DePaul University
UNIVERSITY LIBRARIES

DePaul Law Review

Volume 22
Issue 3 *Spring 1973*

Article 10

Constitutional Law - The "Fighting Words Doctrine" Is Applied to Abusive Language toward Policemen

Mark Pearlstein

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation
Mark Pearlstein, *Constitutional Law - The "Fighting Words Doctrine" Is Applied to Abusive Language toward Policemen*, 22 DePaul L. Rev. 725 (1973)
Available at: https://via.library.depaul.edu/law-review/vol22/iss3/10

This Case Notes is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact wsulliv6@depaul.edu, c.mcclure@depaul.edu.

CONSTITUTIONAL LAW—THE "FIGHTING WORDS DOCTRINE" IS APPLIED TO ABUSIVE LANGUAGE TOWARD POLICEMEN

"One of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation."[1]

Johnney C. Wilson was participating in an anti-Vietnam War demonstration on August 18, 1966 in which the members of his group were picketing Army headquarters in Atlanta, Georgia. When the inductees arrived at the building, the demonstrators began to block the door so that the inductees could not enter. When the police attempted to move the protesters, a scuffle began. Wilson was indicted for making the following statements to two police officers: "White son of a bitch, I'll kill you, you son of a bitch, I'll choke you to death" and "You son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces."[2] He was convicted on two counts of assault and battery and two counts of opprobrious or abusive language.[3] The case was appealed to the United States Supreme Court on the issue of abusive language. The Court held,[4] that the statute, which had not been narrowed by the Georgia courts to apply only "to 'fighting words' which by their very utterance . . . tend to incite an immediate breach of the peace,"[5] was unconstitutional for vagueness and overbreadth.[6] *Gooding v. Wilson*, 405 U.S. 518 (1972).

The problem of abusive language recurs frequently today as a result of American society's preoccupation with many emotional social issues. People who express their viewpoints in many forms of language do not

---

1. Mr. Justice Frankfurter in Baumgartner v. United States, 322 U.S. 665, 673-74 (1944).

2. Wilson v. State, 223 Ga. 531, 534, 156 S.E.2d 446, 449 (1967).

3. The defendant was convicted under GA. CODE § 26-6303 (1933) which provides in relevant part: "Any person, who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor." *As amended*, GA. CODE ANN. § 26-2610 (1972).

4. 405 U.S. 518 (1972) (hereinafter cited in text as *Gooding*).

5. *Cf.* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

6. 405 U.S. at pp. 520-30.

often follow customary standards of polite expression. However, as Thomas Emerson has stated, "a system of free expression . . . recognizes the right of the citizen to disagree with, arouse, antagonize and shock his fellow citizens and the government."[7]

The case law prior to *Gooding* prohibited only that form of expression known as "fighting words." Such words were not considered free expression and were subject to governmental regulation. This note will review the case history of the "fighting words" requirement which is a judicial addition to disorderly conduct statutes. The note will also concern itself with the special problem of a citizen's use of "unseemly expletives" toward a policeman that was presented in *Gooding* and which has occurred frequently in disorderly conduct cases.

The first significant case of this nature was *Cantwell v. Connecticut.*[8] Cantwell had stopped two men, asked and received permission to play a record which attacked their religion. Both men became angry and were tempted to strike Cantwell, who eventually left their presence. The Supreme Court set aside Cantwell's conviction for inciting a breach of the peace because there was no evidence that he was personally offensive or was involved in any argument with those interviewed. The Court limited the right of a state to regulate speech to those situations "[w]hen clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order appears . . . ."[9]

The "fighting words" doctrine became the dominant principle in free speech controversies in *Chaplinsky v. New Hampshire.*[10] A Jehovah Witness had caused some public resentment while distributing handbills on the street. He was taken from the scene by police officers because of the threat of violence from the crowd. While he was being led to the police station, Chaplinsky told the City Marshall that " '[y]ou are a . . .

7. Emerson, *Toward A General Theory of the First Amendment*, 72 YALE L. J. 877, 894 (1963).

8. 310 U.S. 296 (1940).

9. *Id.* at 308. The "clear and present danger doctrine" was first stated in Schenck v. United States, 249 U.S. 47 (1919) where the Supreme Court upheld the conviction of a Socialist Party member for distributing leaflets urging men to oppose the draft. Mr. Justice Holmes explained that "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." *Id.* at 52. Subsequent cases affirming this doctrine have included Dennis v. United States, 341 U.S. 494 (1951), American Communications Association v. Douds, 339 U.S. 382 (1950), and Pennekamp v. Florida, 328 U.S. 331 (1946).

