

A TENDENCY TO INCITE:  
APPLYING KENNETH BURKE'S PENTAD TO *COHEN V. CALIFORNIA*

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Paul Robert Cohen was arrested and sentenced to 30 days imprisonment in 1968 for wearing a jacket which read "Fuck the Draft" into a California courthouse. Appealing to the United States Supreme Court, Cohen claimed that his First Amendment rights to freedom of expression had been violated. In a landmark decision, the Court found that states cannot universally criminalize the use of expletives in public, with five justices in the majority opinion and four justices dissenting. This paper examines the link between communication theory and jurisprudence by using Kenneth Burke's dramatic pentad to compare the two opinions as competing dramas.

A Tendency to Incite:

Applying Kenneth Burke's Pentad to *Cohen v. California*

Cohen's Jacket

Paul Robert Cohen walked into the Los Angeles Municipal Court in April of 1968 wearing a jacket which had "Fuck the Draft" painted on it. Although he removed his jacket upon entering the courtroom, a policeman who had noticed the slogan approached the bench and asked the judge to hold Cohen in contempt of court. The judge denied the request, and the policeman arrested Cohen when he left the courtroom. The young man was charged with violating a California law which prohibited "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct" (*Cohen v. California*, 1971, para. 2), and was sentenced to 30 days in prison.

The California Court of Appeal acknowledged that Cohen did not verbalize his message at any point while he was in the courthouse (*Cohen v. California*, 1971). Also, though the words on the jacket were clearly visible and intentionally strong, they did not provoke any violent reaction. In fact, no other complaint was made about the jacket aside from the arresting officer's charge. Cohen's defense during the trial and his subsequent appeals was that he wore the jacket "as a means of informing the public of the depth of his feelings against the Vietnam War and the draft" (*Cohen v. California*, 1971, para. 3). He claimed that the California law violated his First Amendment rights by limiting his freedom of expression.

The United States Supreme Court granted certiorari on February 22, 1971, and delivered their decision on June 7, 1971. Though deeply split, with five justices in the majority opinion (Brennan, Douglas, Harlan, Marshall, and Stewart) and four justices

dissenting (Black, Blackmun, Burger and White), the Supreme Court reversed the California Court's decision. The majority agreed that "absent a more particularized and compelling reason for its actions" (*Cohen v. California*, 1971, para. 23) the State could not criminalize the use of expletives in public. The dissenting justices viewed Cohen's expression as conduct, as opposed to speech, and thus not protected by the First Amendment. They also felt that the California Court of Appeal's interpretation of the law might not have been the authoritative California interpretation at that time. The dissenting justices recommended that the case be remanded to the California Court of Appeal for reconsideration (refer to Appendix A for the full text of the judicial decision).

The majority decision in *Cohen v. California*, written by Justice Harlan, is praised as being "a helpful, and remarkably gallant, contribution to first amendment theory" (Farber, 1980, p. 283). Susan Balter-Reitz (2003) calls the decision "perhaps the Court's finest articulation of the importance of protecting the ability of protesters to use the language they find most appropriate to their message" (p. 160). As a landmark case, *Cohen v. California* has been used in other Court cases (*Gooding v. Wilson*, *Rosenfeld v. New Jersey*, *Brown v. Oklahoma*, *Lewis v. City of New Orleans*) as a standard for incitement and 'fighting words'.

This study examines the majority and dissenting opinions for *Cohen v. California* to determine why the justices were split on the case, and why *Cohen* has had such a lasting impact in First Amendment law. Using Kenneth Burke's theory of dramatism and pentadic methodology, the two opinions are compared, and their underlying philosophies are discovered. The philosophical standpoints of the justices provide insight into both the case and First Amendment law during and after the 1970s regarding incitement.

A case in 1942 also helped limit the kinds of speech that could be considered exceptions to the First Amendment. *Chaplinsky v. New Hampshire* created a two-tier approach to restricting speech based on its inherent value (Herbeck, 2003). Worthwhile speech has “social value as a step to truth” (*Chaplinsky v. New Hampshire*, 1942, para. 11) and is protected by the First Amendment. Worthless speech, which includes not only ‘fighting words’ (words which incite violent reaction or immediate breach of the peace), but also “language that is lewd and obscene, profane, and libelous” (*Chaplinsky v. New Hampshire*, 1942, para. 11), is unprotected by the First Amendment.

The definition of ‘fighting words’ has been narrowed since *Chaplinsky*. In fact, *Cohen v. California* played a key role in redefining fighting words by claiming that “a speaker cannot be silenced because an audience finds the message offensive” (Balter-Reitz, 2003, p. 167). By saying that word choice is a matter of taste, the *Cohen* decision opened the public forum to potentially vulgar language. As Harlan eloquently wrote in the majority opinion, “While the particular four-letter word being litigated here is perhaps more distasteful than others of its genre, it is nevertheless often true that one man’s vulgarity is another’s lyric” (*Cohen v. California*, 1971, para. 20). Thus, epithets cannot be universally struck from public discourse, and cannot be blamed for causing general offense. Tedford and Herbeck note, “the Court [in *Cohen*] narrowed the definition of ‘fighting words’ stated in *Chaplinsky* to words that actually are directed *to another* [italics added] in such a way as to create a danger of breach of peace” (2005, p 171).

The decision in *Cohen* has been cited and expanded upon in many First Amendment cases since 1971. For its standards concerning the captivity of an audience, the Court has since applied the reasoning in *Cohen* to *Spence v. Washington* (1974),

*Erzonznik v. City of Jacksonville* (1975) and *Consolidated Edison v. Public Service Commission of New York* (1980), stating that the message receivers could easily avoid a message they found offensive by turning away, or by throwing away a flyer (Balter-Reitz, 2003, p. 166). While a captive audience can still exist under the *Cohen* standards, the Court usually recognizes a speaker's right to expression over the protection of the public decorum.

*Cohen* has also been used in other offensive message cases. During 1972, a trio of cases that have come to be known as the "motherfucker decisions" (*Rosenfeld v. New Jersey*, *Lewis v. City of New Orleans*, and *Brown v. Oklahoma*) were each remanded to their respective State appellate courts for reconsideration in light of *Cohen v. California* (Herbeck, 2003, p. 89). The Court also used the decision in *Baines v. Birmingham* (1971), and *Hess v. Indiana* (1973), saying that a speaker's "use of profane language was insufficient grounds for restricting protest" (Balter-Reitz, 2003, p. 167). The Court has even cited *Cohen* in several flag-burning cases, including *Spence v. Washington* (1974) and *United States v. Eichman* (1990).

*Cohen v. California*, *Chaplinsky v. New Hampshire*, and *Brandenburg v. Ohio* have each gone a long way toward protecting freedom of speech in subsequent cases. The arguments used in each of the decisions are eloquent and lasting, evidenced by the fact that they are still cited today, even though the most recent of the cases, *Cohen v. California*, was heard over 35 years ago. In order to find the reasons for their longevity, it becomes necessary to look at the cases in terms of communication theory.

### Communication Theory and Jurisprudence

Though it may seem odd to look at jurisprudence, or the philosophy of law, in terms of communication or rhetorical theory, a closer look reveals how intertwined they are (Parker, 2003). The power of language, of words, is the heart of the First Amendment. As Susan Balter-Reitz (2003) states, “There would be no need to protect expression if language had no effect on individuals or culture” (p. 160). Language and jurisprudence are also linked in another important way. Practically speaking, the law and its relevance must be conveyed to the general public in ways a layman could easily understand and follow.

