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Purging Unseemly Expletives from the Public Scene: A Constitutional Dilemma

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NOTES

PURGING UNSEEMLY EXPLETIVES FROM THE PUBLIC SCENE: A CONSTITUTIONAL DILEMMA

There can be no doubt that some expressions currently in vogue among the radical elements of the populace do little to elevate public discourse. At least one court has taken judicial notice that the current language of dissent is offensive to many.[1] It is questionable, however, whether such language constitutes disorderly conduct. Indeed, broad disorderly conduct statutes are susceptible to discriminatory enforcement against those whose ideas, language or physical appearance cause offense to others.[2] Perhaps it is only coincidental that during the last decade the total number of disorderly conduct arrests rose 2.8 per cent while the number of such arrests for persons under eighteen rose 66.3 per cent for males and 99.5 per cent for females.[3] Whatever the ultimate reason, however, the recent Supreme Court decision in *Cohen v. California*[4] represents the latest in a series of constitutional attacks upon disorderly conduct and related statutes[5] and their susceptibility to discriminatory

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1. Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969), took judicial notice of the use of the word "motherfucker" by young radicals and protestors from coast to coast. *Cf.* Attorney General John Mitchell, in a major policy speech:

> 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.

Los Angeles Times, July 4, 1970, § 1, at 2, col. 4.

2. In Coates v. Cincinnati, 402 U.S. 611 (1971), the Supreme Court struck down a disorderly assembly ordinance, which provided in part:

> It shall be unlawful for three or more persons to assemble . . . and . . . conduct themselves in a manner annoying to persons passing by. . . .

CINCINNATI, OHIO, CODE OF ORDINANCES §901-L6 (1956)

Noting that "alleged discriminatory enforcement of this ordinance figured prominently in the background of the serious civil disturbances that took place in Cincinnati in June 1967" (402 U.S. at 616, n.6), the Court indicated also that anti-social conduct could not be regulated by "an ordinance whose violation may entirely depend upon whether or not a policeman is annoyed." 402 U. S. at 614.

3. 1970 FBI UNIFORM CRIME REPORTS, tables 24, 26.

4. 403 U.S. 15 (1971).

5. *See, e.g.*, Cox v. Louisiana, 379 U.S. 536 (1965); Wilson v. Gooding, 431 F.2d 855 (5th Cir. 1970); Severson v. Duff, 322 F. Supp. 4 (M.D. Fla. 1970); University Comm. to End the War in Viet Nam v. Gunn, 289 F. Supp. 469 (W.D. Tex. 1968), *appeal dismissed*, 399 U.S. 383 (1970); Hunter v. Allen, 286 F. Supp. 830 (N.D. Ga. 1968); Baker v. Bindner, 274 F. Supp. 658 (W.D. Ky. 1967); Carmichael v. Allen, 267 F. Supp. 985 (N.D. Ga. 1967). *See generally* Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like*, 3

enforcement. *Cohen* effectively points out the dangers of using prohibition of particular words as a guise for suppression of unpopular views.

Section 415 of the California Penal Code states:

> Every person who maliciously and willfully disturbs the peace or quiet of any neighborhood or person, by loud or unusual noise, or by tumultuous or offensive conduct, or threatening, traducing, quarreling, challenging to fight, or fighting . . . [shall be guilty of a misdemeanor].[6]

In *Cohen,* the Supreme Court rejected the California Court of Appeals' application of §415 in light of the constitutional limitations upon regulation of speech and made it clear that choice of words, as well as the content of the message, may be protected under the first amendment. Thus, the California court's interpretation of the statute as creating a ban against the use of certain words[7] was rejected. Therefore, the conviction of Cohen for violating that per se rule by wearing a jacket bearing the words "Fuck the Draft" in a court house corridor was reversed. While the expression used was "perhaps more distasteful than most others of its genre,"[8] its use could not be prohibited on such a basis. Consistent with the Court's expressed preference for speech which is "uninhibited, robust, and wide open,"[9] *Cohen* established that the first amendment protects not only cognitive,[10] but also emotive[11] speech and thus a state may not ban unseemly expletives from the public dialogue.

CRIM. L. BULL. 205 (1967); Watts, *Disorderly Conduct Statutes in Our Changing Society,* 9 WM. & MARY L. REV. 349 (1967); Comment, *Obscene Remarks to a Police Officer: "Disorderly Conduct," "Disturbance," "Improper Diversion" or Poor Taste?,* 45 MINN. L. REV. 137 (1960), *commenting on* St. Paul v. Morris, 258 Minn. 467, 104 N.W.2d 902 (1960); Comment, *Wisconsin's Disorderly Conduct Statute: Why It Should Be Changed,* 1969 WIS. L. REV. 602; Note, *Breach of the Peace and Disorderly Conduct Laws: Void for Vagueness?,* 12 How. L.J. 318 (1966).