10. 315 U.S. 568 (1942).

damned racketeer' and 'a damned Fascist. . . .' "[11] The defendant was convicted under the state disorderly conduct statute. The United States Supreme Court upheld the conviction because it believed that the state supreme court had properly limited the statute to the use of words in a public place which directly tended to "cause acts of violence by the person to whom, individually, the remark is addressed. . . . The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. . . ."[12] Mr. Justice Murphy, speaking for the Court, emphasized that the right of free speech is not absolute:

> 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 . . . .[13]

However, the Court returned to the "clear and present danger" test, first stated in *Cantwell*,[14] in *Terminiello v. Chicago*.[15] This case involved a Nazi speaker who had addressed a public meeting. Terminiello was convicted of disorderly conduct but the Supreme Court reversed on the basis of the trial court's charge to the jury which had construed "breach of the peace" to include "speech which stirs the public to anger, invites dispute, brings about a condition of unrest or creates a disturbance."[16] Justice Douglas, speaking for the majority, conceded that freedom of speech was not absolute but felt that such speech was protected against punishment unless "shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."[17]

The Court also focused on the reaction of a crowd to a speaker in *Feiner v. New York*.[18] The petitioner made some derogatory remarks about government officials. He also urged black people to rise up in arms and fight for equal rights. The speech stirred some excitement but only one person threatened violence if police did not act.[19] The Supreme

---

11. *Id.* at 569.

12. State v. Chaplinsky, 91 N.H. 310, 313-320, 18 A.2d 754, 758-762 (1941).

13. 315 U.S. at 571-72. *See* Note, *Prohibition of Offensive Utterances Not Violative of the Right of Free Speech*, 2 BILL OF RIGHTS REV. 224 (1942) and Note, *Constitutional Law—Limitations on the Freedom of Speech*, 22 B.U.L. REV. 446 (1942).

14. 310 U.S. at 307.

15. 337 U.S. 1 (1949).

16. *Id.* at 4.

17. *Id.*

18. 340 U.S. 315 (1951).

19. *Id.* at 317.

Court upheld the action of the police officers in removing the speaker from the platform, on the basis that an imminent breach of the peace was threatened by Feiner's actions. The Court recognized the danger of giving overzealous policemen complete discretion to silence speakers advocating unpopular views but felt that the case involved a situation where the speaker passed the point of argument and was inciting to riot. The *Feiner* opinion was unduly restrictive in comparison to those boisterous situations found in subsequent decisions. Yet *Feiner* did employ the judicial technique of looking at the circumstances of the speech, including the actual response of the audience, in determining whether such speech was justifiably restricted by local authorities.

The Supreme Court was confronted with a series of free speech cases arising out of the civil rights and anti-Vietnam War movements. In *Cox v. Louisiana I*[20] two cases resulted from one set of facts in which the petitioner led a group of Black students who were protesting the jailing of their fellow students. Since the original grievance involved the failure of stores to serve blacks, Cox urged his followers to go to those stores which had practiced discrimination. *Cox I*[21] was the result of the petitioner's conviction for violating a Louisiana statute making it a crime to congregate with others with the intent to provoke a "breach of the peace." Justice Goldberg, speaking for the Court in both cases, held that this statute gave undue discretion to the Louisiana authorities in depriving Cox of his rights of free speech and assembly. The Court also reversed Cox's conviction for demonstrating outside a courthouse in violation of a law which prohibited that particular act.[22] The Court felt that the statute itself was a valid law but that the petitioner's arrest for failure to disperse was unjustified after state officials had previously given permission for the demonstration to take place at the same location. The *Cox* cases were among the first to distinguish forms of expression as primarily speech or conduct. There were certain forms of conduct, mixed with speech, which could be regulated: "We emphatically reject the notion . . . that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct, such as patrolling, marching and picketing . . . as these amendments afford to those who communicate ideas by pure speech."[23]

20. 379 U.S. 536 (1965).