Case law concerning freedom of expression is explicitly communicative in nature, and the issues raised are inherently rhetorical (Parker, 2003). As Streeter (1995) says, “Language is not only the vehicle but the subject-matter of the law” (p.34). Fox expands upon this, saying that “language is not understood as a neutral vehicle for transmitting information; rather it is understood as constituting and reconstituting social relations and power structures” (2002, p. 365). As the dynamics of the social system change, so does the conception and definition of justice. Thus, when Supreme Court rulings are written out, they perform symbolic (linguistic) acts by voiding unconstitutional laws, reversing lower courts’ decisions, or setting precedents for future courts to follow (Rountree, 2001, p. 3). The decisions written by the Supreme Court become the guidelines for interpreting the Constitution. The opinions and explanations written by the Supreme Court justices *become* the interpretation of the law as society must follow it.

Because language is so intertwined with jurisprudence, it is not only the majority opinions that carry weight in future cases. Dissents are written as persuasive arguments,

marking the objection of one or more judge against some aspect of the majority's viewpoint. Beaney and Mason (1972) describe dissenting opinions as "a warning against pressing any particular legal doctrine too far...it is not unusual for the dissents of one generation to become the dominant opinions of the next" (p. 8). Because of this tendency, it becomes equally important to examine the dissenting opinions in a Supreme Court decision as it is to study the majority opinion. Levin-Epstein writes that dissenting opinions "may be conceived as articulations born of divisiveness within the court itself and thus they are the very source of the disorder which the public as well as the legal community traditionally associates with Supreme Court first amendment decisions" (1977, p. 30). These dissents can be seen as merely additional sides to the argument at hand, and it makes as much sense examining them as it does the majority opinions.

#### Research Question

California's claim that Cohen's jacket posed a significant threat rests heavily upon the idea that communicators have a direct impact on an audience. Bailey (1980) describes this as speech efficacy, or the "causal relationships between the speech and the violation of law" (p. 1). In his article concerning the Supreme Court and speech efficacy, Bailey questions whether a speaker can be held fully responsible for the actions taken by her audience after her message has been received, or whether the disposition of the audience must be taken into account as well. Bailey compares the Supreme Court's social model of communication (one-way influence) to the transactional model (two-way interaction) that is accepted by communication scholars. He argues that the audience has as substantial an impact on a rhetorical situation as the speaker, and that the Supreme Court must take that into account when examining incitement cases.

When Cohen wore his jacket into the courthouse, he was not immediately the subject of violence by his peers. The message he wore on his back didn't cause any sort of breach of the peace within the court. Yet the California courts claimed that his message and his behavior were a danger to the public. California maintained that his jacket had a reasonable chance of inciting a violent reaction against Cohen himself. When the Supreme Court heard the case, the majority opinion decided that Cohen's use of an epithet was within his constitutional rights both because his jacket didn't produce a disturbance, and because his choice of words helped to explain his position on the draft more fully to his audience. The dissenting judges argued instead that Cohen's case was not based on speech, but conduct. Even in terms of communication, his expression had nothing positive to contribute to the public dialog, and as such was still unprotected by the First Amendment.

This study examines the decisions for this landmark Supreme Court case to discover the underlying perspectives of the justices. The study also looks at why *Cohen* has had such a lasting impact in First Amendment law. The guiding question for the study is thus: what do the two different opinions of *Cohen v. California*, as presented by the majority and the dissenting justices, say about the nature of provocation within jurisprudence?

### Kenneth Burke's Dramatistic Pentad

#### Dramatism

In 1945, Kenneth Burke wrote *A Grammar of Motives*, in which he introduced his theory of dramatism. The theory studies the elements of a rhetorical situation in terms of a play which can be picked apart and analyzed. Burke's primary interests in studying

rhetical artifacts were discovering “what is involved when we say what people are doing and why they are doing it,” (1945, p. x) or, more simply, action and motive. The term ‘action’ is not to be confused with the biological process of motion, but is rather a symbolic interaction combining choices, purpose, and also motion (Foss, 2004, 383-384). Action involves using specific language and symbols to form a message to complete a task. By studying “the ‘grammatical’ limitations produced by perceptions and characterizations of the elements of action” (Rountree, 2001, p. 4), or the way in which the speaker explains her action, a critic can determine the motive for the action. Thus, there must be a tool to pick apart the elements of the action. This tool is the pentad.

### The Pentad

The dramatistic pentad is made up of five elements that guide the interpretation of an event: act (the description of what took place), scene (the background of the event), agent (the person committing the act), agency (how the act is committed), and purpose (the end the person was trying to achieve). Burke argues that “all statements that assign motives can be shown to arise out of [the elements] and to terminate in them” (1945, p. x). Because the terms are universal and so readily accessible, they make excellent tools for rhetorical criticism.

The pentad is useful for two reasons, as explained by David Ling (1970) in his analysis of Edward Kennedy’s Chappaquiddick speech. Firstly, the pentad serves as a way to determine how the speaker views the world. Each element of the pentad reflects a philosophical school. The materialist school of philosophy, for example, would focus on the scene as the driving element of an event, with the other pentadic elements subject to the scene. The idealist school makes the agent the controller of the event. Likewise, act,

agency, and purpose take on the realism, pragmatism, and mysticism schools, respectively (Levin-Epstein, 1977). Thus individuals from the different philosophical schools would view the same elements of an event, but come to different conclusions about what actually happened, including how and why it happened.

Secondly, the speaker's description of a situation reveals "what he regards as the appropriate response" (Ling, 1970, p. 345) to a given situation. Each philosophical school prescribes a different strategy to alleviate a problem. Because the materialist school sees the scene as the cause of a problem, a materialist would solve that problem by fixing the scene. An idealist would fix the problem by changing the agent, since the idealist school believes it is the agent who is the controlling element of a situation. By indicating which element of the pentad he views as controlling, the speaker also indicates the sort of actions he feels may be taken to resolve the problem at hand. Rountree (1998) notes that a speaker's characterizations of the elements within a situation are not deterministic; they do not dictate a certain action or response. However, they are terministic in that they suggest how a situation should be interpreted.

The pentad itself, however, is not sufficient enough to explain a rhetorical situation. The real power of the pentadic elements lies in their relationships with one another. Each element is intrinsically linked to the other such that "our understanding of one term is necessarily tied to our understanding of all the other terms" (Rountree, 1998, para. 5). These links between the elements are called pentadic ratios, and offer new ways of viewing the situation through terministic screens, or rhetorical filters. Burke describes ten ratios (scene-act, scene-agent, scene-agency, scene-purpose, act-purpose, act-agent, act-agency, agent-purpose, agent-agency, and agency-purpose) which help establish what

factors are controlling the rhetorical situation (1945, p. 15). By looking at each ratio and how the two terms influence or determine each other, a critic can discover what the speaker viewed as the most important dimension of their drama.

