the scope of limited protected speech in *Dietze*, where the Court held that PL section 240.25 was unconstitutional because it "prohibited a substantial amount of constitutionally protected expression."[86] In *Dietze*, the complainant and her son, who are both mentally retarded, were walking on a public street when the defendant came to the doorway of her home and called the complainant a "bitch" and the complainant's son a "dog."[87] The defendant also stated that she would "beat the crap out of [the complainant] some day or night on the street."[88]

The defendant was charged with violating PL section 240.25.[89] Although the defendant argued that PL section 240.25 violated her right to free speech, the town court convicted the defendant of violating the statute and the county court affirmed.[90] The New York Court of Appeals reversed the conviction.[91]

Although the defendant's act of calling the complainant and her son a "bitch" and a "dog" constituted abusive language within the scope of PL section 240.25, the defendant's words constituted protected speech.[92] The court reasoned that speech, which is often ab-

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[84] *Id.* at 21-22.

[85] *Id.* at 21.

[86] *Dietze*, 549 N.E.2d at 1167.

[87] *Id.* The defendant was aware of the complainant's mental disability and had previously received a warning from the police about arguing with the complainant again. *Id.*

[88] *Id.* After hearing the defendant's statement, the complainant fled the scene in tears. *Id.*

[89] *Dietze*, 549 N.E.2d at 1167. N.Y. Penal Law § 240. 25 provides that:

> A person is guilty of harassment in the first degree when he or she intentionally and repeatedly harasses another person by following such person in or about a public place or places or by engaging in a course of conduct or by repeatedly committing acts which places such person in reasonable fear of physical injury.

[90] *Dietze*, 549 N.E.2d 1167-68. The defendant further argued that PL section 240.25 is overbroad because it prohibits a large portion of protected speech as well as unprotected obscenities and fighting words. *Id.* at 1168 (internal quotations omitted).

[91] *Id.* at 1170.

[92] *Id.* at 1168.

usive, vulgar, derisive and provocative, constitutes protected speech.[93] Therefore, this speech may not be prohibited nor penalized unless it "presents a clear and present danger of some serious substantive evil."[94] But because PL section 240.25 extends to any abusive language intended to annoy, the court concluded that the statute is unconstitutional for overbreadth.[95]

Furthermore, the defendant's words did not pose an immediate threat to the complainant. Because the defendant's claim that she would "beat the crap out of" the defendant was not supported by other words or acts showing that it was anything more than a rude outburst, the court reasoned that it cannot be taken seriously.[96] Therefore, the defendant's statement does not constitute a genuine threat of physical harm and falls outside the scope of PL section 240.25.[97]

Subsequently, the New York Court of Appeals considered the relationship between the right to free speech and the right to privacy when it decided *Shack*.[98] In *Shack*, the defendant was charged with aggravated harassment in the second degree.[99] The defendant, suffering from a mental illness, sought to establish a telephone relationship with the complainant, who was the defendant's first cousin and a psychologist, so that he could obtain information concerning his illness and treatment.[100] At first, the complainant agreed to speak with the defendant on the condition that he remain in treatment with his

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[93] *Id.* The Court further explained that casual conversations as well as light-hearted banter or expression of personal opinion may be abusive or made with the intentions to annoy. *Id.*

[94] *Dietze*, 549 N.E.2d at 1168.

[95] *Id.* However, the court refused to limit the statute's reach by judicial construction "to fighting words or other words, which, by themselves, inflict substantial personal injury." *Id.* at 1169. The court provided two reasons to support its refusal for judicial construction: (1) because the language of the statute does not suggest a limitation to violence-provoking or substantial injury-inflicting statements, judicial construction to so limit the statute would be a complete revision of the Legislature's enactment; (2) limiting the statute to particular speech would make the statute vague because the statutory language would signify one thing while it would stand for something completely different under this judicial decision. *Id.*

[96] *Id.* 1169-70.