6. CALIFORNIA PENAL CODE § 415 (West 1970).

7. The California Court of Appeals had found the word "fuck" inherently likely to cause violence. People v. Cohen, 1 Cal. App. 3d 94, 81 Cal. Rptr. 503 (1969).

8. 403 U.S. at 25.

9. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

10. The Court has often indicated that ideas, even if offensive, are protected. Bachellar v. Maryland, 397 U.S. 564 (1970); Coates v. Cincinnati, 402 U.S. 611 (1971); Brandenburg v. Ohio, 395 U.S. 444 (1969); Edwards v. South Carolina, 372 U.S. 229 (1963).

11. Additionally, we cannot overlook the fact, because it is well illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. . . . We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.

403 U.S. at 25-26.

Speaking for the majority, Mr. Justice Harlan began his analysis by pointing out what was not at issue. Finding no identifiable conduct[12] and concluding, therefore, that the conviction must have rested solely on Cohen's expression, the Court went on to find that none of the traditional justifications for the regulation of speech were present. The California statute was not directed toward preserving the decorum of a courthouse but was applicable throughout the state and did not differentiate between locations.[13] The expression was not viewed as obscene, since it was not erotic but merely vulgar.[14] Upon examining the "fighting words" doctrine of *Chaplinsky v. New Hampshire*,[15] the Court found it inapplicable. Finally, the Court found no invasion of the privacy of captive hearers.[16] Absent such justifications for state interference with free speech, the Court narrowed the issue to whether the conclusion of the California Court of Appeals that a particular word had a tendency to lead to violence justified the imposition of a complete ban against that word.

In addition to criticizing the California statute because of its indiscriminate sweep,[17] the Court recognized that the California court's construction of the statute was similarly overbroad. The majority believed that the application of a per se rule against the use of the word in question created an irrebutable presumption that the word would cause

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12. *See, e.g.*, United States v. O'Brien, 391 U.S. 367 (1968). O'Brien was convicted for the knowing destruction of a draft card. Since the statute did not distinguish public from private destruction, nor punish destruction which was solely to express one's views, the Court regarded it as directed to the non-communicative aspect of such conduct. The statute was not directed in terms against expression, but against conduct.

Cf. reversals by the Court in expression cases under disorderly conduct statutes where convictions might have been sustained under narrower statutes regulating picketing, demonstrating, blocking streets. Bachellar v. Maryland, 397 U.S. 564 (1970); Street v. New York, 394 U.S. 576 (1969); Gregory v. Chicago, 394 U.S. 111 (1969); Edwards v. South Carolina, 372 U.S. 229 (1963).

> Might it make a difference whether legislators set out to make a law against acts, which may sometimes be accomplished by words, or a law against the words—a difference of constitutional dimension?

Linde, *"Clear and Present Danger" Re-examined: Dissonance in the Brandenburg Concerto*, 22 STAN. L. REV. 1163, 1175 (1970).

13. 403 U.S. at 19.

14. *Id.* at 20. *Cohen* would appear to dispose of such cases as State v. Leonard, 255 Iowa 1365, 124 N.W.2d 429 (1963), in which "son of a bitch" was held obscene on the rationale that the word "bitch" implies a "hussy." The dissent pointed out the unlikelihood that the words "I'll punch you in the mouth, you son of a bitch" would appeal to the average person's prurient interests. *Id.* at 1374, 124 N.W.2d at 435 (dissenting opinion).

15. 315 U.S. 568 (1942).

16. 403 U.S. at 22. The Court noted that the statute was not directed toward protecting such hearers but applied indiscriminately to conduct that disturbed "any neighborhood or person." *Id.* at 22.

17. *Id.*

people to act violently.[18] However, rather than basing its decision either upon the breadth of the statute or the California court's per se rule, the Supreme Court chose to analyze other possible justifications for the conviction. The Court examined the possibility that the use of the word, apart from the per se rule, actually did have a tendency to cause violence or, alternatively, that a ban might be necessary for the maintenance of a suitable level of public discourse.

In considering the tendency of Cohen's words to cause violence, the Court, concluding that such a presumption was based on "undifferentiated fear,"[19] found no evidence that

> . . . substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities with execrations. . . . There may be some persons about with such lawless and violent proclivities, but that is an insufficient base upon which to erect . . . a governmental power to force persons who wish to ventilate their dissident views into avoiding particular forms of expression.[20]

Furthermore, the Court found that the argument was

> . . . little more than the self-defeating proposition that to avoid physical censorship of one who has not sought to provoke such a response by a hypothetical coterie of the violent and lawless, the States may more appropriately effectuate that censorship themselves. . . .[21]

It regarded a subsequent "clear and present danger" construction of the statute by the California Supreme Court[22] as insufficient justification for remand since the new construction represented no difference of substance.[23]

Turning to the alleged necessity of maintaining a suitable level of discourse, the Court examined the function of free expression in a

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18. *Id.* at 23 n. 5.
19. *Id.* at 23.
20. *Id.*
21. *Id.*
22. The statute was construed to require: . . . wilful and malicious conduct that is violent and endangers public safety and order or that creates a clear and present danger that others will engage in violence of that nature.

