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Constitutional Law - Freedom of Speech - Symbolic Protest by the Use of Opprobrious Language

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CONSTITUTIONAL LAW—FREEDOM OF SPEECH—SYMBOLIC PROTEST BY THE USE OF OPPROBRIOUS LANGUAGE

On April 26, 1968 Paul Cohen appeared in a Los Angeles County Courthouse wearing a jacket bearing the words "Fuck the Draft." He entered the courtroom, removed his jacket, and held it folded over his arm. A police officer, who had seen the jacket, sent a message to the judge requesting that Cohen be held in contempt of court, but the judge declined and returned a message informing the officer of his refusal. Cohen, then entering a corridor where women and children were present, was arrested by the officer. He was convicted in the Los Angeles Municipal Court and sentenced to thirty-days imprisonment, for willfully disturbing the peace or quiet of any neighborhood or person by the use of offensive conduct.[1] The California Court of Appeals affirmed the conviction[2] and the Supreme Court of California declined review in a split decision. The United States Supreme Court granted certiorari on the basis of the constitutional questions presented and found that absent a more particularized and compelling reason for its actions, a state may not, consistently with the first and fourteenth amendments, make the simple public display of a single four-letter expletive a criminal offense. *People v. Cohen*, 403 U.S. 15 (1971).

It would seem that the facts indicated in *Cohen*, taken in and of themselves, pose merely a criminal misdemeanor problem and thus have negligible significance. However, the constitutional issues presented are highly significant, and the decision will carry a heavy impact upon subsequent

1. CAL. PENAL CODE § 415 (West 1970). The statute provides: "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, quarrelling, challenging to fight, or fighting, or who, on the public streets of any unincorporated town, or upon the public highways in such unincorporated town, runs 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, and upon conviction by any Court of competent jurisdiction shall be punished by fine not exceeding two hundred dollars, or by imprisonment in the County Jail for not more than ninety days, or by both fine and imprisonment, or either, at the discretion of the Court." It should be noted that Cohen was charged with disturbing the peace by tumultuous or offensive conduct and not for using vulgar or indecent language within the hearing of women and children.

2. People v. Cohen, 1 Cal. App. 3d 94, 81 Cal. Rptr. 503 (1969).

first amendment cases. For the first time the Supreme Court has held that the use of opprobrious language, by itself, can play an essential part in the exposition of ideas and is, therefore, subject to first amendment protection. Further, the Supreme Court found that the only conduct involved in wearing such an inscription on a jacket is that of communication, which is pure speech.

Therefore, the purpose of this casenote is to present and analyze the major constitutional issues decided. This will be accomplished by a discussion of the general background and circumstances under which the case arose. Further, the effect of past decisions and possible future consequences and trends that will result from *Cohen* will be considered.

In laying a background, the first logical area of inquiry would be the law of early England. At common law, there were basically two types of breaches of the peace—actual breach of the peace, such as fighting and dueling, and constructive breach, which tended to make others break the peace, such as a challenge to fight.[3] The spoken word, when viewed in terms of common law breach of the peace, will fall in the latter category, in that it is the reaction of the hearer to the words spoken that will amount to an actual breach of the peace. Fundamental to a constructive breach is that the words must be spoken in an attempt to provoke a breach of the peace.[4] Opprobrious language, however, though a motive for a breach of the peace, did not tend immediately to the breach of the peace and, therefore, was not indictable at common law.[5]

The common law concept that abusive language was not indictable as a criminal offense was generally adopted in this country.[6] The public peace was interpeted as "that sense of security and repose which is the right of every person under orderly government."[7] Mere words alone, no matter how offensive, could not amount to a breach of the peace, because actual or threatened violence is an essential element. The fact that the words used are either immoral or reprehensible is of no consequence,

3. 4 BLACKSTONE, COMMENTARIES * 142; *see generally* 2 ANDERSON, WHARTON'S CRIMINAL LAW & PROCEDURE 655 (1957); Rush, *A Breach of the Peace by the Spoken Word*, 33 CONN. B.J. 114 (1959).

4. *Ex parte* Chapman, 4 AD. & E. 773, 111 Eng. Rep. 974 (1836); *Ex parte* Marborough, 5 Q.B. 955, 114 Eng. Rep. 1508 (1844).

5. *Ex parte* Chapman, *supra* note 4; *Ex parte* Marlborough, *supra* note 4; Regina v. Langley Holt, K.B. 654, 90 Eng. Rep. 1261 (1728); *see generally* 1 RUSSELL, CRIME 205 (9th ed. 1936).

6. *E.g.*, Fischbach v. Ohio State Racing Commission, 76 Ohio L. Abs. 540, 147 N.E.2d 258 (1955); State v. Steger, 94 W. Va. 576, 119 S.E. 682 (1923); St. Louis v. Slupsky, 254 Mo. 309, 162 S.W. 155 (1914); State v. Schlottman, 52 Mo. 164 (1873).