It must be noted that performing a pentadic analysis is not an exercise in discovering the absolute 'truth'. Instead, Burke intended for dramatism to reveal the complex ways in which humans interact symbolically. Rather than reducing interactions to a single reality, the pentad "provides us with constructive possibilities for uncovering multiple truths" (Fox, 2002, p. 370). In *A Grammar of Motives*, Burke insists that "what we want is not terms that avoid ambiguity, but terms that clearly reveal the strategic spots at which ambiguities necessarily arise" (1945, p. xii). Dramatism and the pentad are especially useful critical tools when examining legal judgments, since judges are particularly concerned with action and motive while hearing a case. It becomes their charge to construe the ambiguities within the dramas so they may hand down their decisions.

#### Levin-Epstein's *The Rhetoric of the Supreme Court*

Levin-Epstein, in her 1977 Temple University dissertation, studies dissenting opinions of the Supreme Court using dramatistic analysis. Because first amendment rulings are reversed or get modified frequently, Levin-Epstein examines which dissents later became majority opinions, and whether those dissents were rhetorically different from those dissents that were not changed. She identifies the pentadic elements for each dissenting opinion within the First Amendment Supreme Court cases from 1940-1970, and distinguishes which opinions later became majority decisions.

The study finds that, depending on which element of the pentad the dissent describes as the controlling factor in the drama, the opinion has a better or worse chance of later becoming a majority judgment. The more dramatic and complex a dissenting opinion describes the rhetorical situation to be, the more likely the dissent will be taken up by a later Court. Also, every dissent which focused on agent, agency, and scene within the drama were later adopted by the majority of the Court. Alternatively, none of the eleven dissents that focused on purpose as the guiding factor in the pentad became majority opinions.

#### Rountree's Multipentadic Analysis

In his 2001 study of the controversial 1944 Supreme Court case *Korematsu v. United States*, Rountree uses pentadic analysis to examine the actions that drove the case. *Korematsu v. United States* came about when the military created an exclusion area along the West Coast and forced Japanese-Americans into internment camps after the attack on Pearl Harbor. When Korematsu appealed to the Supreme Court, saying that the military order was unconstitutional and racially biased, the majority decided that the threat of espionage and sabotage within the Japanese-American community (scene) was dangerous enough to justify relocating the group because of their race (act). The dissenting justices focused on the agency of the military to contradict the majority by claiming that it was the racist nature of the military personnel (agency) which led to the relocation of Japanese-Americans (act). Thus, the basic ratios of the opinions were scene-act for the majority and agency-act for the minority. By construing the pentad in these different manners, the majority and dissenting justices found two very different motives behind the creation of the exclusion areas.

After identifying the pentadic elements of the case and explaining why the majority and dissenting opinions diverged, Rountree also looks at the actions the justices took in forming their opinions. The majority, he found, borrowed the language of an earlier court in *Hirabayashi v. United States* as the *agency* for their own decision. By doing so, Rountree explains,

Words that are agencies of decision for one decisional act are transplanted – along with the authority of the court and judges who made them – into a new context, where they are used as an agency of decision involving a different act, a different scene, and a different purpose. (2001, p. 8)

Once the majority made the move to use a precedent, the dissent had to argue that the precedent was incorrect and had to be changed, or that the majority had misused the precedent. In *Korematsu*, the dissenting justices argued that the precedent used by the majority was not applicable in the current case. It had been an “act joined by reluctant justices (skeptical agents) who only agreed to join in light of the strict limitations on the decision (a restriction on the act as future agency)” (Rountree, 2001, p. 17). Instead, the dissenters focused on the *purpose* of the decision within constitutional law. They worried that allowing *Korematsu* to be imprisoned on the basis of his race alone left constitutional law wide open for further racial discrimination.

Rountree calls his approach to *Korematsu v. United States* a “multipentadic” analysis (2001, p. 21). By looking at more than just the obvious or immediate pentad, a critic can gain a greater understanding of the entire rhetorical situation, as opposed to simply the rhetorical artifact. Rountree explains that his approach has three advantages

over traditional pentadic analyses. The first of these advantages is the ability to account for more of the rhetorical work involved in symbolic acts. By analyzing more pentadic sets, each word choice and characterization of elements reveals more about the rhetorical goal, or motive, of the speaker. The second advantage is the consideration of complex rhetorical strategies. By looking for relationships between pentadic sets, as well as within them, “we can track down how one or more acts set the stage for our interpretation of other acts” (Rountree, 2001, p. 21). In this way, multipentadic analysis has a predictive function. The third advantage, Rountree argues, is the widening of the array of material that can be analyzed using dramatism. Perceptions of action can be considered as well as characterizations of it. This allows for the analysis of more abstract artifacts, such as hypothetical, imagined, or generalized action.

#### Analyzing *Cohen v. California*

This study dissects first the majority opinion and then the dissenting opinion in *Cohen v. California* in terms of Kenneth Burke’s pentad in order to determine why the decision in the case was split so deeply. The central pentadic element in each drama is established, and the two dramas are compared (refer to Appendix B for the approach to the pentadic analysis). Then, the philosophical background of each position is analyzed to provide insight on provocation and incitement in jurisprudence.

#### Evaluation of *Cohen v. California*

##### The Majority Opinion

In constructing their drama, the majority spent as much time explaining what the case did *not* involve as what it did involve. In discussing the event, Justice Harlan took

care to specify which areas of freedom of expression were not presented in *Cohen v. California*.

The four-letter word on Cohen's jacket was often used during the late 1960's as an epithet to provoke a violent reaction from people involved with the draft. In such a situation, it could be termed a 'fighting word' under the *Chaplinsky v. New Hampshire* decision, and declared unprotected by the First Amendment. However, since Cohen was not directing his statement toward any particular audience, and no violence was aroused at the courthouse, his *act* does not fit the 'fighting words' test. Also, the act could not reasonably be called obscene. No one could plausibly claim that the jacket conjured erotic thoughts about the Selective Service System. Put simply, the act could only be seen as Cohen expressing his views about the Vietnam War and the draft using a four-letter word.

Harlan also explained why the *scene* could not be the problem behind the event. California claimed that Cohen's jacket counted as "offensive conduct" which "maliciously and willfully disturbed the peace" (California Penal Code § 415). Arguments were made before the court that Cohen's crude message was forced upon unwilling or unsuspecting viewers, and that these viewers' private lives were invaded. Harlan countered these arguments in the majority opinion by claiming, "We are often 'captives' outside the sanctuary of the home and subject to objectionable speech" (*Cohen v. California*, 1971, para. 13) He went on to explain that the people who encountered Cohen's jacket were in a much different position than people who are subjected to similarly disturbing messages in their residences. Furthermore, anyone in the courthouse at that time could have simply averted their eyes to avoid the message altogether. If

invasion of privacy was not an issue, then the scene of the drama was not the essential problem in the Cohen case.

Consequently Harlan and the concurring justices have eliminated act and scene as controlling elements of the majority drama. *Agent* can also be eliminated because Cohen was an ordinary citizen. He held no political or paid office that would have prevented him from protesting the draft. Similarly, the *purpose* of the act holds no bearing on the drama. Cohen was well within his rights to share his feelings about the Vietnam War. His self-stated purpose, to inform the public of the depth of his feelings about the War and the draft, was accepted by the California Court of Appeals as well as the Supreme Court. Thus act, scene, agent, and purpose were not viewed by the majority to be the key elements in the drama.