21. *Id.*

22. Cox v. Louisiana II 379 U.S. 559 (1965).

23. 379 U.S. at 555. Mr. Justice Douglas, dissenting in Roth v. United States, 354 U.S. 476, 514 (1957) stated that "[f]reedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an

Other federal courts have been confronted with similar situations. A section of the Atlanta city ordinance was declared unconstitutional in the case of *Carmichael v. Allen.*[24] The ordinance declared it to be ". . . unlawful for any person to act in a violent, turbulent, quarrelsom, boisterous, indecent, or disorderly manner or to use profane, vulgar, or obscene language."[25] This statute was used to convict Stokely Carmichael for statements which he made after the shooting of a black man by police The federal district court rejected the all-encompassing nature of the ordinance as an unconstitutional restriction on free speech and assembly.[26]

Similar statutes were found in the cases of the *University Committee to End the War in Viet Nam v. Gunn*[27] and *Wright v. Montgomery.*[28] Several anti-war protesters were arrested in the former case after they had been attacked by soldiers. Their conviction was based on a Texas statute which prohibited "loud, vociferous or obscene . . . language . . . in a manner calculated to disturb the person or persons present . . . ."[29] The district court, in declaring the statute unconstitutional, stated that the law relied on "calculations as to the boiling point of a particular person . . ." and was not an evaluation of the comments themselves.[30] The latter case demonstrated that a statute would be upheld if construed within narrowly defined limits. The ordinance was very similar to that of the previous case. However, the measure was strictly limited by state courts to violent and menacing conduct.[31]

The Supreme Court cases of *Coates v. City of Cincinnati*[32] and *Cohen*

inseparable part of it." *See* Edwards v. South Carolina, 372 U.S. 229 (1963) where the petitioners, civil rights demonstrators, were convicted for breach of the peace on the basis of a statute which prohibited speech that "stirred people to anger, invited public dispute, or brought about a condition of unrest." *Id.* at 238. The Court stated that the conviction should be reversed because the statute infringed on the petitioner's rights of free speech and assembly. *See also* Adderley v. Florida, 385 U.S. 39 (1966), where the Court felt that the actions of students who blocked the non-public driveway constituted conduct. The Court upheld the state trespass statute because it was aimed at a limited kind of conduct and was not unconstitutionally vague. *See also* Kalven, *The Concept of the Public Forum: Cox v. Louisiana,* 1965 SUP. CT. REV. 1

24. 267 F. Supp. 985 (N.D. Ga. 1967).

25. "Sec. 20-7 of Chapter, RELATED LAWS CODE AND ORDINANCES OF THE CITY OF ATLANTA," Vol. 11, p. 1022.

26. 267 F. Supp. at 998-99.

27. 289 F. Supp. 469 (W. D. Tex. 1968).

28. 406 F.2d 867 (5th Cir. 1969).

29. TEX. PEN. CODE art. 474 (Supp. 1952).

30. 289 F. Supp. at 475.

31. 406 F.2d at 874.

32. 402 U.S. 611 (1971).

v. California[33] are significant, with respect to *Gooding*, because these decisions contained the latest treatment of broad disorderly conduct statutes which were not narrowly construed by state courts.

The *Coates*[34] decision struck down a disorderly assembly ordinance which provided, in part, that "It shall be unlawful for three or more persons to assemble . . . and . . . conduct themselves in a manner annoying to persons passing by."[35] Justice Brennan's majority opinion stated that anti-social conduct could not be regulated by an ". . . ordinance whose violation may entirely depend upon whether or not a policeman is annoyed."[36] The Court noted that this statute had not been narrowed by any construction of the Ohio Supreme Court. Since the law was "overly broad" on its face, the measure was unconstitutional and there was no need to examine the details of the conduct found to be annoying.[37]

The case arising out of Paul Cohen's controversial jacket was the leading free speech opinion before *Gooding* because of its clear distinction between speech and conduct. This young man was wearing a jacket, bearing the words "fuck the draft," while in the corridor of a county courthouse. The California Court of Appeals upheld the lower court conviction on the grounds that the "word" was inherently likely to cause violence.[38] The Supreme Court reversed the decision on the grounds that a state may not, absent a clear danger of violence, make the simple use of a four-letter expletive a criminal offense. The statute in question prohibited one from disturbing the peace "by loud or unusual noise, or by tumultuous or offensive conduct, or threatening, traducing, quarreling . . . or fighting . . . ."[39] The Court found that the statute had been construed broadly so as to limit forms of expression often associated with unpopular views or life styles without a showing that the use of such words intended to arouse the "ordinary citizen" to violence.[40]

One can argue that the use of such expressions violate the privacy of persons who have these distasteful terms forced upon them. However, "the mere presence of unwilling listeners does not justify curtailing all potentially offensive speech."[41] Justice Harlan, speaking for the majority,