7. State v. Steger, *supra* note 6, at 580, 119 S.E. at 683.

absent an incitement or immediate threat of violence.[8] Whether abusive language was indictable at common law is no longer an important issue. Statutes, varying in their general format, were passed in virtually every jurisdiction that rendered the use of abusive language a criminal offense.[9] They include breach of the peace, disorderly conduct, vagrancy, or the separate offense of using offensive language. But all of these legislative enactments fall under the general category of crimes against the public peace. Further, the manner and circumstances in which the language is used may vary. Some statutes render the use of obscene language an offense if used in the presence of a girl or woman,[10] the opposite sex,[11] or a child.[12] Others condemn the use of such language in the presence of, addressed to, or within the hearing of another,[13] in public or a public place,[14] or anywhere.[15] Yet, others require that the language arouses

8. *See supra* note 6; *contra,* a few early cases held that abusive language was indictable at common law in that it was a gross violation of public decency and good morals. Davis v. Burgess, 54 Mich. 514, 20 N.W. 540 (1884); State v. Appling, 25 Mo. 315 (1857); Barker v. Commonwealth, 19 Penn. 412 (1852); Bell v. State, 1 Swan 42 (Tenn. 1851).

9. *See infra* notes 10-19.

10. ALA. CODE ANN. tit. 14 § 11 (1958) (separate offense); CAL. PENAL CODE § 415 (West 1970) (breach of the peace); GA. CODE ANN. § 26-6303 (1935) (separate offense); IDAHO CODE § 18-6409 (1948) (disorderly conduct); IND. ANN. STAT. § 10-2801 (1956) (public indecency); MONT. REV. CODES ANN. § 94-3560 (1969) (disturbing the peace); NEB. REV. STAT. § 28-920 (1965) (separate offense); N.D. CENT. CODE tit. 12 § 21-06 (1960) (separate offense); OHIO REV. CODE ANN. § 2905.30 (Supp. 1969) (separate offense); S.D. COMPILED LAWS ANN. § 22-24-5 (1969) (separate offense).

11. MASS. GEN. LAWS ANN. ch. 272 § 53 (1970) (separate offense).

12. ARIZ. REV. STAT. ANN. § 13-377 (1956) (disorderly conduct); IDAHO CODE § 18-6409 (1948) (disorderly conduct); MONT. REV. CODES ANN. § 94-3560 (1969) (disturbing the peace); N.D. CENT. CODE § 12-21-06 (1960) (separate offense); OHIO REV. CODE ANN. § 2905.30 (Supp. 1969) (separate offense) S.D. COMPILED LAWS ANN. § 22-24-5 (1969) (separate offense).

13. ARK. STAT. ANN. § 41-1412 (1964) (breach of peace); CONN. GEN. STAT. ANN. § 53-174 (1960) (breach of peace); FLA. STAT. ANN. § 877.03 (1965) (breach of peace); GA. CODE ANN. § 26-6303 (1935) (separate offense); KAN. STAT. ANN. § 21-950 (1964) (breach of the peace); MD. ANN. CODE art. 27 § 121 (1971) (breach of peace); N.H. REV. STAT. ANN. § 570:2 (1955) (separate offense); S.D. COMPILED LAWS ANN. § 22-24-5 (1969) (separate offense); TEX. PEN. CODE art. 482 (1952) (breach of peace); VA. CODE ANN. § 18.1-255 (1960) (Separate offense); WASH. REV. CODE ANN. § 9.68.040 (1961) (separate offense).

14. ARIZ. REV. STAT. ANN. § 13-377 (1956) (disorderly conduct); DEL. CODE ANN. tit. 7 § 471 (1953) (disorderly conduct); HAWAII REV. LAWS § 759-1 (1968); IND. ANN. STAT. § 10-2801 (1956) (public indecency); IOWA CODE ANN. § 728.1 (1950) (separate offense); MD. ANN. CODE art. 27 § 121 (1971) (breach of peace); MASS. GEN. LAWS ANN. ch. 272, § 53 (1970) (separate offense); MICH. STAT. ANN. § 28.364 (Supp. 1971) (disorderly conduct); N.J. STAT. ANN. 2A:170-29 (1971) (disorderly conduct); N.Y. PENAL LAW § 240.20 (McKinney 1967)

anger,[16] provokes,[17] or has a tendency to provoke[18] a breach of the peace. Finally, some merely provide for offensive or tumultuous behavior.[19]

In spite of the numerous divergencies in statutory language, the generalization may be made that these enactments are broad and all encompassing. The general assumption which impliedly follows is that there is no justification for the use of the language. In *Delk v. Commonwealth*,[20] a minister used certain abusive words in a sermon addressed to his congregation. The intended purpose of his sermon was to strike out against the sin of impurity. While Delk felt that the words chosen could best serve his design, the court held to the contrary, finding no possible excuse for the use of such language, in the pulpit or elsewhere; Delk's

(disorderly conduct); N.C. GEN. STAT. § 14-197 (1964) (separate offense); N.D. CENT. CODE § 12-21-06 (1960) (separate offense); ORE. REV. STAT. § 166.060 (1969) (vagrancy); R.I. GEN. LAWS ANN. § 11-45-1 (Supp. 1970) (disorderly conduct); S.C. CODE ANN. § 16-558 (Supp. 1970) (disorderly conduct).