The main issue as Harlan describes it is whether California can remove particular epithets or four-letter words from public discourse. Epithets are a function of *agency*, or manner of expression. The First Amendment is not meant to give absolute protection to every individual to speak whenever, wherever, or by whatever means he pleases. As Justice Murphy wrote in the decision handed down in *Chaplinsky v. New Hampshire*, “it is well understood that the right of free speech is not absolute at all times and under all circumstances” (1941, para. 11). It is, however, designed to protect diverse public discussion from most governmental restraints. Fanatics and crackpots must be granted the same rights to share their views as any ruling majority. So long as the means of communication are peaceful, the messages themselves need not be subjected to standards of acceptability. This freedom of speech is seen as a way to produce a citizenry more capable of discussing issues and deciding upon them. Harlan wrote in the majority

opinion, “Tumult, discord and even offensive utterance are...within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve” (*Cohen v. California*, 1971, para. 19). That the United States allows for rhetoric about revolution is a sign of strength.

Cohen chose to state his message in a vulgar and aggressive manner. However the majority opinion recognized that “words are often chosen as much for their emotive as their cognitive force.” In fact, the emotional impact of the message may be more important than the cognitive meaning of the words that were used. By employing an epithet, Cohen expressed his anger about draft. After all, the words “I am outraged by the draft” are hardly as expressive as “Fuck the draft.” Harlan writes that language “conveys not only ideas capable of relatively precise, detached explications, but otherwise inexpressible emotions as well” (*Cohen v. California*, 1971, para. 21). The true meaning of Cohen’s message might well have missed had he not used an emotional appeal.

Furthermore, Harlan points out that determining which words are disallowed becomes preventatively difficult. It is inherently contradictory to ban one four-letter word and not another. Where does the cleansing stop? The State does not have the right to purify language so that it appeals to the most squeamish denominator. To do so would be to block a form of expressive communication used by a large percentage of the public. It is nearly impossible to forbid particular words from public discourse without running the risk of suppressing ideas in the process. While some words are certainly more vulgar than others, Harlan explains that “one man’s vulgarity is another’s lyric” (*Cohen v. California*, 1971, para. 20), and the government cannot control that which is a matter of taste and style. The only constraints that could be put upon this kind of speech are

narrowly defined time and place conditions which would prohibit vulgar language in very specific situations.

The majority opinion used the agency, Cohen's manner of expressing his feelings against the draft, to explain how the act took place. Thus the agency-act ratio is at the forefront of the majority's decision. Because the majority felt that California did not have the right to stop Cohen from using that particular manner of expression, namely the epithet, California's decision to convict Cohen of offensive conduct was reversed.

Table 1

*The Drama as Constructed by the Justices in the Majority.*

<u>Pentadic Element</u>	<u>Element of the Drama as Assigned by Harlan</u>
Agent	Paul Robert Cohen
Act	Cohen expressed anti-war sentiments (speech)
Purpose	To inform the public of the depth of his feelings against the Vietnam War and the draft
Scene	The Los Angeles Municipal Court, during the Vietnam war in 1968
Agency	"Fuck the Draft" (speech)
Dominant Ratio	Agency-Act

#### The Dissenting Opinion

Justice Blackmun wrote the dissenting opinion, which Justice Black and Chief Justice Burger joined. The controlling element in the dissenting justices' drama was the *act* that Cohen committed. Blackmun described Cohen's behavior as "mainly conduct

and little speech” (*Cohen v. California*, 1971, para. 25). No evidence was presented that Cohen uttered any sounds prior to his arrest at the courthouse. He merely wore a jacket promoting a message. Because the First Amendment only deals with the freedom of expression as speech and not as action, Blackmun felt that the case should not be decided in Supreme Court.

This distinction between speech and conduct is vital in First Amendment jurisprudence. In *Chaplinsky v. New Hampshire* (1941), the Court set up a two-tier system of testing freedom of expression cases (Tedford and Herbeck, 2005). After testing the law in question for vagueness and overbreadth, the Court classifies expression as speech (worthwhile) or nonspeech (worthless). The first tier, worthwhile speech, has potential social value and is further examined by the Supreme Court justices. The second tier, nonspeech, is seen as unnecessary to the democratic process. Nonspeech includes the lewd, obscene, profane, defamatory, and fighting words, as well as false and misleading advertising, and ‘speech plus’ actions. ‘Speech plus’ acts are those where “speech [is] combined with action, such as blocking the entrance to a building while holding signs or shouting slogans” (Tedford and Herbeck, 2005, p. 458). States are allowed to constrain nonspeech acts, without fear of violating the Constitution. Because the dissenting justices saw Cohen’s action as nonspeech, they felt that California had the right to curb his expression.

The dissenting opinion also stated that if the case were to be classified as speech and not conduct, the act would still fall under the fighting words characterization as written in *Chaplinsky v. New Hampshire*. In that case, a well known proponent of First

Amendment freedoms, Justice Murphy, wrote the opinion for a unanimous bench.

Fighting words were explicitly defined and narrowly limited.

These words include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

*(Chaplinsky v. New Hampshire, 1941, para. 11)*

The use of a four-letter word was viewed as profane and insulting. It also had the possible effect of inciting the audience to violence.

The dissenting opinion agreed with the majority opinion upon the other elements of the dramatistic pentad. In fact, they even agreed on the dominant pentadic ratio within the drama: the agency-act ratio. The difference for the dissenting justices was their focus on the act within the ratio, instead of the agency. They felt that agonizing over the First Amendment values as the majority had was unnecessary. If the act was characterized by conduct rather than speech, the case did not belong in the Supreme Court. If the act was characterized by speech, it was well within the sphere of *Chaplinsky v. New Hampshire*, and should have been decided using that precedent.

The dissent was also based upon a second reason that falls outside of the drama as set up by both the majority and dissenting opinions. The California Court of Appeals'

construction of Penal Code § 415 during the hearing of *Cohen v. California* might not have been the authoritative construction of that law. Justice Blackmun explained that the law was not truly construed until a month after the Supreme Court of California declined review of the Cohen case. Because of this, Blackmun suggested that the case be remanded to the Supreme Court of California for reconsideration. It is with this portion of the dissent, and only this portion, that Justice White concurred.

Table 2.

*The Drama as Constructed by the Justices in the Minority.*

<u>Pentadic Element</u>	<u>Element of the Drama as Assigned by Blackmun</u>
Agent	Paul Robert Cohen
Act	Cohen wore a jacket that read “Fuck the Draft” in public (conduct)
Purpose	To inform the public of the depth of his feelings against the Vietnam War and the draft
Scene	The Los Angeles Municipal Court, during the Vietnam war in 1968
Agency	The “immature and absurd antic” with which Cohen expressed his feelings (conduct)
Dominant Ratio	Act-Agency

Philosophical Implications of *Cohen v. California*

The majority opinion viewed the agency of the situation to be the controlling factor because they felt that the manner of Cohen’s speech was the driving force behind the case. The dissenting opinion focused instead on the act in the drama. They saw an act

of conduct, not speech, and thus expression not protected by the First Amendment. An in-depth look at both descriptions of Cohen's behavior reveals the philosophical schools to which the justices belong. This suggests why five of the judges reversed the California courts' decision to convict Cohen. It also implies why four of the nine justices came to a separate conclusion about the event that took place in 1968, and why they recommended the case be remanded to the California courts for reconsideration.