[97] *Dietze*, 549 N.E.2d at 1170.

[98] *Shack*, 658 N.E.2d at 711.

[99] *Id.* at 709. The defendant was charged with violating N.Y. Penal Law § 240.30(2) (McKinney 2009), which provides: "A person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy, threaten or alarm another person, he makes a telephone, whether or not a conversation ensues, with no purpose of legitimate communication."

[100] *Shack*, 658 N.E.2d at 711.

psychiatrist and continue to take his medication.[101] But when the defendant informed the complainant that he was no longer taking his medication, the complainant refused to speak with him.[102] In response, the defendant repeatedly called the complainant.[103] Furthermore, the defendant repeatedly threatened the complainant, stating that he would burn down her elderly father's house, sell her telephone number to a pervert, or call the licensing board to have her psychologist's license revoked.[104]

At trial, the defendant argued that PL section 240.30(2) was unconstitutional because it prohibits protected speech under the United States Constitution and the New York Constitution.[105] The trial court convicted the defendant of aggravated harassment in the second degree, and the New York Court of Appeals affirmed.[106]

Unlike in *Dietze*, the New York Court of Appeals reasoned that PL section 249.30(2) does not criminalize "pure speech."[107] Instead, it limits conduct, such as the act of making a telephone call without any legitimate purpose for doing so.[108] To constitute "no purpose of legitimate communication," there must be an "absence of expression of ideas or thoughts other than threats or intimidating or coercive utterances."[109] Because the defendant stopped taking his medication and the complainant no longer welcomed his phone calls, the defendant no longer had a legitimate purpose for calling the complainant.[110] Therefore, the statute only imposed criminal liability on him for the calls made without a legitimate purpose.[111]

Even if the statute prohibited speech, it would still be constitutionally valid because the complainant's privacy right outweighed

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[101] *Id.*

[102] *Id.*

[103] *Id.* at 709. From December 12 through the end of the month, the defendant called the complainant's home eighty-eight times, calling as many as seven times a day. *Id.* In total, the defendant called the complainant's home one hundred and eighty five times between December 12, 1990 and May 20, 1991. *Shack*, 658 N.E.2d at 709.

[104] *Id.* at 709-10.

[105] *Id.* at 709. The defendant further argued that PL section 240.30 was overbroad because it prohibited lawful exercises of free speech. *Id.* at 711.

[106] *Id.*

[107] *Shack*, 658 N.E.2d at 710.

[108] *Id.*

[109] *Id.* at 712.

[110] *Id.* at 711.

[111] *Id.*

the defendant's right to free speech.[112] Relying on *Rowan*, the court concluded that an individual has a substantial privacy interest in his telephone.[113] Therefore, pursuant to PL section 240.30(2), a caller's right to free speech must be balanced against the recipient's right to be free from unwelcomed telephone calls.[114]

In contrast to *Shack*, the New York Court of Appeals *in People v. Mangano* overturned the defendant's conviction for violating PL section 240.30(2).[115] The defendant was charged with five counts of aggravated harassment in the second degree for leaving five messages on the Village of Ossining Parking Violations Bureau's answering machine.[116] In the messages, the defendant verbally attacked two village employees, wishing them and their families' ill health and complaining about their job performance and parking tickets she had received.[117]

At trial, the jury convicted the defendant of four of the five counts of harassment in the second degree.[118] However, the New York Court of Appeals disagreed with the lower court and overturned the conviction.[119] The court reasoned that the defendant's statements did not fall within the scope of the prohibited speech or conduct under PL section 240.30.[120] Although the defendant's statements were offensive, she made them in the context of complaining about the government, on a telephone answering machine set up for the purpose of receiving complaints from the public.[121] Therefore, the defendant had a legitimate purpose for leaving the messages on the Bureau's answering machine.[122]

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[112] *Shack*, 658 N.E.2d at 710-11.