15. COLO. REV. STAT. ANN. § 40-8-1 (1964) (breach of peace); CONN. GEN. STAT. ANN. § 53-174 (1960) (breach of peace); FLA. STAT. ANN. § 847.05 (1965) (separate offense); IOWA CODE ANN. § 728.1 (1950) (separate offense); KAN. STAT. ANN. § 21-950 (1964) (breach of peace); ME. REV. STAT. ANN. tit. 17 § 3953 (1965) (disorderly conduct); MICH. STAT. ANN. § 28.364 (Supp. 1971) (disorderly conduct); MINN. STAT. ANN. § 609.72 (Supp. 1971) (disorderly conduct); MISS. CODE ANN. § 2A:11-2089.5 (Supp. 1970) (breach of peace); MO. STAT. ANN. tit. 41, § 562.240 (1953) (disturbing the peace); NEV. REV. STAT. § 203.010 (1967) (breach of peace); N.H. REV. STAT. ANN. § 570:3 (1955) (separate offense); N.M. STAT. ANN. § 40A-20-1 (Supp. 1971) (disorderly conduct); OKLA. STAT. ANN. tit. 21, § 1362 (Supp. 1970) (breach of peace); PA. STAT. ANN. tit. 18, § 4406 (1963) (disorderly conduct); R.I. GEN. LAWS ANN. § 11-45-1 (Supp. 1970) (disorderly conduct); TENN. CODE ANN. § 39-1213 (Supp. 1970) (disturbing the peace); UTAH CODE ANN. § 76-59-9 (1953) (breach of peace); VT. STAT. ANN. tit. 13, § 1021 (1958) (breach of peace).

16. ARK. STAT. ANN. § 41-1412 (1964) (breach of peace); MINN. STAT. ANN. § 609.72 (Supp. 1971) (disorderly conduct).

17. CONN. GEN. STAT. ANN. § 53-174 (1960) (breach of peace); KY. REV. STAT. § 437.020 (1962) (breach of peace); VA. CODE ANN. § 18.1-255 (1960) (separate offense).

18. S.D. COMPILED LAWS ANN. § 22-13-7 (1969) (separate offense); VA. CODE ANN. § 18.1-255 (1960) (separate offense); WIS. STAT. ANN. § 947.01 (1958) (disorderly conduct).

19. COLO. REV. STAT. ANN. § 40-8-1 (1964) (breach of peace); CONN. GEN. STAT. ANN. § 53-174 (1960) (breach of peace); ILL. ANN. STAT. ch. 38, § 26-1 (Smith-Hurd 1970) (disorderly conduct); IND. ANN. STAT. § 10-2801 (1956) (public indecency); MICH. STAT. ANN. § 28.364 (Supp. 1971) (disorderly conduct); NEV. REV. STAT. § 203.010 (1967) (breach of peace); N.M. STAT. ANN. § 40A 20-1 (Supp. 1971) (disorderly conduct); PA. STAT. ANN. tit. 18, § 4406 (1963) (disorderly conduct); TENN. CODE ANN. § 39-1213 (Supp. 1970) (disturbing the peace); UTAH CODE ANN. § 76-59-9 (1953) (breach of peace); WIS. STAT. ANN. § 947.01 (1958) (disorderly conduct).

20. 166 Ky. 39, 178 S.W. 1129 (1915).

excuse of merely rebuking the sin of impurity was wholly without justification.[21]

The concept relied upon in *Delk*—that abusive language is devoid of any redeeming values—permeates the justification for many convictions involving the use of abusive language. In the majority of cases, first amendment protection is not even asserted.[22] Yet, one must not overlook the fact that this type of legislation may render criminal, certain activities that are constitutionally protected. Justice Black has described disorderly conduct laws "as a meat-ax ordinance, gathering in one comprehensive definition of an offense a number of words which have a multiplicity of meanings, some of which would cover activity specifically protected by the First Amendment."[23] A similarly distasteful view of these statutes, encompassing crimes against the public peace, is brought out in a presidential task force report which describes these statutes as embracing "an excessively broad range of conduct, some of it dangerous, some merely annoying, some harmless, some constitutionally protected."[24]

The generality of these statutes permits a police official to exercise broad discretionary power, and accounts for more arrests than any other crime except drunkenness.[25] Despite the large number of arrests, there is relatively little appellate review. A study conducted in New York reveals that although there were over 70,000 disorderly conduct arraignments in 1957 alone, only approximately 150 reported opinions have been handed down since the enactment of the statute in 1923.[26] This looseness, which envelops these laws, gives the police a virtual charter of authority on the streets, which is often used against various subculture groups within the population.[27]

Thus, against the background of a crime that did not exist at common law, but evolved by the enaction of broad statutes tending to include constitutionally protected interests, the issues presented in the *Cohen* case find their relevance. Cohen's constitutional contention was that his con-

21. *Id.* at 47, 178 S.W. at 1132.

22. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Williams v. District of Columbia, 227 A.2d 60 (C.A.D.C. 1967). *See generally* CHAFEE, FREE SPEECH IN THE UNITED STATES 149 (1954); 2 ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE 655-682 (1957); Annot., 48 A.L.R. 83 (1927).

23. Gregory v. Chicago, 394 U.S. 111, 118 (1969) (concurring opinion).

24. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 102 (1967).