#### Agency as Pragmatism

The majority opinion's focus on the agency of Cohen's case suggests a pragmatic point of view. In order to understand pragmatism's main tenet – that fact, reality, and meaning are determined by their practical implications – it is necessary to look at the underlying assumption that guides it.

Pragmatism's founders, Charles Peirce, William James, and John Dewey argued that the limits of experience defined the limits of knowledge. Colapietro quotes Peirce claiming that "human beings are so completely hemmed in by the bounds of their possible practical experience, their minds are so restricted to being instruments of their needs and desires, they cannot in the least mean anything transcending those bounds" (Colapietro, 2006, p. 17). Humans can only know, can only express, that which they have already experienced. This assumes that what humans do is experience *is* real; that perception is reality. Colapietro (2006) writes, "The way things appear is indicative of the way things are" (p. 18). Pragmatists are eager to make this distinction, because it differs so widely from the realist perspective that reality is something outside of and separate from the human mind.

With this assumption in mind, it becomes clear that truth is not a fixed point or concept. Truth is, instead, an “instance of existence” (Perry, 1968, p. 204). That is, an idea must be couched within a particular context for it to be true. That context, pragmatists argue, is its practical effect in a given environment. Perry puts it simply, saying, “An idea *is*, in short, what an idea *does*” (1968, p. 201). Thus an idea or statement that causes problems in one context may not have the same effect in another context (Petrilli, 2004).

This philosophy has also implications for the judgment of expression. In a statement which calls to mind Harlan’s written opinion, Colapietro explains that “thought cannot be separated from its modes of expression. Of course, a thought expressed in one way almost always can be expressed in other ways, though not infrequently this results in a depletion or distortion of meaning” (2006, p. 25). If, as the pragmatists argue, we only know reality as it is when experience it, then we cannot know that which has not been explicitly told to us.

Pragmatism is a context driven and thus pluralistic system of philosophy, which bases judgment on the effect of an idea or statement. Justice Harlan discusses the manner in which Cohen conveyed his message in terms of the emotional impact, or the consequence, it has upon his audience. He quotes the decision in *Tinker v. Des Moines Independent Community School District* in saying that the California court’s rationale reflects an “undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression” (*Cohen v. California*, 1971, para. 16). He notes that Cohen’s jacket, while vulgar and distasteful, did not actually cause any breach of the peace.

Harlan also uses a pragmatic argument when he explains why the majority cannot justify criminalizing four-letter words. He says that prohibiting certain epithets becomes not only difficult, since it is nearly impossible to draw a line where words are no longer constitutionally acceptable, but dangerous, as that can lead down a path toward suppressing ideas. Epithets are considered content-laden speech. Allowing suppression of ideas expressed in epithets is a form of censorship that cannot be permitted, since it would open the door to governmental censorship of unpopular opinions. As such, the majority offers a pragmatic solution to the problem. They refuse to take away anyone's right to express themselves using epithets and reverse the lower courts' decision to convict Cohen.

#### Act as Realism

The dissenting justices, describing Cohen's case in terms of the act, come from the school of realism. Realism is a school of thought which asserts that facts exist independently of what anyone says or thinks about them. Gamble describes realism, saying, "the world exists and has the composition and properties it does independent of both our thought and language." (2002, p. 244). It is a worldview that looks upon facts as truths which transcend our current knowledge of them.

If there are thus true and false entities in the world, then there are also definite concepts of right and wrong. Perry describes rightness as "fulfilling what is good for the individual" (1968, p. 334). What is good for the individual is survival and self-preservation, as well as what makes the individual most content. If rightness is good for one person, then goodness for many people must also be right. Rightness for many compounds to become what Perry (1968) calls comparative goodness, which describes

fulfilling all interests as better than fulfilling the interests for just one. Thus the ultimate rightness, or what is morally right, is what is right (good) for the most people.

Realists see the power of the Constitution as an established system of good versus bad for the American society. They believe that the founding fathers “bequeathed a document that simply needed deductive interpretation rather than radical correction” (Hasian, 1998, p. 433). This prescribes a syllogistic method of reasoning, where the justices need only compare the current case to those of the past to determine what the right decision should be. As such, justices need only look to the Constitution, and to previous judicial decisions, for guidance in additional cases which come to the Supreme Court.

According to the dissent as written by Blackmun, Cohen committed a conduct-act, and not a speech-act, and thus should not be allowed the protection of the First Amendment. His words did not add an appreciable sentiment to the public discourse because he did not express himself verbally. Further, even if Cohen had vocalized his expression, his words had so little social value that they were “outweighed by the social interest in order and morality” (*Chaplinsky v. New Hampshire*, 1941, para. 11). His words did not promote “rightness” for individuals other than himself, and it would be right for more people for the peace to be protected than for Cohen’s freedom to use certain words to be protected.

Blackmun also situated his opinion within the realist school by basing it on legal precedent. By relying on the *Chaplinsky* decision for the division of speech and nonspeech to describe Cohen’s expression as an act, and then further using the ‘fighting words’ doctrine, Blackmun is clearly using legal precedent as the impetus for the

dissenting opinion. He uses syllogistic reasoning in determining that since fighting words have no value (as stated in *Chaplinsky*), and Cohen used fighting words in his expression, Cohen's expression had no value. In doing so, Blackmun claimed that the case was not worthy of arguing over, and recommended that it be remanded to the California court to be reexamined.

### Cohen's Impact on First Amendment Jurisprudence

Through the rhetorical lens of dramatism, a clash between pragmatism and realism is found in *Cohen v. California*. Indeed, conflict is found in all cases involving freedom of expression, because speech cannot simply be free. Very few people would support a social system where individuals could say whatever they wanted, whenever they wanted to say it. The Supreme Court supported this idea in *Schenck v. United States* (1919), saying that "the most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing panic" (para. 5). The Court echoed the sentiment in *Cohen* saying "the First and Fourteenth amendments have never been thought to give absolute protection to every individual to speak whenever or wherever he pleases" (*Cohen v. California*, 1971, para. 9). Thus, the duty of the Supreme Court is to determine which speech is protected and which may be constrained. The Court is charged with deciding cases within the individual contexts in which they occurred while remaining consistent and "persuasively legal" (Hasian, 1998, p. 431).

Hasian (2001) suggests that the American legal system fought with this philosophical conflict during a paradigm shift in the 1960s. The Court moved from a realist stance to a more pragmatic approach. Realism had been predominant in legal studies since the 1800s, and had been celebrated as systematic and logical. Pragmatism,

saying in their opinions, critics can find patterns in how the Court is making its decisions. Rumble (1968) suggests that “[trying] to discover the nature of the extralegal factors which are the actual determinants of judicial discourse” (p. 139) aids in discovering these patterns.

This analysis of *Cohen v. California* offers guidance in looking at how lawyers should approach the Court when making their case, and how the Court approaches provocation and incitement. By looking at the way the justices individually, and the Court as a whole, approach cases, lawyers can judge how they should argue in front of them. If the Court seems to be taking a realist perspective, the lawyer should argue from precedent, and cite other cases which resulted in the desired outcome. If, like in *Cohen*, the majority of justices seem to be taking a pragmatic view cases, then the lawyer should argue in terms of the impact (or lack thereof) on the audience. Lawyers should emphasize as many of the contextual factors as they can. For *Cohen* and subsequent provocation cases these factors include whether the communication was face to face, whether it was directed toward a particular person, and whether the language actually incited a violent reaction. Since *Cohen*, provocation and incitement have been determined predominantly by pragmatic reasoning.