In re Bushman, 1 Cal. 3d 767, 773, 463 P.2d 727, 731, 83 Cal. Rptr. 375, 379 (1970).

23. 403 U.S. at 17 n. 2. *Bushman* was decided one month after the California Supreme Court declined, over the objections of Chief Justice Traynor and Justices Peters and Tobriner, to review *Cohen*. *Bushman* is evidently the first case in which the California Supreme Court has construed the statute.

The *Cohen* dissent would have remanded *Cohen* for reconsideration in light of *Bushman*. *Id.* at 27-28.

"diverse and populous" society[24] and noted that apparent discord and tumult were unavoidable side effects of such freedom. In this context, the Court weighed the dangers of banning particular words against the social benefits to be gained from such a ban and declined to take the three risks which it recognized: (1) the difficulty of distinguishing among offensive words, (2) the possibility of censoring particular words as a means of banning unpopular views and (3) the necessity of protecting the emotive as well as the cognitive content of speech.

Concluding that the only arguably sustainable rationale for Cohen's conviction, the necessity of maintaining a suitable level of discourse, did not justify the complete ban imposed by the California court, the Supreme Court reversed the conviction.

THE "FIGHTING WORDS" DOCTRINE AFTER "COHEN"

The Supreme Court's refusal to apply the "fighting words" doctrine of *Chaplinsky* raises serious doubts as to the current limits of that principle. *Chaplinsky* has been relied upon in various contexts to support broad per se rules regulating other classes of speech[25] in addition to "fighting words," based on its dictum that:

> . . . 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.[26]

While *Chaplinsky* stated that punishment of obscenity, profanity and libel raises no constitutional problems, subsequent cases have indicated

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24. *Id.* at 24.

25. Roth v. United States, 354 U.S. 476 (1957) (obscenity). Chief Justice Warren and Justices Black, Douglas and Harlan dissented. Beauharnais v. Illinois, 343 U.S. 250 (1952) (criminal libel). Justices Black, Reed, Douglas and Jackson wrote separate dissents.

26. 315 U.S. at 571-72. No case law is cited for this proposition. Z. CHAFEE, FREE SPEECH IN THE UNITED STATES (1941) is the only authority given. For the narrower category of epithets and personal abuse, the Court cites Cantwell v. Connecticut, 310 U.S. 296 (1940). Again this is dictum since the conviction was reversed, despite the fact that hearers were offended by Cantwell's attack on Catholics (one felt "like hitting him" and another was "tempted to throw him off the street"), on the ground that the effect on the hearers was not a breach of the peace.

The *Chaplinsky* language is sufficiently broad to suggest to at least one commentator a"split-level" theory of the first amendment:

> There are two categories of speech—that entitled to First Amendment scrutiny . . . and that so without importance or ideas that it is virtually *per se* subject to regulation and raises no constitutional issues.

H. KALVEN, THE NEGRO AND THE FIRST AMENDMENT 46 (1965).

that, in some circumstances, obscenity,[27] profanity[28] and libel[29] are not per se beyond the protection of the first amendment. The *Cohen* decision now indicates that the "fighting words" doctrine is narrower than the dictum *Chaplinsky* had recognized.

While the majority in *Cohen* cited *Chaplinsky* with approval,[30] they found the *Chaplinsky*-related rationale of the California Court of Appeals "plainly untenable."[31] The Court distinguished *Chaplinsky* on the facts by pointing out that Cohen's expression was not addressed to a particular person, nor could anyone have reasonably regarded it as a personal insult. Moreover, the Court stressed the state's failure to show either that Cohen intended to arouse anyone to violence or that any person was so aroused.[32]

The *Cohen* decision, therefore, made it clear that the "fighting words" doctrine is limited to situations in which such an expression is addressed to a particular individual. Thus, as construed by the majority in *Cohen, Chaplinsky* has no application to situations where members of an audience are not personally insulted by the speaker but merely dislike the views expressed or are antagonized by them. Such a result is

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27. Stanley v. Georgia, 394 U.S. 557 (1969), held a Georgia statute, insofar as it made private possession of obscene matter a crime, unconstitutional under the first and fourteenth amendments.

28. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952), held that the motion picture, "The Miracle," though deemed sacrilegious by the state of New York, was entitled to the protection of the first amendment.