25. *Id.*

26. *Id.*

27. *Id.* at 103-4.

viction for displaying distasteful words violated his right to free speech.[28] While freedom of speech is a fundamental right protected by the Constitution, this safeguard does not extend to every form of utterance.[29] In *Chaplinsky v. New Hampshire*,[30] which illustrates this principle, the petitioner was distributing literature of the Jehovah Witnesses on a street corner while denouncing all other religions. A crowd gathered and a minor disturbance resulted. The police, fearful that a larger disturbance would materialize, led Chaplinsky away but did not place him under arrest. While leaving the area, Chaplinsky called the marshall "a God damned racketeer" and "a damned Fascist" and said, "the whole government of Rochester are Fascists or agents of Fascists."[31] He was convicted under a breach of the peace statute although he claimed free speech protection. The Supreme Court, in affirming his conviction, laid down in dictum what is frequently quoted as law:

> 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 might be derived from them is clearly outweighed by the social interest in order and morality.[32]

By this statement, it would appear that the Supreme Court classifies obscene, profane, libelous and fighting words as not meritorious of constitutional protection.

The particular word chosen by Cohen to express his deep-seated views against the draft, although it is perhaps the most distasteful of its particular classification of words, does not fall into the category of obscenity.[33] This conclusion seems more than obvious. When the *Roth* standard[34] is ap-

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28. U.S. CONST. amend. I.

29. *See* Adderley v. Florida, 385 U.S. 39, 48 (1966); Breard v. Alexandria, 341 U.S. 622, 642 (1951); Feiner v. New York, 340 U.S. 315, 321 (1951); Niemolko v. Maryland, 340 U.S. 268, 289 (1951) (concurring opinion of Justice Frankfurter); Kovacs v. Cooper, 336 U.S. 77, 88 (1949); Stromberg v. California, 283 U.S. 359, 368-69 (1931); Schenck v. United States, 249 U.S. 47, 52 (1919); Frohwerk v. United States, 249 U.S. 204, 206 (1919).

30. *Supra* note 22.

31. Chaplinsky v. New Hampshire, *supra* note 22, at 569.

32. Chaplinsky v. New Hampshire, *supra* note 22, at 571-72.

33. Cohen v. California, 403 U.S. 15, 20 (1971).

34. Roth v. United States, 354 U.S. 476, 489 (1957). The test handed down for obscenity is "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." The test, in part, requires that the material be lascivious in some way.

plied, the choice of Cohen's expression could in no possible way be pruriently interesting. The court further excluded Cohen's epithet from the classes set out in *Chaplinsky* by holding that while the particular word used is often employed in a personally provocative fashion, the manner of its use distinguishes it from the traditional *fighting words*.[35]

Fighting words are generally of such a nature that when addressed to a group, they will bring about some sort of reprisal and, therefore, have fallen without the constitutional protection; this is due to their tendency to invite others to breach the peace.[36] The Supreme Court in *Beauharnais v. Illinois*,[37] employed this doctrine in upholding an Illinois criminal libel statute, proscribing conduct which downgrades any class of citizens because of their race, creed, or color. Beauharnais was arrested for passing out leaflets calling on the City of Chicago and its mayor to stop the invasion of white property by negroes, who he classified as depraved, unchaste, and unvirtuous citizens.[38] He argued, in his defense, that the statute violated his right to free speech. However, his conviction was affirmed, as his argument gave way to the principle that free speech is limited and does not protect those who would incite riots and breaches of the peace, in order to deprive others of their liberties.[39]

Cohen's statement was distinguished from the category of fighting words which cause an incitement to riot and breach of the peace, because it clearly was neither directed to the person of the hearer, nor could anyone who read the inscription have considered it as a personal insult.[40] The fact that using abusive language to express an idea will often create a hostile reaction is not, per se, a valid reason to suppress its use. Under our system of government, one of the main functions of free speech is to invite dispute. Speech may often be most effective when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or

35. *Supra* note 33, at 20.

36. *See* Cohen v. California, *supra* note 33; Beauharnais v. Illinois, 343 U.S. 250 (1952); Chaplinsky v. New Hampshire, *supra* note 22. *But see* Terminiello v. Chicago, 337 U.S. 1 (1949), where a disorderly conduct charge was reversed, in that the ordinance permitted a conviction if the speech stirred people to anger and thus, invaded the province of free speech. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940), where a statute that suppressed free views under the guise of conserving desirable conditions in the street was found to be unconstitutional.

37. *Supra* note 36.

38. Beauharnais v. Illinois, *supra* note 36, at 252.

39. Beauharnais v. Illinois, *supra* note 36, at 261. This holding came subsequent to the court's discussion of the riots, killings, and other racial problems that had occurred in Illinois.

40. *Supra* note 33, at 20.

even stirs people to anger.[41] Similarly, the fact that an agency of the federal government is under criticism, does not justify censoring the idea presented. The content of speech itself cannot be the basis of a conviction merely because the views presented are offensive to its hearers.[42]

The Supreme Court, in holding that offensive language alone does not lose its constitutional protection as speech, has in effect sounded the death knoll for the dictum laid down in *Chaplinsky*.[43] That there may be certain classifications of speech which, by their very utterance, are denied constitutional protection can be seriously questioned. In *New York Times v. Sullivan*,[44] libelous statements were granted first amendment protection because directed against a public official. The Alabama courts had granted recovery to the Montgomery Police Chief for a defamatory advertisement which appeared in the *New York Times*; however, the Supreme Court reversed the Alabama court because the law failed to provide safeguards for freedom of speech and press, required by the first amendment.[45] Although obscenity is not within the constitutional ambit of free speech or press,[46] recent obscenity cases have presented such a myriad of constitutional "stumbling blocks" that obscenity, in effect, occupies the same preferred position as free speech.[47] The granting of first amendment protection to the use of abusive language rounds off the dissipation of unprotected classes of speech. Clearly, after the *Cohen* decision, the denial of free speech protection cannot be based solely on the ability of the prosecution to characterize the defendant's statement as a particular form of expression denounced in *Chaplinsky*.