---

33. 403 U.S. 15 (1971).
34. 402 U.S. 611 (1971).
35. §§ 901-16, CODE OF ORDINANCES OF THE CITY OF CINCINNATI (1956).
36. 402 U.S. at 614.
37. *Id.* at 616.
38. People v. Cohen, 1 Cal. App. 3d 94, 81 Cal. Rptr. 503 (1969).
39. CAL. PENAL CODE § 415 (Supp. 1970).
40. 403 U.S. at 20.
41. Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971).

was careful to point out that the issue in the case was one of speech, rather than conduct, because Cohen's conviction was only based on the offensiveness of the words he used. His opinion stated that a court cannot outlaw an expression as offensive conduct either on the theory ". . . that its use is inherently likely to cause violent reaction or . . . that the States, acting as guardian of public morality, may properly remove this offensive word from the public vocabulary."[42]

The situation in *Gooding* goes one step beyond *Cohen*[43] in terms of the classification of disorderly conduct problems. In *Cohen*, a policeman was confronted with a symbolic form of expression while the officers in *Gooding* were faced with the actual verbal expression of the defendant. In both cases state courts: (1) failed to limit the application of the pertinent statute to "fighting words" and (2) found it unlikely that the policemen, who were recipients of the expression, would resort to violence.

The Georgia statute in *Gooding* was declared unconstitutional because, as construed by the state courts, it applied to speech protected by the first amendment. It was seen from *Cohen*[44] and *Terminiello*[45] that vulgar or offensive expression, in itself, is still protected by the first and fourteenth amendments. Therefore, the statute must be construed with such specificity so as not to interfere with protected expression.[46] The Court will look to the construction given by state courts when there is serious doubt as to the constitutionality of a statute.[47]

---

42. 403 U.S. at 23. Mr. Justice Harlan concluded that part of his opinion which emphasized that a state could not forbid the mere use of a word with the following statement: "For, while the particular four-letter word being litigated here is perhaps more distasteful that most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric." *Id.* at 25. For a more detailed analysis of *Cohen*, *See* Thomas, *Purging Unseemly Expletives from the Public Scene: A Constitutional Dilemma*, 47 IND. L.J. 142 (1971) and Note, *Symbolic Protest by the Use of Opprobrious Language*, 21 DEPAUL L. REV. 546 (1971).

43. 403 U.S. 15 (1971).

44. *Id.*

45. 337 U.S. 1 (1949).

46. The Constitution forbids states from punishing the use of words not within narrowly limited classes of speech. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), Cantwell v. Connecticut, 310 U.S. 296 (1940). The Supreme Court, in upholding the right of the NAACP to challenge racial discrimination in the courts despite Virginia's claim that the organization was soliciting legal business, stated that the threat of sanctions for the exercise of first amendment activities ". . . may deter their exercise almost as potently as the actual application of sanctions. Because first amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." NAACP v. Button, 371 U.S. 415, 433 (1963).

47. United States v. Thirty-Seven Photographs, 402 U.S. 363, 369 (1971). The

The Supreme Court concluded that the Georgia courts failed to follow the specificity required by the "fighting words" doctrine.[48] In *Elmore v. State*,[49] a young man was convicted under a similar statute, which prohibited the use of opprobrious or abusive language to an officer who had him in legal custody ". . . if the character of the language is such as would ordinarily tend to cause a breach of the peace when addressed to a private person."[50] In *Jackson v. State*,[51] it was held that the jury was to determine whether the words "God damn you, why don't you get off the road?" were words which, under the circumstances tended to cause a breach of the peace. In the case of *Samuels v. State*[52] the court of appeals interpreted the term "breach of the peace" to include "all violations of public peace or order or decorum . . ." and applied the law to the actions of Blacks arrested for sitting at a segregated lunch counter. The defendants were convicted of assembling for the purpose of disturbing the public peace. Finally, the district court, in the present case, held that the words charged were in themselves opprobrious and abusive and that it was not necessary to determine in what manner these words tended to cause a breach of the peace.[53]

These cases illustrated the practice of the Georgia courts to either construe the use of opprobrious or abusive language as a breach of the peace or leave the question to the jury. The appellant maintained that the words opprobrious and abusive connoted disgraceful, reproachful or insulting language and that such words tend to cause a breach of the peace in certain situations.[54] Yet the appellee and the Supreme Court felt that any standard short of "fighting words" was unacceptable. Furthermore, such vague terms would give the jury unlimited discretion in applying these terms to a specific case.[55]

The fact that the words "opprobrious and abusive" have greater reach than "fighting words" make the Georgia statute void for vagueness and overbreadth. The defect of overbreadth was originally defined as statutory language "in which men of common intelligence must necessarily guess

---

Court noted, in this case involving the seizure of obscene photographs, that a statute could be "saved" by judicial construction.