29. New York Times Co. v. Sullivan, 376 U.S. 254 (1964). The Alabama Supreme Court had relied on *Beauharnais, Chaplinsky* and *Roth, inter alia,* for the proposition that libel is not protected by the first amendment. The United States Supreme Court said:

> [W]e are compelled by neither precedent nor policy to give any more weight to the epithet "libel" than we have to other "mere labels" of state law. . . . Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity . . . and the various other formulae for the repression of expression . . . libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.

Id. at 269.

Garrison v. Louisiana, 379 U.S. 64 (1964), held that *Sullivan* limits state power to impose criminal sanctions for criticism of official conduct of public officials.

It has been noted that the ancient justification given by the Star Chamber for the punishment of criminal libel was on the same rationale as the "fighting words" doctrine:

> [F]or although the libel be made against one, yet it incites all of those of the same family, kindred or society to revenge, and so tends *per consequens* to quarrels and breach of the peace, and may be the cause of shedding of blood, and of great inconvenience. . . .

Note, *Constitutionality of the Law of Criminal Libel,* 52 COLUM. L. REV. 521, 522 n.12 (1952), *citing* De Libellis Famosis, 77 Eng. Rep. 250, 251 (K.B. 1606).

30. 403 U.S. at 20.

31. *Id.* at 23.

32. *Id.* at 20.

consistent with prior cases indicating that the first amendment does not permit the power of a hostile audience to silence a speaker.[33]

The approval of *Chaplinsky* does suggest that the state's prohibition of "fighting words" directed to a particular person may retain some immunity from first amendment scrutiny. However, much of the language of *Cohen* appears to point the other way, at least where no intent to provoke is shown. The distaste exhibited by the Court for the flat ban on any particular word, the difficulties of distinguishing among offensive words and the disinclination of the Court to believe that citizens will retaliate with violence when their sensibilities are offended are considerations which appear equally applicable to the "fighting words" doctrine. In any case, if the "fighting words" doctrine does retain any vitality after *Cohen,* that case restricts its application to expressions directed to, or perceived by, an "ordinary citizen."[34] The Court quoted with approval[35] Mr. Justice Frankfurter's statement in another context concerning public officials:

> [O]ne 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.[36]

This limitation of *Chaplinsky* to the "ordinary citizen," as opposed to the "public man," is consistent with the logic of *New York Times Co. v. Sullivan,*[37] and the Court seems to recognize that it would be inconsistent to provide a qualified protection for those who libel public officials while providing no protection whatever for those who slander them.[38] However, "ordinary citizen" is not defined.

The Implications of "Cohen"

Whited v. State[39] decided a few weeks before *Cohen,* involved a

33. *See* Street v. New York, 394 U.S. 576 (1969); Gregory v. Chicago, 394 U.S. 111 (1969); Edwards v. South Carolina, 372 U.S. 229 (1963).

34. 403 U.S. at 20.

35. *Id.* at 26.

36. Baumgartner v. United States, 322 U.S. 665, 673-74 (1944).

37. 376 U.S. 254 (1964). *Sullivan* indicated that uninhibited, robust and wide open speech "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.* at 270.

38. Under the *Cohen* standard, it is doubtful whether *Chaplinsky* itself would be decided in the same way today, for it was based on insults to public officials. Chaplinsky called a city marshal a "God damned racketeer" and a "damned Fascist" and stated that the "whole government of Rochester are Fascists or agents of Fascists." 315 U.S. at 569. The Court found argument unnecessary to demonstrate that such epithets would be likely to provoke the average person to violence. *Id.* at 574.

39. —Ind.—, 269 N.E.2d 149 (1971).

disorderly conduct conviction in circumstances analagous to those in *Cohen*. Although the conviction of Whited was affirmed by the Indiana Supreme Court, the decision appears questionable in light of *Cohen*.

Whited, along with several friends, was on the porch of a house in Indianapolis when police approached to make a search.[40] Whited called out, "Here come the damn pigs." When asked for identification, he replied that he had done nothing, did not have "to say a god-damn thing"[41] and that the officer should "get his ass off the porch and stop harassing" him.[42] He was thereupon arrested for disorderly conduct.[43] No testimony indicated that any of his remarks other than the first was loud. All the persons on the porch were also arrested, along with members of a crowd which had gathered.

While both the majority and dissent make it clear that Whited was convicted solely for what he said rather than for his actions, the court analyzed the case as one of conduct,[44] without deciding whether mere

40. As far as the record indicates, the police had no warrant for arrest or search, nor was probable cause shown. The subsequent search turned up no evidence of criminal activity. The order of arrival is not clear; there were, however, twelve officers and five cars involved. The record is silent as to whether sirens or flashing lights were used. *Id.* at—, 269 N.E.2d at 152, 153.