41. Terminiello v. Chicago, *supra* note 36, at 4. *Accord*, Tinker v. Des Moines School Dist., 393 U.S. 503, 508 (1969); Edwards v. South Carolina, 372 U.S. 229, 238 (1963). *But see* Abrams v. United States, 250 U.S. 616 (1919); Schenck v. United States, *supra* note 29; Frohwerk v. United States, *supra* note 29, where circumstances such as war or a national emergency will have a decided effect on what can be said or printed. *Compare* Feiner v. New York, *supra* note 29, where the contents of the speech were designed to incite the listeners to go out and riot.

42. *See* Bachellar v. Maryland, 397 U.S. 564, 571 (1970); Street v. New York, 394 U.S. 576, 592 (1969); Niemotko v. Maryland, *supra* note 29, at 272 (1951); De Jonge v. Oregon, 299 U.S. 353, 365 (1937).

43. *Supra* textual quote indicated at *supra* note 32.

44. 376 U.S. 254 (1964).

45. *Id.* at 264, 270. The court stated that they considered the case within the concept that debate on public issues should be robust and uninhibited. Wide, open discussion may, at times well include unpleasantly sharp attacks on government and public officials. Because of this national commitment, a public official has to show actual malice, in order to recover on a libel action.

46. Roth v. United States, *supra* note 34, at 485.

47. *See* Stanley v. Georgia, 394 U.S. 557 (1969); Ginzburg v. United States, 383 U.S. 463 (1966); Mishkin v. New York, 383 U.S. 502 (1966); Times Film Corp. v. Chicago, 365 U.S. 43 (1961); Smith v. California, 361 U.S. 147 (1959).

Since opprobrious language per se is presently considered to be protected speech, a conviction for the use of a "four letter" word can stand only if some other conduct, not amounting to pure speech, is concommitant with the words. The mere fact that speech is involved does not give an act unbridled protection.[48] More often than not, when speech is involved, there is accompanying conduct such as the time, place, or manner in which the speech is uttered. It is against these added considerations that the state's interest in regulating may be sustained.

Since the prime effectiveness of speech is its power to criticize existing conditions and persuade others of a point of view,[49] the free speech issue often arises in the area of protest for change. In order to achieve the desired result, the protestor must reach as wide an audience as is humanly possible. Obviously, the most logical forum for a large audience would be a place in which a mass of people could easily be gathered—the streets, parks, highways and other public places. However, when a protest is moved into public places, it runs the risk of providing the state with those factors against which it may effectively legislate. For, while the right to protest through speech is constitutionally protected, the extent of such protection cannot possibly extend to all forms of conduct.[50]

In the *Cohen* case, the state unsuccessfully attempted to attack the conduct of wearing a jacket, containing an offensive statement against the draft, in a court room corridor where women and children were present by separating Cohen's conduct from his speech.[51] While it is difficult to untangle speech and conduct, a state may constitutionally prohibit conduct even though speech may be incidentally affected.[52] When conduct, as distinct from speech, is the subject of state regulation, the

48. *See supra* note 29. *Cf.* Annot., 21 L. Ed. 2d 976 (1969); annot., 16 L. Ed. 2d 1053 (1966); annot., 11 L. Ed. 2d 1116 (1964).

49. *See supra* note 41.

50. Adderley v. Florida, *supra* note 29; Cox v. Louisiana, 379 U.S. 559 (1965). In *Cox*, at 574, the court stated: "[T]he right of peaceful protest does not mean that everyone with opinions or beliefs to express may do so at anytime and at any place. There is a proper time and place for even the most peaceful protest and a plain duty and responsibility on the part of all citizens to obey all valid laws and regulations." The court proceeded to state that there are also requirements for laws to be drawn so that people have fair warning as to what is illegal.

51. *Supra* note 33.

52. Shuttlesworth v. City of Birmingham, 394 U.S. 147, 152 (1969); Cox v. Louisiana, *supra* note 50, at 562 (1965); Street v. New York, *supra* note 42, at 615 (1969) (dissent of Justice Fortas); United States v. O'Brien, 391 U.S. 367, 376 (1968). *Cf.* Walker v. City of Birmingham, 388 U.S. 307 (1967); Adderley v. Florida, *supra* note 29.

free speech issues are minimal. Therefore, as in *Cohen*, states have attempted to legislate against conduct, indirectly oppressing unpopular and offensive speech under the guise of punishing conduct.[53] However, when the conduct is such that it becomes indistinguishable from speech as a form of expression, the courts have faced a dilemma; this is the problem presented to the Court in *Cohen*.