48. 315 U.S. 568 (1942).

49. 15 Ga. App. 461, 83 S.E. 799 (1914).

50. *Id.* at 461, 83 S.E. at 799.

51. 14 Ga. App. 19, 80 S.E. 20 (1913).

52. 103 Ga. App. 66, 67, 118 S.E.2d 231, 232 (1967).

53. Wilson v. State, 223 Ga. 531, 156 S.E.2d 446, 449 (1967).

54. Brief for Appellant at 18, Gooding v. Wilson, 405 U.S. 518 (1972).

55. Brief for Appellee at 3-5, Gooding v. Wilson, 405 U.S. 518 (1972).

at its meaning."[56] It is based on the premise that no man should be punished for violating a statute that is not "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties."[57] The doctrine of "void-for-vagueness" has been explained as a "doctrine of unconstitutional indefiniteness . . . used by the Supreme Court for the creation of an insulating buffer zone of added protection at the peripheries of several of the Bill of Rights freedoms."[58] This "buffer zone" is created in those cases where the particular communication might not have warranted absolute immunity under the first amendment.[59] But federal courts often feel that state laws exceed constitutional bounds because such laws have a "chilling effect" on speech.

Since overly broad or vague statutes may inhibit persons from exercising their right of free speech, the Court concluded that one may attack a statute as being overly broad without showing that his conduct could not be regulated by a properly drawn statute.[60] This requirement was eliminated because of the tendency to consider the validity of a statute on its face when dealing with civil liberty questions because of the threat that a broad statute presents in inhibiting free expression.[61]

The dissent reiterated the appellant's insistence that the Georgia statute will not suppress constitutionally protected speech. Chief Justice Burger, joined by Mr. Justice Blackmun, maintained that the statute was only directed at personal, face-to-face, abusive language.[62] However, it must be remembered that Johnney Wilson addressed his words to a police offi-

---

56. Connally v. General Construction Co., 269 U.S. 385, 391 (1926).

57. *Id.* at 391. *See* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 852 (1970): "The overbreadth doctrine . . . results often in the wholesale invalidation of the legislature's handiwork, creating a judicial-legislative confrontation.

In the end, this departure from the normal method of judging the constitutionality of statutes must find justification in the favored status of rights to expression and association of the constitutional scheme."

58. Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 75-76 (1960).

59. *Id.* at 75.

60. 405 U.S. at 521, in reference to Dombrowski v. Pfister, 380 U.S. 479, 491-92 (1965).

61. Thornhill v. Alabama, 310 U.S. 88 (1940), Winters v. New York, 333 U.S. 507 (1948). The general rule was that the defendant cannot claim that a statute is unconstitutional in some of its reaches if it is constitutional as applied to him. C. WRIGHT, LAW OF FEDERAL COURTS §14 (2d Ed. 1970). *See also* Yazoo & Miss. R.R. v. Jackson Vinegar Co., 226 U.S. 217 (1912); United States v. Raines, 362 U.S. 17, 21-24 (1960).

62. 405 U.S. at 532.

cer. Although such disrespect for a public official may be reprehensible, the officer is trained to react professionally to such comments. Since his words would not ordinarily provoke a violent reaction when addressed to a policeman, they cannot be considered "fighting words." This fact was recognized in *Williams v. District of Columbia.*[63] The defendant was convicted in a lower court of using profane, indecent and obscene words to a policeman. The court of appeals reversed the decision classifying the statute as overly broad. The opinion stated that the statute would be valid if it were interpreted to require that the language be spoken in circumstances which threatened a breach of the peace.[64] The Court cited the Model Penal Code in expressing its doubt that the particular situation would have resulted in a breach of the peace. "Insofar as the theory of disorderly conduct rests on the tendency of the actor's behavior to provoke violence in others, one must suppose that policemen, employed and trained to maintain order, would be least likely to be provoked to disorderly responses."[65]

Three Supreme Court cases followed the *Gooding* treatment of the "overbreadth doctrine" and the problem of abusive utterances toward police. In *Rosenfeld v. New Jersey*,[66] a disgruntled teacher addressed a school board meeting and used the words "mother fucker" on numerous occasions. He was convicted under a disorderly person statute which prohibited indecent language in a public place. The conviction was reversed because the statute was not limited to "fighting words" but had only been construed to apply to those words which "affect the sensibilities of the hearer."[67] Similarly, in *Lewis v. City of New Orleans*,[68] appellant addressed the policemen who were arresting her son as "goddamn fucking police." She was convicted under a statute prohibiting the use of obscene language toward a policeman on duty. The Court also reversed that conviction. Mr. Justice Powell, in his concurring opinion, had no doubt that Mrs. Lewis' remarks would be "fighting words" if addressed to a private citizen. But he emphasized that the "fighting words" standard could not be applied where the words are addressed to a police officer.[69] Finally,

63. 419 F.2d 638 (D.C. Cir. 1969).