41. Brief for Appellee at 2.

42. *Id.*

43. *Id.* at 2-3. Subsequent to his arrest, Whited's "tirade continued concerning [an officer's] 'origination into the world' and so forth." *Id.* at 3.

44. The court used such language as: "appellant's conduct," "appellant's acts," "conduct on the porch," "conduct which by its nature is offensive," "Whited's actions," "accused's actions." —Ind. at—, 269 N.E.2d at 151; "unseemly actions," "appellant's conduct," "the acts themselves," "tendency of appellant's actions." *Id.* at —, 269 N.E. 2d at 152.

The disorderly conduct statute under which Whited was convicted also looks toward conduct:

> Whoever shall act in a loud, boisterous or disorderly manner so as to disturb the peace and quiet of any neighborhood or family, by loud or unusual noise, or by tumultuous or offensive behavior, threatening, traducing, quarreling, challenging to fight or fighting, shall be deemed guilty of disorderly conduct. . . .

IND. CODE § 35-27-2-1 (1971), IND. ANN. STAT. § 10-1510 (1956). The statute was enacted in 1943 as a replacement for IND. ANN. STAT. § 10-1509 (Supp. 1941), which provided:

> Whoever shall act in a loud, boisterous or disorderly manner in any place either publicly or privately, or whoever shall act to the prejudice of the good order of any community, shall be guilty of disorderly conduct.

Prior to 1941, Indiana had had no disorderly conduct statute and dealt with public offenses under specific statutes or ordinances, *e.g.*, affray, provoking assault, picketing, profane swearing.

Cf. IND. CODE § 35-1-80-1 (1971), IND. ANN. STAT. § 10-1508 (1956), which provides that the offense of disturbing a public meeting may be accomplished by either words or acts: "loud or unnecessary talking, hallowing, or by any threatening, abusive, profane or obscene language or violent actions. . . ." The maximum penalty for violation of the statute is a fine of fifty dollars; no jail term is authorized. The penalty for violating the disorderly conduct statute may be as much as 500 dollars and 180 days.

language is an "act" within the meaning of the statute.[45] Quoting the statute, the court found the requisite elements to be:

(1) act[ed] in a loud, boisterous manner

(2) *so as* to disturb the peace and quiet of the neighborhood.[46]

The court noted that "a conviction would be proper if appellant's conduct was *such as* to disturb the neighborhood,"[47] thereby construing the statute as having no element of intent. The fact that a crowd assembled had evidentiary weight but was not required for conviction:

> [O]nly a showing of conduct which *by its nature* is offensive in the context . . . is required. . . .[48]

Whereas prior Indiana cases had indicated that an actual disturbance of a neighborhood was required,[49] the court in *Whited* made it clear that

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45. *Cf.* Commonwealth v. Jarrett, —Mass.—, 269 N.E.2d 657, 662 (1971) (dictum):

> The mere making of statements, or expressing of views or opinions, no matter how unpopular, or views with which persons present do not agree, has never been and is not now punishable as a disturbance of the peace under the law of this Commonwealth.

46. —Ind. at —, 269 N.E.2d at 150 (emphasis added).

47. *Id.* at —, 269 N.E.2d at 151 (emphasis added). The court evidently viewed "so as" in the statute as synonymous with "such as," reading it to mean a tendency to produce a certain result. An equally plausible reading of "so as" is "in order to," that is, with the purpose of producing that result. Unless read in the latter way, the statute is silent as to intent.

48. *Id.* at —, 269 N.E.2d at 151 (emphasis in original). On appeal, defense counsel had argued that the police activity, not the defendant, had attracted the crowd and that no evidence showed that persons other than the police were disturbed or offended by anything the defendant said. Brief for Appellant at 9-10.

49. In Romary v. State, 223 Ind. 667, 64 N.E.2d 22 (1945), the affidavit had been drawn under the requirements of the superseded statute (quoted in note 44 *supra*) and failed to allege a neighborhood disturbance. It fully described the acts; however, it stated only that such acts were done "to the prejudice of the good order of the community of Fort Wayne." In ruling on a motion in arrest of judgment, the court indicated that while a defective indication of a material fact might render the indictment or affidavit insufficient on motion to quash, such a defect on motion to arrest could be cured by evidence. Evidence that the events complained of occurred at 2:35 a.m., that the language was loud and profane and the conduct of four persons libidinous and sensual, that many beer bottles were near the defendants, that the attention of the police had been attracted from 300 feet away and that the police had stopped at a lighted house and found a neighbor woman and her children awake warranted the inference that the woman and her children had been disturbed.