Conduct was first recognized as having the quality of becoming so intertwined in speech as to become the expression itself in *Stromberg v. California*.[54] Stromberg, a member of the Young Communist League, worked as a supervisor of a summer camp for children. She taught children class-consciousness and that the workers of the world were all brothers. Because Stromberg directed the children daily in the raising of a red flag (that of the U.S.S.R. and the Communist Party of the United States) and the recital of a worker's pledge of allegience, she was convicted of violating a state statute which prohibited the display of a red flag as an emblem of opposition to organized government. Stromberg claimed that the state statute was unconstitutional by reason of the first amendment. The Supreme Court reversed her conviction upon the ground that it violated free political discussion. A statute, which on its face would punish one who tried to avail himself of this right, cannot constitutionally stand.[55]

53. It should be noted that merely because the state is able to separate conduct from speech, it does not necessarily follow that a conviction will be sustained. For a general discussion of the tests the Supreme Court use, *see* Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963). For cases where conduct has been separated from speech, *see* Bachellar v. Maryland, 397 U.S. 564 (1970) (demonstrating outside induction center); Gregory v. Chicago, *supra* note 23 (march through streets); Shuttlesworth v. City of Birmingham, *supra* note 52 (demonstrating in street); United States v. O'Brien, *supra* note 52 (burning draft card); Adderley v. Florida, *supra* note 29 (trespass); Brown v. Louisiana, 383 U.S. 131 (1966) (silent protest in library); Edwards v. South Carolina, 372 U.S. 229 (1963) (protest outside courthouse); Walker v. City of Birmingham, *supra* note 52 (parading in streets); Cox v. Louisiana, *supra* note 50 (picketing near courthouse); Cox v. New Hampshire, 312 U.S. 569 (1941) (parading in street); Thornhill v. Alabama, 310 U.S. 88 (1940) (picketing labor dispute); Kovacs v. Cooper, 336 U.S. 77 (1949) (sound amplifier); Saia v. New York, 334 U.S. 558 (1948) (sound amplifier); Breard v. Alexandria, *supra* note 29 (door to door solicitation); Martin v. Struthers, 319 U.S. 141 (1943) (distributing handbills door to door); Lovell v. Griffin, 303 U.S. 444 (1938) (distributing handbills in street).

54. *Supra* note 29.

55. Stromberg v. California, *supra* note 29, at 369. The court found the statute prohibiting the display of a red flag unconstitutional, because it prohibited a means of expressing a political view: "The 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, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to

Thus, *symbolic speech* was born in the Court's holding that a red flag can be a constitutional means of expressing one's political views.

The symbolic speech doctrine was carried one step further in *West Virginia State Board of Education v. Barnette*.[56] The defendant school board had adopted a resolution requiring school children to salute the flag and specifying that refusal to do so is insubordination. A group of Jehovah's Witnesses, contending that saluting a flag amounts to paying homage to an idol, obtained an injunction against its enforcement. The Court looked upon the mandatory requirement of saluting a flag as compelling the students to express a belief in violation of their first amendment rights:

> There is no doubt that, in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas . . . A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn.[57]

In upholding the plaintiffs' refusal to salute, the Court approved silence or inaction as a symbolic method of expressing views.

Although both the *Stromberg* and *Barnette* cases recognized that conduct can, under certain circumstances, be equivalent to speech, neither decision attempted to identify the point at which conduct became speech. The necessity for such a distinction is evidenced by *United States v. O'Brien*,[58] in which O'Brien had burned his selective service card before

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the guaranty of liberty contained in the Fourteenth Amendment." Thus, the court emphasized the importance of free political discussion.

56. 319 U.S. 624 (1943).

57. *Id.* at 632-33.

58. *Supra* note 52. The lack of a sufficient distinction for the time at which conduct becomes speech, has caused a diversity of problems in the lower courts. These problems have been aggravated by the statement in *O'Brien* at 376: "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." The courts have, on occasion, held certain conduct to be protected as symbolic speech. These decisions are generally void of any explanation for the fact that conduct is considered speech, other than the fact that it expresses an idea. *Cf.* Hill v. Lewis, 323 F. Supp. 55 (D.N.C. 1971) (armbands); Crosson v. Silver, 319 F. Supp. 1084 (D. Ariz. 1970) (burning flag); Korn v. Elkins, 317 F. Supp. 138 (D. Md. 1970) (artistic representation of burning flag); Aguirre v. Tahoka Independent School Dist., 311 F. Supp. 664 (N.D. Tex. 1970) (armbands); Reichenberg v. Nelson, 310 F. Supp. 248 (D. Neb. 1970) (hair length); Westley v. Rossi, 305 F. Supp. 706 (D. Minn. 1969) (hair length); Leslie Tobin Imports, Inc., v. Rizzo, 305 F. Supp. 1135 (E.D. Penn. 1969) (buttons); Richards v. Thurston, 304 F. Supp. 449 (D. Mass. 1969) (hair length); Einhorn v. Maus, 300 F. Supp. 1169 (E.D. Penn. 1969) (armbands); State v. Lundquist, — Md. —, 278 A.2d 263 (1971) (saluting flag). However, the questions that most frequently confront the courts are whether all communicative action is symbolic speech and whether all symbolic speech is protected. Further, the question of whether a person has, in

a sizeable crowd, in order to influence others to adopt his anti-war beliefs. Indicted under a section of the Universal Training and Service Act, which prohibited knowing mutilation of one's registration card, O'Brien asserted as his defense that the statute was unconstitutional because it denied the right of freedom of expression. After a lengthy discussion of the history and purposes underlying a draft card law, the court found the conduct unrelated to O'Brien's expression.[59] The government interest involved is the efficient operation of the Selective Service System. The separate conduct for which O'Brien was convicted, was the destruction of his selective service card, which tended toward the disruption of the smooth functioning of that system, and as such, was separate and apart from any expression of anti-war views that the card burning may have symbolized.[60] From *O'Brien* it can be concluded that a government may regulate when the expression intended is not related to the conduct prohibited, and any incidental restrictions upon speech are minimal.[61]