Contextual factors will become increasingly relevant as the Supreme Court continues to adjudicate freedom of expression in the United States. With the advent of the Internet an entirely new medium for speech, publication, and communication has been introduced to people around the globe. Anyone with access to a computer can send out whatever message they choose to a larger audience than ever before. The Internet also presents problems concerning transboundary communication. Freedom of expression is a

on the other hand, came into popular philosophical thought during the 1920s and 30s, and trickled into legal philosophy from there. Hasian writes, “By the 1960s, the generations that had imbibed the teachings of [pragmatism] were now in positions of power throughout the land” (2001, p. 94). Pragmatists viewed the laws inferred from judicial decisions as prescriptive in nature, not necessarily commanding. Prior rulings suggested what future justices ought to consider, but those same future justices were free to listen to the rule, to incorporate it partially into a new opinion, or to disregard the rule entirely (Rumble, 1968). Depending on the context of the case, a past ruling might not be entirely, or at all, relevant. The system seemed to be a good balance, since it considered legal precedent, but allowed the justices to deal with each new case on an individual basis.

After finding the philosophical standpoint of the Court, the next logical idea is to try to apply that knowledge to future cases. It's an attractive thought – that understanding the viewpoint inherent within a Court decision may help in the prediction of case outcomes. Caution must be taken with this step. Rodell as says that “he who would analyze, predict, or understand the Supreme Court's constitutional decisions will fare considerably better if he concentrates on that same infinite variety of human factors which make precise prediction impossible” (Rodell, 1962, p. 708). Justices have many varied reasons for deciding cases as they do, including personal experience and private motivations.

All the same, there must be some suggestive function that can be gleaned from a study such as this one. In fact, Llewellyn (1960) suggests that researchers can look at judicial opinions for the “‘flavor’ that could indicate how far that court, tomorrow, would stand to today’s decision, or would expand it” (p. 58). By studying what the justices are

privilege that is unique to the United States. The Court will soon have to consider how U.S. regulations mesh with, or overlap, other countries' standards. Because there is little precedent in First Amendment cases for free expression in such a new and expansive medium, the Court will have to decide cases based on very pragmatic reasoning. The context of any case that comes to the Supreme Court will be tremendously important.

This study provides a method to study Supreme Court cases, or indeed any court case, from a critical and philosophical point of view. With these tools in hand, the researcher gains deeper insight into the United States legal system, and into the ideological underpinnings of the society which uses it. Freedom of expression is a trait which is unique and essential to America's democratic process. Discovering more about this crucial freedom helps us further understand the society in which we live.

## Appendix A

### The Full Text of *Cohen v. California*

As retrieved from [http://www.bc.edu/bc\\_org/avp/cas/comm/free\\_speech/cohen.html](http://www.bc.edu/bc_org/avp/cas/comm/free_speech/cohen.html)  
on January 10, 2007.

#### **Cohen v. California**

No. 299

SUPREME COURT OF THE UNITED STATES

403 U.S. 15

Argued February 22, 1971

Decided June 7, 1971

#### Syllabus

Appellant was convicted of violating that part of Cal. Penal Code § 415 which prohibits "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct," for wearing a jacket bearing the words "Fuck the Draft" in a corridor of the Los Angeles Courthouse. The Court of Appeal held that "offensive conduct" means "behavior which has a tendency to provoke others to acts of violence or to in turn disturb the peace," and affirmed the conviction. Held: Absent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourteenth Amendments, make the simple public display of this single four-letter expletive a criminal offense. Pp. 22-26.

1 Cal. App. 3d 94, 81 Cal. Rptr. 503, reversed.

[15] MR. JUSTICE HARLAN delivered the opinion of the Court.

This case may seem at first blush too inconsequential to find its way into our books, but the issue it presents is of no small constitutional significance.

[16] Appellant Paul Robert Cohen was convicted in the Los Angeles Municipal Court of violating that part of California Penal Code § 415 which prohibits "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct . . . "[note 1] He was given 30 days' imprisonment. The facts upon which his conviction rests are detailed in the opinion of the Court of Appeal of California, Second Appellate District, as follows:

"On April 26, 1968, the defendant was observed in the Los Angeles County Courthouse in the corridor outside of division 20 of the municipal court wearing a jacket bearing the words 'Fuck the Draft' which were plainly visible. There were women and children present in the corridor. The defendant was arrested. The defendant testified that he wore the jacket knowing that the words were on the jacket as a means of informing the public of the depth of his feelings against the Vietnam War and the draft.

"The defendant did not engage in, nor threaten to engage in, nor did anyone as the result of his conduct [17] in fact commit or threaten to commit any act of violence. The defendant did not make any loud or unusual noise, nor was there any evidence that he uttered any sound prior to his arrest." 1 Cal. App. 3d 94, 97-98, 81 Cal. Rptr. 503, 505 (1969).

In affirming the conviction the Court of Appeal held that "offensive conduct" means "behavior which has a tendency to provoke others to acts of violence or to in turn disturb the peace," and that the State had proved this element because, on the facts of this case, "it was certainly reasonably foreseeable that such conduct might cause others to rise up to commit a violent act against the person of the defendant or attempt to forceably remove his jacket." 1 Cal. App. 3d, at 99-100, 81 Cal. Rptr., at 506. The California Supreme Court declined review by a divided vote.[note 2] We brought the case here, postponing the consideration of the question of our jurisdiction over this appeal to a hearing of the case on the merits. 399 U.S. 904. We now reverse.

The question of our jurisdiction need not detain us long. Throughout the proceedings below, Cohen consistently [18] claimed that, as construed to apply to the facts of this case, the statute infringed his rights to freedom of expression guaranteed by the First and Fourteenth Amendments of the Federal Constitution. That contention has been rejected by the highest California state court in which review could be had. Accordingly, we are fully satisfied that Cohen has properly invoked our jurisdiction by this appeal. 28 U. S. C. § 1257 (2); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921).

# I

In order to lay hands on the precise issue which this case involves, it is useful first to canvass various matters which this record does not present.

The conviction quite clearly rests upon the asserted offensiveness of the words Cohen used to convey his message to the public. The only "conduct" which the State sought to punish is the fact of communication. Thus, we deal here with a conviction resting solely upon "speech," cf. *Stromberg v. California*, 283 U.S. 359 (1931), not upon any separately identifiable conduct which allegedly was intended by Cohen to be perceived by others as expressive of particular views but which, on its face, does not necessarily convey any message and hence arguably could be regulated without effectively repressing Cohen's ability to express himself. Cf. *United States v. O'Brien*, 391 U.S. 367 (1968). Further, the State certainly lacks power to punish Cohen for the underlying content of the message the inscription conveyed. At least so long as there is no showing of an intent to incite disobedience to or disruption of the draft, Cohen could not, consistently with the First and Fourteenth Amendments, be punished for asserting the evident position on the inutility or immorality of the draft his jacket reflected. *Yates v. United States*, 354 U.S. 298 (1957).