64. *Id.* at 639.

65. MODEL PENAL CODE § 250.1 Comment 4(c) at 14 (Tentative Draft No. 13, 1961).

66. 408 U.S. 901 (1972).

67. *Id.* at 904-05, in reference to State v. Profaci, 56 N.J. 346, 353, 266 A.2d 579, 583-84 (1970).

68. 408 U.S. 913 (1972).

69. *Id.*

the Court reversed a lower court decision in *Brown v. Oklahoma*,[70] in which the appellant had been invited to a meeting as a representative of the Black Panther Party. The appellant expressed his opinion of police in less than glowing terms. Mr. Justice Powell's concurring opinion pointed out that the appellant's language in such circumstances should have been anticipated.[71]

Two recent denials of certiorari by the Supreme Court indicate that the Court found the contested disorderly conduct statutes were sufficiently definite so as not to be considered unconstitutionally vague or overbroad. The case of particular interest to this jurisdiction is of *City of Chicago v. Weiss*[72] in which the petitioner was arrested for disobeying a police dispersal order during the 1968 Democratic National Convention. He based his appeal on the alleged unconstitutionality of Chapter 193, Section (d) of the Municipal Code of Chicago which states as follows: "A person commits disorderly conduct when he knowingly: fails to obey a lawful order of dispersal by a person known by him to be a peace officer under circumstances where three or more persons are committing acts of disorderly conduct in the immediate vicinity, which acts are likely to cause substantial harm or serious inconvenience, annoyance or alarm." The Supreme Court, in denying certiorari, felt that the petitioners first, fourth and fourteenth amendment rights were not violated by either the statute or the dispersal order.[73]

In *Waller v. City of St. Petersburg*,[74] the Court also upheld a Florida statute prohibiting verbal abuse of policemen which was much more specific than the Georgia law in *Gooding*. The ordinance made it unlawful "to challenge to fight, assault, strike, verbally abuse or make derogatory remarks to a police officer in the performance of his duties."[75] The Court also felt that this ordinance was not unconstitutionally overbroad.[76]

The last cases reflect the three step process used by the Court in disorderly conduct cases from *Chaplinsky*[77] to *Gooding*. The Court will examine the wording of the statute, its interpretation by state courts, and the particular circumstances in which the law is applied. The third requirement becomes especially significant when the objectionable language

---

70. 408 U.S. 914 (1972).
71. *Id.*
72. 51 Ill. 2d 113, 281 N.E.2d 310 (1972).
73. 51 Ill. 2d 113, 281 N.E.2d 310, *cert. denied*, 409 U.S. 896 (1972).
74. 261 So. 2d 151 (Fla. 1972).
75. 261 So. 2d 151 (Fla.), *cert. denied*, 409 U.S. 989 (1972).
76. *Id.*
77. 315 U.S. 568 (1962).

is directed towards a police officer. Although the *Gooding* decision may be appreciated for its stubborn defense of free expression, it does not resolve the problem of abuse toward police. Perhaps the solution lies in the recommendation of the Model Penal Code that a policeman "preface the arrest by a warning."[78] Yet even an exact constitutional formula will not negate the fact that the right of free expression requires tolerance on the part of all citizens. Former Attorney General John Mitchell acknowledged this fact when he said, "We cannot expect political demonstrations to be conducted like prayer meetings. We must expect language which may incite hostility or may be obscene. The First Amendment protects all of us, including men and women who choose to be unruly, unreasonable or impolite."[79]

Mark Pearlstein

---

78. "Where the policeman is the victim of the provocative words of abuse, he must preface his arrest by a warning. It appears that there is no first amendment right to engage in deliberate and continued baiting of policemen by verbal excess which have no apparent purpose other than to provoke reaction." MODEL PENAL CODE § 250.1 Comment 4(c) at 14 (Tentative Draft No. 13, 1961).

79. L.A. Times, July 4, 1970 § 1 at 2, col. 4.