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fact, intended such conduct to operate as symbolic speech heightens the dilemma. Generally, the courts have treated these problems by holding that such conduct was not intended to be protected, or by assuming arguendo, that such conduct was considered to be speech, and then by going on to show a sufficient governmental interest. *Cf.* United States v. Zink, 436 F.2d 1248 (8th Cir. 1971) (burning draft card); Banks v. Muncie Community Schools, 433 F.2d 292 (7th Cir. 1970) (school symbols); Guzick v. Drebus, 431 F.2d 594 (6th Cir. 1970) (wearing button in classroom); Baird v. Eisenstadt, 429 F.2d 1398 (1st Cir. 1970) (delivery of contraceptive); Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970) (hair length); United States v. Eberhardt, 417 F.2d 1009 (4th Cir. 1969) (mutilation of public records); United States v. Gutknecht, 406 F.2d 494 (8th Cir. 1969) (dropping draft card at marshall's feet); Zigmond v. Selective Service Local Board No. 16, 396 F.2d 290 (1st Cir. 1968) (turning in draft card); United States v. Miller, 367 F.2d 72 (2nd Cir. 1966) (burning draft card); Press v. Pasadena Independent School District, 326 F. Supp. 550 (S.D. Tex. 1971) (wearing pantsuit); Gere v. Stanley, 320 F. Supp. 852 (M.D. Penn. 1970) (hair length); Hernandez v. School District Number One, Denver, Colo., 315 F. Supp. 289 (D. Colo. 1970) (black berets combined with disruptive conduct); Livingston v. Swanquist, 314 F. Supp. 1 (N.D. Ill. 1970) (hair length); United States v. Ferguson, 302 F. Supp. 1111 (N.D. Cal. 1969) (flag burning); Koehl v. Resor, 296 F. Supp. 558 (E.D. Va. 1969) (nazi uniform); United States v. Berrigan, 283 F. Supp. 336 (D. Md. 1968) (destroying draft files); Davis v. Firment, 269 F. Supp. 524 (E.D. La. 1967) (hair length); State v. Adams, 3 Wash. App. 849, 479 P.2d 148 (1971) (use of set net in salmon fishing); Kleijans v. Lombardi, 52 H. 427, 478 P.2d 320 (1970) (occupying office of university official); State v. Nelson, — Iowa —, 178 N.W.2d 434 (1970) (disrobing at sex education program); Scott v. Board of Ed., U.F. Sch. Dist. #17, Hicksville, 61 Misc. 333, 305 N.Y.S.2d 601 (1969) (female students wearing slacks). *See generally* Comment, THE LEGALITY OF DRESS CODES FOR STUDENTS, ET AL., 20 DE PAUL L. REV. 222, 229-231 (1971).

59. United States v. O'Brien, *supra* note 52, at 377.

60. United States v. O'Brien, *supra* note 52, at 385-86.

61. United States v. O'Brien, *supra* note 52, at 377. According to *O'Brien*, a

A year after *O'Brien,* another protest against war by the use of symbolic conduct came before the Supreme Court in *Tinker v. Des Moines School District.*[62] The conduct involved in the *Tinker* case was the wearing of black armbands by a group of students, in order to publicize their objections to the war in Vietnam.[63] The decision to wear the armbands was made at a meeting attended by a group of adults and students. The various school officials became aware of the plan and adopted the policy that any student wearing a black armband would be asked to remove it. Refusal would be followed by suspension. The petitioner wore the armband, refused to remove it, and was suspended. A complaint was filed seeking an injunction, preventing further disciplinary action and nominal damages for the period in which the students were actually suspended.

The court held that the fact of wearing the armbands is entirely divorced from actual or potentially disruptive conduct and thus, is closely akin to pure speech.[64] In order to justify the armband prohibition, school officials had the burden of proving that its actions were caused by more than a desire to avoid the unpleasantness that accompanies an unpopular viewpoint.[65] The decision laid down in *Tinker* raised a question with regard to the rationale of the court's holding in *O'Brien.*[66] Did the court oversimplify the free speech elements in draft card burning? One who burns his draft card does not intend to disrupt the Selective Service System. Instead, he is essentially concerned with the value of his act as an expression. Surely, one person's burning of his draft card would be literally devoid of destructive effect.[67]

Any logical basis of distinction between *O'Brien* and *Tinker* was further confused by *Street v. New York*[68] Hearing a news bulletin con-

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government regulation is justified if: (1) it is in the constitutional power of the government to regulate it; (2) it furthers an important or substantial government interest; (3) free speech is not related to the governmental interest; and (4) if any incidental restrictions fall upon free speech, they are no greater than what is essential to protect that interest.

62. *Supra* note 41.

63. Tinker v. Des Moines School Dist., *supra* note 41.

64. Tinker v. Des Moines School Dist., *supra* note 41, at 505.

65. Tinker v. Des Moines School Dist., *supra* note 41, at 509.

66. United States v. O'Brien, *supra* note 52.

67. Alfange, *Free Speech and Symbolic Conduct: The Draft Card Burning Case,* 1968 Sup. Ct. Rev. 1, 15 (1968). *Compare* Justice Black's dissent, Tinker v. Des Moines School Dist., *supra* note 41, at 514, where he feels that the record shows that the armbands took the other students' minds off their classwork and thus, disrupted the normal classroom process.