[19] Appellant's conviction, then, rests squarely upon his exercise of the "freedom of speech" protected from arbitrary governmental interference by the Constitution and can be justified, if at all, only as a valid regulation of the manner in which he exercised that freedom, not as a permissible prohibition on the substantive message it conveys. This does not end the inquiry, of course, for the First and Fourteenth Amendments have never been thought to give absolute protection to every individual to speak whenever or wherever he pleases, or to use any form of address in any circumstances that he chooses. In this vein, too, however, we think it important to note that several issues typically associated with such problems are not presented here.

In the first place, Cohen was tried under a statute applicable throughout the entire State. Any attempt to support this conviction on the ground that the statute seeks to preserve an appropriately decorous atmosphere in the courthouse where Cohen was arrested must fail in the absence of any language in the statute that would have put appellant on notice that certain kinds of otherwise permissible speech or conduct would nevertheless, under California law, not be tolerated in certain places. See *Edwards v. South Carolina*, 372 U.S. 229, 236-237, and n. 11 (1963). Cf. *Adderley v. Florida*, 385 U.S. 39 (1966). No fair reading of the phrase "offensive conduct" can be said sufficiently to inform the ordinary person that distinctions between certain locations are thereby created.[note 3]

In the second place, as it comes to us, this case cannot be said to fall within those relatively few categories of [20] instances where prior decisions have established the power of government to deal more comprehensively with certain forms of individual expression simply upon a showing that such a form was employed. This is not, for example, an obscenity case. Whatever else may be necessary to give rise to the States' broader power to prohibit obscene expression, such expression must be, in some significant way, erotic. *Roth v. United States*, 354 U.S. 476 (1957). It cannot plausibly be maintained that this vulgar allusion to the Selective Service System would conjure up such psychic stimulation in anyone likely to be confronted with Cohen's crudely defaced jacket.

This Court has also held that the States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called "fighting words," those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). While the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not "directed to the person of the hearer." *Cantwell v. Connecticut*, 310 U.S. 296, 309 (1940). No individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult. Nor do we have here an instance of the exercise of the State's police power to prevent a speaker from intentionally provoking a given group to hostile reaction. Cf. *Feiner v. New York*, 340 U.S. 315 (1951); *Terminiello v. Chicago*, 337 U.S. 1 (1949). There is, as noted above, no showing that anyone who saw Cohen was in fact violently aroused or that appellant intended such a result.

[21] Finally, in arguments before this Court much has been made of the claim that Cohen's distasteful mode of expression was thrust upon unwilling or unsuspecting viewers, and that the State might therefore legitimately act as it did in order to protect the sensitive from otherwise unavoidable exposure to appellant's crude form of protest. Of course, the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense. See, e.g., *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971). While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue, e.g., *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970), we have

at the same time consistently stressed that "we are often 'captives' outside the sanctuary of the home and subject to objectionable speech." *Id.*, at 738. The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, 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.

In this regard, persons confronted with Cohen's jacket were in a quite different posture than, say, those subjected to the raucous emissions of sound trucks blaring outside their residences. Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes. And, while it may be that one has a more substantial claim to a recognizable privacy interest when walking through a courthouse corridor than, for example, strolling through Central Park, surely it is nothing like the interest in [22] being free from unwanted expression in the confines of one's own home. Cf. Keefe, *supra*. Given the subtlety and complexity of the factors involved, if Cohen's "speech" was otherwise entitled to constitutional protection, we do not think the fact that some unwilling "listeners" in a public building may have been briefly exposed to it can serve to justify this breach of the peace conviction where, as here, there was no evidence that persons powerless to avoid appellant's conduct did in fact object to it, and where that portion of the statute upon which Cohen's conviction rests evinces no concern, either on its face or as construed by the California courts, with the special plight of the captive auditor, but, instead, indiscriminately sweeps within its prohibitions all "offensive conduct" that disturbs "any neighborhood or person." Cf. *Edwards v. South Carolina*, *supra*. [note 4]

## II

Against this background, the issue flushed by this case stands out in bold relief. It is whether California can excise, as "offensive conduct," one particular scurrilous epithet from the public discourse, either upon the theory of the court below that its use is inherently likely to cause violent reaction or upon a more general assertion that the States, acting as guardians of public morality, [23] may properly remove this offensive word from the public vocabulary.

The rationale of the California court is plainly untenable. At most it reflects an "undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression." *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 508 (1969). We have been shown no evidence that substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities with execrations like that uttered by Cohen. There may be some persons about with such lawless and violent proclivities, but that is an insufficient base upon which to erect, consistently with constitutional values, a governmental power to force persons who wish to ventilate their dissident views into avoiding particular forms of expression. The argument amounts to 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. Cf. *Ashton v. Kentucky*, 384 U.S. 195, 200 (1966); *Cox v. Louisiana*, 379 U.S. 536, 550-551 (1965).

Admittedly, it is not so obvious that the First and Fourteenth Amendments must be taken to disable the States from punishing public utterance of this unseemly expletive in order to maintain what they regard as a suitable level of discourse within the body politic.[note 5] We [24] think, however, that examination and reflection will reveal the shortcomings of a contrary viewpoint.

At the outset, we cannot overemphasize that, in our judgment, most situations where the State has a justifiable interest in regulating speech will fall within one or more of the various established exceptions, discussed above but not applicable here, to the usual rule that governmental bodies may not prescribe the form or content of individual expression. Equally important to our conclusion is the constitutional backdrop against which our decision must be made. The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests. See *Whitney v. California*, 274 U.S. 357, 375-377 (1927) (Brandeis, J., concurring).

To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and [25] even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated. That is why "wholly neutral futilities . . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons," *Winters v. New York*, 333 U.S. 507, 528 (1948) (Frankfurter, J., dissenting), and why "so long as the means are peaceful, the communication need not meet standards of acceptability," *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

Against this perception of the constitutional policies involved, we discern certain more particularized considerations that peculiarly call for reversal of this conviction. First, the principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive word? Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below. For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.

Additionally, we cannot overlook the fact, because it [26] 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. In fact, words are often chosen as much for their emotive as their cognitive force. 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. Indeed, as Mr. Justice Frankfurter has said, "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." *Baumgartner v. United States*, 322 U.S. 665, 673-674 (1944).

Finally, and in the same vein, we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views. We have been able, as noted above, to discern little social benefit that might result from running the risk of opening the door to such grave results.

It is, in sum, our judgment that, absent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourteenth Amendments, make the simple public display here involved of this single four-letter expletive a criminal offense. Because that is the only arguably sustainable rationale for the conviction here at issue, the judgment below must be

Reversed.

[27] MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACK join.

I dissent, and I do so for two reasons:

1. Cohen's absurd and immature antic, in my view, was mainly conduct and little speech. See *Street v. New York*, 394 U.S. 576 (1969); *Cox v. Louisiana*, 379 U.S. 536, 555 (1965); *Giboney v. Empire Storage Co.*, 336 U.S. 490, 502 (1949). The California Court of Appeal appears so to have described it, 1 Cal. App. 3d 94, 100, 81 Cal. Rptr. 503, 507, and I cannot characterize it otherwise. Further, the case appears to me to be well within the sphere of *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), where Mr. Justice Murphy, a known champion of First Amendment freedoms, wrote for a unanimous bench. As a consequence, this Court's agonizing over First Amendment values seems misplaced and unnecessary.