[113] *Id.* at 711. In drawing a comparison to *Rowan*, the Court reasoned that the telephone is the "functional equivalent of the mailbox." *Id.*

[114] *Id.* at 711.

[115] 796 N.E.2d 470, 471 (2003).

[116] *Id.* The Village of Ossining prohibits overnight parking between the hours of 3:00 A.M. and 6:00 A.M. *Id.* at 470. However, residents with overnight guests may avoid getting a parking ticket by leaving a message on the Bureau's telephone answering machine. *Id.* In the messages, callers must identify the license plate number of the vehicle and describe the vehicle and area in which the vehicle is parked. *Id.* Callers may also leave complaints. *Mangano*, 796 N.E.2d at 470.

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] *Mangano*, 796 N.E.2d at 471.

[122] *Id.*

Both the United States Constitution and the New York Constitutions provide individuals with the right to free speech. However, this right is not absolute. The United States Supreme Court and the New York Court of Appeals agree that offensive words do not constitute protected free speech because they have the tendency to cause a breach of the peace. Because these words can cause the addressee to respond with violence, it is necessary that they remain unprotected for public policy reasons. If individuals were permitted to use "fighting words," chaos would ensue. Therefore, this limit on free speech is necessary to maintain order and civility in our society.

Furthermore, the Supreme Court and the New York Court of Appeals agree that the right to free speech needs to be limited if it is clearly outweighed by the right to privacy. The courts seem to recognize different levels of interest in privacy. At one end of the spectrum, an individual has the greatest interest in privacy in his home. But at the other end of the spectrum, an individual has the smallest interest in privacy on a public sidewalk. For instance, the Supreme Court in *Rowan* recognized that an individual's right to be free from unwanted intrusion in his home substantially outweighed a mailer's right to send an advertisement.[123] However, the Supreme Court and the New York Court of Appeals did not recognize a privacy interest for the complainants in *Chaplinsky*[124] and *Dietze*[125] because the defendants directed their statements towards the complainants while the complainants were standing on a public street. Therefore, it appears that the greater the interest in privacy, the more likely the courts will be willing to limit free protected speech.

Under the circumstances in *Duran*, it is questionable as to how the deponent's interest in privacy may be balanced against Duran's right to free speech. Like the complainant in *Shack*, the defendant has a right to be free from unwanted communications sent through the phone. However, the complainant in *Shack* received messages through her home phone while the deponent in *Duran* received text messages through her cell phone. The Criminal Court of the City of New York, New York County notes that the deponent received the first set of text messages from Duran when she was in

[123] *Rowan*, 397 U.S. at 736-37.

[124] *Chaplinsky*, 315 U.S. at 569-70.

[125] *Dietze*, 549 N.E.2d at 1167.

1090 Amsterdam Avenue.[126] However, the Supreme Court does not specify whether this address is the deponent's home. Because the cell phone is a moveable object, the deponent may not have necessarily been home when she received the text messages from Duran. Therefore, the deponent's right to be free from unwanted calls while in her home may not have been intruded on while she was at home.

Furthermore, the deponent could have avoided reading the insults from Duran just like the Supreme Court suggests in *Cohen*. In this modern era, most cell phones are programmed so that the receiver can see who text messages are from without actually having to read the message. Because the deponent stated that she was familiar with Duran's phone number, she should have recognized that the messages sent from Duran's number on September 2 was from Duran, and she could have easily deleted the messages without reading them.

Although the Supreme Court and the New York Court of Appeals agree that the right to free speech should be limited, the New York Court of Appeals distinguishes itself from the Supreme Court by requiring that the speech pose an immediate danger to the addressee. Therefore, the speech must not only be offensive, but it must also indicate that the speaker will act with violence against the addressee at that moment. By adding this extra requirement, the New York Court of Appeals makes it more difficult for an individual's speech to be deemed unprotected.

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[126] *Duran*, 2009 WL 3199214, at *1.