68. *Supra* note 42.

cerning the shooting of civil rights leader, James Meredith, Street took an American flag to a street corner near his home and proceeded to burn it. A small crowd had gathered and he told them, "We don't need no damn flag . . . If they let that happen to Meredith, we don't need an American flag."[69] Street was arrested and convicted under a statute proscribing the casting of contempt by acts or words upon any American flag. Street claimed as his defense that his act was performed as a means of expressing his right to free speech. In reversing his conviction, the Supreme Court, under a tortured reading of the legal posture within which the case arose, decided that the indictment may have been for the words he uttered. Since he could not be punished for the words spoken, the Court ruled that there was no reason to decide whether he could have been punished for burning the flag.[70] In comparing the *Street* decision with that in *O'Brien* and *Tinker*, one can only conclude that the area of symbolic speech is indeed one of uncertainty.

Cohen v. California[71] was the next decision handed down in the symbolic conduct area, but it also failed to enunciate a definitive standard as to when conduct becomes speech. Between the time of the *Cohen* and *Street* decisions, Justice Harlan, in a concurring opinion to a *per curiam* decision,[72] recognized the need for some substantial standard:

> The court has, as yet, not established a test for determining at what point conduct becomes so intertwined with expression that it becomes necessary to weigh the State's interest in proscribing conduct against the constitutionally protected interests in freedom of expression.[73]

Because *Cohen* was the next full opinion to be handed down, the logical conclusion would be that it would contain some clarification of this test. But *Cohen* instead, by failing to do this, has only added haze to this already cloudy issue.

Cohen's conduct in wearing the jacket through the court's corridor was dismissed rather lightly. The court found that the only conduct involved was that of communication and, therefore, held it to be solely within the

69. Street v. New York, *supra* note 42, at 579.

70. Street v. New York, *supra* note 42, at 594. *See generally* Comment, *Flag Desecration Under the First Amendment: Conduct or Speech*, 32 Ohio St. L.J. 119 (1971).

71. *Supra* note 33.

72. Cowgill v. California, 396 U.S. 371 (1970). *See also* Schacht v. United States, 398 U.S. 58 (1970) where, in a *per curiam* opinion, the court reversed the conviction of petitioner who wore parts of an army uniform in a street skit, put on before an induction center, in order to show his dissent to the Viet Nam War. The court felt that a statute which allowed an actor to wear an army uniform in a play, only so long as it did not discredit the army, was a violation of free speech.

73. Cowgill v. California, *supra* note 71, at 372.

purview of free speech.[74] In a sense the *Cohen* decision is as oversimplified as *O'Brien*. Was not the disruption in the courthouse, caused by the presence of Cohen and his jacket, of greater proportion than that caused to the Selective Service System by the burning of a solitary draft card? For what reason was the conduct, relied upon in the lower court, dismissed so readily as pure speech, without an attempt to delineate the point at which conduct becomes speech? The only logical interpretation of the *Cohen* decision is that the background of the case weighed heavily in its final outcome.[75]

In conclusion, the *Cohen* decision has had a dual effect. In one area it enhanced the importance of freedom of speech, by granting first amendment protection to the use of opprobrious language. It further recognized that there may be an inherent value in the exposition of ideas in such language. The best example of this proposition is a California appellate decision which relied on *Cohen*. There, the defendant displayed a poster in the rear of his automobile reading "Fuck War." In commenting on its redeeming social importance, the court stated: "[I]n its condemnation of war, petitioner's language—whatever its bad taste—might reasonably be deemed a condemnation of what some view as mankind's greatest 'obscenity'."[76]

In the wake of *Cohen*, the proliferation of buttons, T-shirts, bumper stickers, and the like, bearing distasteful inscriptions is highly probable. What may add shock value to today's protestors may also cause the disruption of courts, schools, libraries, and other public buildings. To protect against abuses, statutes with more specific language will have to be enacted to deal with the disruption, rather than the offensive nature of the language.

The second effect of *Cohen*, is that the Court's refusal to establish a formula as to when conduct becomes speech, has made the state legislators' task even more arduous. Without a strict standard to employ as a guideline, the legislators' problem in drafting statutes indirectly and incidentally affecting speech is perplexing, if not impossible. When may *conduct plus speech* be constitutionally prohibited? Within the framework of *Cohen, Tinker, O'Brien, et al.*, the legislators are unable to answer this difficult question.

Perhaps the Court's failure to enunciate a standard for regulating *conduct plus speech* may be explained by the fact that *Cohen* is a very

74. *Supra* note 33, at 18.

75. *See* text at *supra* note 9.

76. *In re* Richard Perlman, 18 Cal. App. 3d 178, 95 Cal. Rptr. 599 (1971).

close case—a five-to-four decision. With four justices dissenting, the Court may simply have found it impossible to establish a new test for deciding at what point on the speech-conduct continuum conduct falls without the first amendment immunity. One may further speculate that in light of the extreme difficulty the Court encountered in administering the *Roth* test for obscenity, it was hesitant to attempt another formula for gauging the first amendment's ambit. To whatever reason the Court's failure to act may be attributed, the *Cohen* decision clearly leaves a large and an undesirable void in the contours of free speech and expression.

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