The defendant in Morris v. State, 227 Ind. 630, 88 N.E.2d 328 (1949), appealed his conviction for brawling in a tavern on the ground that a tavern was not within the meaning of a "neighborhood or family." The court found that:

> The word "neighborhood" as used in the disorderly conduct statute, includes both residential and business sections. . . . A tavern is a part of a neighborhood as well as any other business to which the public is invited, and a disturbance, such as revealed by the evidence herein . . . was sufficient for the court to find that the peace of the neighborhood was disturbed.

Id. at 632, 88 N.E.2d at 329.

Rexroat v. State, 245 Ind. 688, 201 N.E.2d 558 (1964), the only other case to reach

"offensiveness" did not refer to the disturbance of particular individuals, but rather meant the nature of the conduct in terms of its potential for disruption of the neighborhood.[50]

The *Whited* court recognized that in speech-related cases the first amendment requires that proscription be premised upon a tendency to lead to violence. The court, therefore, advanced three points to support the proposition that such a finding was "implicit in the trial court's ruling."[51] First, the court found that the additional arrests in the crowd were evidence that Whited's acts "tended to increase the likelihood of violence."[52] Secondly, the court found "equally persuasive in this regard" Whited's "resistance" to what he should have assumed to be a valid police activity.[53] Thirdly, his acts were found to be "in concert" with those of others on the porch.[54]

As to the first finding, the court apparently[55] relied upon *Bacheller*

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the supreme court under the statute, is ambiguous. The defendant was convicted of entering to commit a felony, auto banditry and disorderly conduct. Three witnesses who lived near the scene of the crime testified as to the defendant's loud, belligerent conduct after the police arrived and his refusal to cooperate until one officer drew a revolver to secure compliance. Two witnesses also testified they had observed the defendant and others ransack a house for seven minutes before the police arrived. It is not clear what attracted the neighbor's attention to the house. A crowd of 15-20 assembled. The court did not discuss the element of actual disturbance of the neighborhood.

50. [I]t is the offensive nature of the conduct in terms of the *neighborhood* that violates the statute. The officers in this case are not the focal point of the conviction. While they related the nature of the appellant's acts it was the acts themselves and not those at whom they were directed that form the basis of the conviction.

—Ind. at—, 269 N.E.2d at 152 (emphasis in original). Apart from the problem of measuring offensiveness in the absence of anyone who is offended, the standard atriculated by the *Whited* court took no account of variations in the sensibilities of different groups, nor did it distinguish among recipients.

51. *Id.* at —, 269 N.E.2d at 152.

52. *Id.* at —, 269 N.E.2d at 152. There is no indication in the record whether the arrests in the crowd were for language or for acts.

53. *Id.* at —, 269 N.E.2d at 152. Why the defendant should have "assumed" the police were acting lawfully is not clear. In fact, they were not, as the dissent points out. They had neither warrant nor apparent probable cause for a search, and without the consent of the householder to search stood in no better position than trespassers. *Id.* at —, 269 N.E.2d at 156.

54. *Id.* at —, 269 N.E.2d at 152. It is not clear whether "in concert" suggests some kind of plan or merely that others also used offensive language. The recital of facts makes it clear that the raid was a surprise to the defendant and his companions and that their exclamations were spontaneous.

55. The point appears to derive from the state's brief. The state's case was based on the proposition that "foul, vulgar and obscene" language to a police officer is per se disorderly conduct. Additionally, the state alleged:

It has been held that the gist of the offense . . . is the doing or saying or both of that which offends, disturbs, or incites a number of people gathered in the same area. Bacheller [*sic*] v. State, 3 Md. App. 626, 240 A.2d 623 (1968). . . . Since members of the gathering crowd were arrested for disorderly conduct as Whited hurled his foul, vulgar, and obscene epithets, it

[*sic*] *v. State*,[56] a case which had already been reversed by the United States Supreme Court.[57] Insofar as that conviction might have been based either upon the bystanders' general disapproval of demonstrations or their anger at the petitioners' particular views, the Court stated:

> It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.[58]

Unfortunately, the Indiana court gives no explanation of how the last two points relate to the possibility of violence.

Whited is subject to many of the same criticisms that the Supreme Court found in the state court's treatment of *Cohen*. Although no separately identifiable conduct was mentioned, conduct was apparently presumed. If there was a basis for identifying Whited's words as conduct, the court should have revealed it. Absent such an explanation, Whited's conviction, like Cohen's, rests solely upon speech. In addition, the Indiana statute suffers from the same indiscriminate sweep criticized by the *Cohen* Court. It is directed neither toward the protection of particular places, such as courthouses, nor toward particularly situated hearers, such as a captive audience. Moreover, the Indiana statute, unlike California's, has no element of intent, an infirmity indicated by the *Whited* court's failure to suggest such a requirement in its construction of the statute.[59]

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can reasonably be inferred that they were disturbed and incited by Whited to such an extent that they were arrested for disorderly conduct.

Brief for Appellee at 13-14.