2. I am not at all certain that the California Court of Appeal's construction of § 415 is now the authoritative California construction. The Court of Appeal filed its opinion on October 22, 1969. The Supreme Court of California declined review by a four-to-three vote on December 17. See 1 Cal. App. 3d, at 104. A month later, on January 27, 1970, the

State Supreme Court in another case construed § 415, evidently for the first time. In *re Bushman*, 1 Cal. 3d 767, 463 P. 2d 727. Chief Justice Traynor, who was among the dissenters to his court's refusal to take Cohen's case, wrote the majority opinion. He held that § 415 "is not unconstitutionally vague and overbroad" and further said:

"That part of Penal Code section 415 in question here makes punishable only willful 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.

[28] ". . . [It] does not make criminal any nonviolent act unless the act incites or threatens to incite others to violence . . . ." 1 Cal. 3d, at 773-774, 463 P. 2d, at 731.

Cohen was cited in *Bushman*, 1 Cal. 3d, at 773, 463 P. 2d, at 730, but I am not convinced that its description there and Cohen itself are completely consistent with the "clear and present danger" standard enunciated in *Bushman*. Inasmuch as this Court does not dismiss this case, it ought to be remanded to the California Court of Appeal for reconsideration in the light of the subsequently rendered decision by the State's highest tribunal in *Bushman*.

MR. JUSTICE WHITE concurs in Paragraph 2 of MR. JUSTICE BLACKMUN'S dissenting opinion.

#### Footnotes to the Majority Opinion

1. The statute provides in full:

"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, or who, on the public streets of any unincorporated town, or upon the public highways in such unincorporated town, run 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."

2. The suggestion has been made that, in light of the supervening opinion of the California Supreme Court in *In re Bushman*, 1 Cal. 3d 767, 463 P. 2d 727 (1970), it is "not at all certain that the California Court of Appeal's construction of § 415 is now the authoritative California construction." Post, at 27 (BLACKMUN, J., dissenting). In the course of the *Bushman* opinion, Chief Justice Traynor stated:

"[One] may . . . be guilty of disturbing the peace through 'offensive' conduct [within the meaning of § 415] if by his actions he willfully and maliciously incites others to violence or engages in conduct likely to incite others to violence. (*People v. Cohen* (1969) 1 Cal. App. 3d 94, 101, [81 Cal. Rptr. 503].)" 1 Cal. 3d, at 773, 463 P. 2d, at 730.

We perceive no difference of substance between the *Bushman* construction and that of the Court of Appeal, particularly in light of the *Bushman* court's approving citation of Cohen.

3. It is illuminating to note what transpired when Cohen entered a courtroom in the building. He removed his jacket and stood with it folded over his arm. Meanwhile, a policeman sent the presiding judge a note suggesting that Cohen be held in contempt of court. The judge declined to

do so and Cohen was arrested by the officer only after he emerged from the courtroom. App. 18-19.

4. In fact, other portions of the same statute do make some such distinctions. For example, the statute also prohibits disturbing "the peace or quiet . . . by loud or unusual noise" and using "vulgar, profane, or indecent language within the presence or hearing of women or children, in a loud and boisterous manner." See n. 1, *supra*. This second-quoted provision in particular serves to put the actor on much fairer notice as to what is prohibited. It also buttresses our view that the "offensive conduct" portion, as construed and applied in this case, cannot legitimately be justified in this Court as designed or intended to make fine distinctions between differently situated recipients.

5. The amicus urges, with some force, that this issue is not properly before us since the statute, as construed, punishes only conduct that might cause others to react violently. However, because the opinion below appears to erect a virtually irrebuttable presumption that use of this word will produce such results, the statute as thus construed appears to impose, in effect, a flat ban on the public utterance of this word. With the case in this posture, it does not seem inappropriate to inquire whether any other rationale might properly support this result. While we think it clear, for the reasons expressed above, that no statute which merely proscribes "offensive conduct" and has been construed as broadly as this one was below can subsequently be justified in this Court as discriminating between conduct that occurs in different places or that offends only certain persons, it is not so unreasonable to seek to justify its full broad sweep on an alternate rationale such as this. Because it is not so patently clear that acceptance of the justification presently under consideration would render the statute overbroad or unconstitutionally vague, and because the answer to appellee's argument seems quite clear, we do not pass on the contention that this claim is not presented on this record.

## Appendix B

### Performing the Pentadic Analysis

#### Step One: Determine the elements of the pentad:

##### Majority opinion:

Cohen (actor) was arrested for expressing anti-war sentiment (speech-act) through use of the phrase Fuck the Draft (agency- speech) in a public courthouse (scene) to inform the public of the depth of his feelings against the draft and the war (purpose).

##### Minority opinion:

Cohen (actor) was arrested for wearing a jacket using obscene and profane fighting words (conduct-act) through an "immature and absurd antic" (agency- conduct) in a public courthouse (scene) to inform the public of the depth of his feelings against the draft and the war (purpose).

#### Step Two: Determine how the pentadic elements relate to one another

In this step, Foss suggests setting up a table listing each possible ratio (Table 3), and asking several questions about how the elements are viewed as interacting with each other within the drama:

Does the nature of *element A* influence the nature of *element B*?

Does the nature of *element A* determine the nature of *element B*?

Does *element A* make *element B* problematic?

Table 3

*Showing Twenty Pentadic Ratio Analysis*

	Does the nature of the first term in the ratio affect the nature of the second term?	
<u>Ratios</u>	<u>Majority Opinion</u>	<u>Dissenting Opinion</u>
Agent-Act	no	no
Agent-Purpose	no	no
Agent-Scene	no	no
Agent-Agency	no	no
Act-Agent	no	no
Act-Purpose	no	no
Act-Scene	no	no
Act-Agency	no	yes
Purpose-Agent	no	no
Purpose-Act	no	no
Purpose-Scene	no	no
Purpose-Agency	no	no
Scene-Agent	no	no
Scene-Act	no	no
Scene-Purpose	no	no
Scene-Agency	no	no
Agency-Agent	no	no
Agency-Act	yes	no
Agency-Purpose	no	no
Agency-Scene	no	no

Step Three: Determine the Dominant Element in the Ratios

Next, condense the ratios down into ten pairings (so that agent-purpose and purpose-agent, for example, are considered one ratio), and use the previous chart to determine which element is driving the drama. This new table (Table 4) provides a way of examining how the ratios interact.

Table 4

*Showing Ten Pentadic Ratio Analysis*

Which term is dominant?		
<u>Ratios</u>	<u>Majority Opinion</u>	<u>Dissenting Opinion</u>
Agent-Purpose	neither	neither
Agent-Agency	neither	neither
Act-Agent	neither	neither
Act-Purpose	neither	neither
Act-Agency	agency	act
Scene-Agent	neither	neither
Scene-Act	neither	neither
Scene-Purpose	neither	neither
Scene-Agency	neither	neither
Agency-Purpose	neither	neither

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### Biographical Sketch

Corinne Griffiths was born in New Bedford, MA on June 10, 1984. After growing up in Mattapoisett, MA she attended Rochester Institute of Technology for her Bachelor of Science degree in Professional & Technical Communication. While at RIT, Corinne was a member of Alpha Xi Delta Women's Fraternity and Lambda Pi Eta Honor Society, and worked for several years as a student supervisor at the Wallace Library. She also worked as Assistant Production Manager at Marjorie Gross and Company during the summer and fall of 2005 for her cooperative education experience. Corinne graduated from RIT in March of 2007.