56. 3 Md. App. 626, 240 A.2d 623 (1968).

57. Bachellar v. Maryland, 397 U.S. 564 (1970). The conviction might have rested on a finding that the defendants obstructed passage and refused to obey a police command to move when their refusal could have endangered public peace. However, it might also have rested on the ground on which the trial judge instructed the jury in the quoted language. Because a conviction based on such an instruction would have been unconstitutional, the United States Supreme Court reversed.

58. *Id.* at 567.

59. In contrast, the General Assembly paid due attention to intent when enacting the following criminal provisions during its last session:

> . . . It shall be unlawful for any person intentionally to . . .engage in any violent conduct with the intent to prevent any peace officer . . . from the performance of his duty . . . when such conduct does in fact substantially hinder or prevent performance of said duty. . . .

Pub. L. No. 450, § 1, [1971] Ind. Acts 2081, *amending* IND. CODE § 35-1-77-1 (1971), IND. ANN. STAT. § 10-1505 (1956).

> . . . A person is guilty of inciting riot if he wilfully incites a group of five (5) or more persons to engage in a riot and said persons thereafter do in fact engage in a riot as a result of such incitement.

Pub. L. No. 450, § 4 [1971] Ind. Acts 2082.

Both offenses require specific intent and an actual result, not merely a tendency. The first statute requires, additionally, violent conduct. It is anomolous in view of the genuine substantive evil of civil disorder that the court allows invocation of the police

The analysis applied by the Indiana Supreme Court is also inconsistent with the *Cohen* interpretation of the "fighting words" doctrine. The court specifically refused to focus on the reaction of the police or of any other individual to whom the expression might have been addressed. In light of *Cohen's* interpretation of *Chaplinsky,* "fighting words" may only be prohibited when directed to a particular individual.[60]

Absent the traditional justifications for such regulation of speech, it is appropriate to ask, as the Court did in *Cohen,* whether the state of Indiana may constitutionally punish Whited's outburst as either tending to lead to violence or unjustifiably lowering the acceptable level of public discourse. As in *Cohen,* there was no indication that Whited intended to arouse anyone to violence or that anyone was, in fact, so aroused. Moreover, in view of *Cohen's* refusal to distinguish between "tendency to lead to violence" and "clear and present danger," the conviction in *Whited* appears even more unsupportable by evidence. Apart from the arrests in the crowd (the reason for which appears nowhere in the record) there was no evidence that Whited's remarks tended to lead to violence or constituted a "clear and present danger."

It would appear, therefore, that there was no justification, traditional or otherwise, for the conviction in *Whited.* Instead, the opinion suggests that the court may have been reacting to more than Whited's single use of the word "pigs" when it characterized that use as "freely employing colloquial terminology used by a minority of our citizens to refer to officers of the law."[61] *Cohen* should prevent future convictions on such a basis.

CONCLUSION

Cohen does suggest legitimate state interests which may justify regulation of speech. Such interests include regulation of separate non-speech elements, of obscenity or of personal insults likely to provoke assault and the protection of particular locations or personal privacy rights. In order for this regulation to satisfy the requirements of the Constitution, however, statutes must be more narrowly construed than the California Court of Appeals was willing to do in *Cohen,* and a fortiori, more narrowly than the Indiana Supreme Court construed the statute in *Whited.* The United States Supreme Court has made it clear that no statutory construction as broad as that attempted in California

power to prevent "tendencies" to less serious disturbances on a considerably lower standard.

60. *See* text accompanying notes 32-33 *supra.*

61. —Ind. at—, 269 N.E. 2d at 150-51.

and accomplished in Indiana can be justified as making valid discriminations between different persons and different places.

A speaker may incite others to violence in either of two ways. First, he may advocate, encourage or counsel others to commit violent acts.[62] Secondly, he may so offend others by his ideas or language that they are provoked to violence against him.[63] *Cohen* suggests, in broad dictum, that at least in the latter case, a speaker may be silenced only upon a showing of the audience's countervailing constitutional right not to listen:

> The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.[64]

Absent a showing of interference with such privacy rights, the result in *Whited* appears unsupportable under a *Cohen*-type analysis. Whited was not only impolite but impolitic. His denunciation of the police,[65] however, would appear as deserving of protection as a denunciation of

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62. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969).

63. *See, e.g.*, Gregory v. Chicago, 394 U.S. 111 (1969).

64. 403 U.S. at 21.

65. The cases are divided as to whether language addressed to the police can be the ground for a charge of disorderly conduct. Among the cases holding in the affirmative are: Landry v. Daley, 288 F. Supp. 183 (N.D. Ill. 1968), *appeal dismissed*, 393 U.S. 220 (1968); Duncan v. United States, 219 A.2d 110 (D.C. App. 1966); St. Paul v. Morris, 258 Minn. 467, 104 N.W.2d 902 (1960), *cert. denied*, 365 U.S. 815 (1961). *Contra*, Oratowski v. Civil Serv. Comm'n, 3 Ill. App. 2d 551, 123 N.E.2d 146 (1954) (dictum); Columbus v. Guidotti, 81 Ohio L. Abs. 33, 160 N.E.2d 355 (1958); Lane v. Collins, 29 Wis. 2d 66, 138 N.W.2d 264 (1965). *See also* dissenting opinion of Judge Hammond in Sharpe v. State, 231 Md. 401, 190 A.2d 628 (1963), *cert. denied*, 375 U.S. 946 (1963):

> . . . Sharpe was foolish and boorish; and his reaction to being pushed around, as he saw it, should have been restrained, as should his use of profanity which was ill advised, unattractive and an empty substitute for thought, as it usually is. In this case it brought him only a severe beating by the two officers, arrest, and conviction.
>
> The officer's impolitic conduct should not have produced Sharpe's discourtesy or arrogance in return, but while discourtesy or arrogance to a policeman may infuriate him, and so are unwise to indulge in, they are not crimes which the policeman may translate into disorderly conduct in order to vent his annoyance by making an arrest.

Id. at 408, 190 A.2d at 632-33. *Cf.* MODEL PENAL CODE § 250.1, Comment 4 (c), at 14 (Tent. Draft No. 13, 1961):

> 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 by disorderly responses.

the Selective Service System,[66] the American flag[67] or the President of the United States.[68]

Cohen, however, has its own inherent ambiguity. It is difficult to reconcile the decision's concern with distinguishing among differently situated recipients with its suggestion that there is a single set of "personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction."[69] Given the diversity of sensibility and linguistic expression among ethnic, cultural, religious, racial, class and age groups in our heterogeneous society, the difficulty of applying a standard involving "common knowledge" of the reactions of "ordinary citizens"[70] seems insurmountable. As Justice Loevinger of the Minnesota Supreme Court has pointed out:

> [I]t is quite impossible to determine how offensive any particular expression is. To begin with, curses, oaths, expletives, execrations, imprecations, maledictions, and the whole vocabu-

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

67. Street v. New York, 394 U.S. 576 (1969).

> [T]he "right to differ as to things that touch the heart of the existing order," encompass[es] the freedom to express publicly one's opinions about our flag, including those opinions which are defiant or contemptuous.

Id. at 593.

68. Watts v. United States, 394 U.S. 705 (1969). Watts was charged with a felony for threatening the President. During a rally he had said, "If they ever make me carry a rifle the first man I want to get in my sights is L. B. J." The Court regarded the statement as political hyperbole, a "crude offensive method of stating a political opposition. . . ." *Id.* at 708. The Court also noted that "[t]he language of the political arena, like the language used in labor disputes . . . is often vituperative, abusive, and inexact." *Id.*

69. 403 U.S. at 20.

70. A construction was recently put on the New Jersey Disorderly Person Act, N.J. STAT. ANN. § 2A:170-29(1), requiring that words be intended to offend and, in view of the sex and age of the listener and other circumstances, be likely to do so. Under this standard, the New Jersey Supreme Court reversed two convictions for arguing with policemen: State v. Profaci, 56 N.J. 346, 266 A.2d 579 (1970) ("What the f--- [*sic*] are you bothering me for?") and State v. Reed, 56 N.J. 354, 266 A.2d 584 (1970) ("[W]ho the hell do you think you are? . . . Jesus Christ. I don't give a God damn who the hell you are.").

In discussing the allegation of overbreadth, the court in *Profaci* said:

> [T]he resolution of this issue depends upon whether the statute permits police and other officials to wield unlimited discretionary powers in its enforcement. If the scope of the power permitted these officials is so broad that the exercise of constitutionally protected conduct depends on their own subjective views as to the propriety of the conduct, the statute is unconstitutional.

56 N.J. at 350, 266 A.2d at 582, *quoting* Landry v. Daley, 280 F. Supp. 938 (N.D. Ill. 1968).

A federal court had previously construed the New Jersey statute in another context to exclude spontaneous and casual profanity from its ambit. Karp v. Collins, 310 F. Supp. 627 (D.N.J. 1970).

lary of insults are not intended or susceptible of literal interpretation. They are expressions of annoyance and hostility—nothing more. To attach greater significance to them is stupid, ignorant, or naive. Their significance is emotional, and it is not merely immensurable but also variable. . . . The standards of verbal behavior of those social groups within which judges move are not fairly applicable to the entire population.[71]

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71. St. Paul v. Morris, 258 Minn. 467, 480-81, 104 N.W.2d 902, 910-11 (1960) (dissenting opinion), *cert. denied*, 365 U.S. 815 (1961).