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**LOOKING BACK AT *COHEN V. CALIFORNIA*:  
A 40-YEAR RETROSPECTIVE FROM INSIDE THE COURT**

Thomas G. Krattenmaker\*

*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.*<sup>1</sup>

In April 1968, at the height of the Vietnam War, when campuses from Columbia to Berkeley were in upheaval and many cities in America were on fire due to racial discord as well as antiwar sentiment, a young man named Paul Robert Cohen engaged in a comparatively quiet act of protest. Summoned to appear as a witness, Cohen walked through a corridor of the Los Angeles County Courthouse wearing a jacket on which “Fuck the Draft” was written.<sup>2</sup> For that act, Cohen was convicted of “maliciously and willfully disturb[ing] the peace or quiet . . . by . . . offensive conduct . . . .”<sup>3</sup> Three years later, by a 5–4 vote, the Supreme Court of the United States reversed that conviction and attendant thirty-day jail sentence by issuing an opinion, with which I was intimately involved, that concluded that the California decision could not withstand First Amendment scrutiny.<sup>4</sup>

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\* Senior Counsel, Wilson Sonsini Goodrich & Rosati. As disclosed below, the author was law clerk to Justice John M. Harlan during the 1970 Term and, at Justice Harlan’s direction, prepared the first draft of the Court’s opinion in *Cohen*. I am very grateful to my assistant, Soraya Howard, for help with the manuscript and to Susan Pennypacker of the Wilson Sonsini library team for research assistance. I owe many thanks to the University of Miami Law School faculty workshop for detailed and incisive critical comments on an early outline of this Article. I have also received very helpful feedback on subsequent drafts from Professors Mary Coombs, Caroline Corbin, Norman Dorsen, Dan Farber, Lili Levy, Paul Marcus, Lucas Powe, Laura Ray, Michael Seidman, Girardeau Spann, and Mark Tushnet and from colleagues Monty Gray, Henry Hauser, Tiffany Lee, Martin Minsker, David Nimmer, Richard Olderman and Seth Wiener. In keeping with the spirit of this Article, in which I take credit for what I like in the opinion and blame Justice Harlan for all its shortcomings, I would like to blame each of these commenters/reviewers for any error(s) in this final version—if there is anything wrong in here, one or all of them made me do it.

Because I was privileged and honored more than a decade ago to serve as Dean of the William and Mary School of Law, I am especially delighted to publish this Article in the *William and Mary Bill of Rights Journal*, a publication that was then, and remains, one of the crown jewels of an exceptionally fine institution.

<sup>1</sup> *Cohen v. California*, 403 U.S. 15 (1971).

<sup>2</sup> *Id.* at 16.

<sup>3</sup> *Id.* (quoting CAL. PENAL CODE § 415 (West 1970)).

<sup>4</sup> *Id.* at 17.

*Cohen v. California* is now over forty years old.<sup>5</sup> In this Article, I revisit and reexamine *Cohen*. The opinion makes some rather bold pronouncements about freedom of speech and its importance to American society.<sup>6</sup> *Cohen* also sets out a series of almost-hornbook law statements about certain aspects of time, place, and manner speech regulation.<sup>7</sup> I ask whether, with the hindsight of these past decades, *Cohen* looks today more like an enduring contribution to First Amendment law and theory, a relic or period piece of the early 1970s, or a jurisprudential quixotic sport. I conclude that both parts of *Cohen*—Part I, with its treatment of time, place and manner regulations, and Part II, with its analysis of offensive public speech—even from a perspective of forty years, are important parts of a sound and robust First Amendment jurisprudence and deserve continuing attention.

Candor, if not modesty, requires that I state at the outset that my perspective is not (solely) that of a disinterested academic. During the 1970 Term of the Supreme Court, I had the good luck and great privilege to serve as one of Justice Harlan's law clerks. One of my tasks that year was to draft, at his direction, an opinion for the court in *Cohen*. With two alterations, Justice Harlan filed the opinion as drafted.<sup>8</sup>

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<sup>5</sup> To some extent, the existence of any Supreme Court opinion in the case is remarkable. When *Cohen*'s attorney filed his jurisdictional statement, according to Justice Brennan's records, only four Justices voted to hear the case. Conference Docket Sheet (Mar. 5, 1971) (on file with Library of Congress, Manuscript Division, Papers of William J. Brennan, Jr., Box I:228, folder 4) [hereinafter Brennan Papers]. Those Justices were Black, Douglas, Brennan and Marshall. Without Black's vote—and he subsequently dissented after briefing and oral argument the following Term—the case would have been dismissed. Both Justices Harlan and Stewart, who became two members of the 5–4 majority, voted not to hear the case, as did Justices Burger, Blackmun and White, all of whom dissented at the merits stage. *Id.* Justice Harlan's vote, at this first stage, was a good indicator of his initial reaction to the case the following Term when he prepared to hear the oral argument. See *infra* note 26. The opinion was handed down on June 7, 1971, near the end of the 1970 Term. Before the next Term of Court began, both Justice Black and Justice Harlan had retired.

<sup>6</sup> See *infra* Part III.

<sup>7</sup> See *infra* Part II.

<sup>8</sup> Harlan added the first paragraph of the opinion, quoted in full in, *supra* note 1 and accompanying text, and discussed *infra*, at note 78. He also added the phrase “within established limits” to a sentence that read in the draft: “These are, however, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve.” *Cohen*, 403 U.S. at 25. I continue to believe that the first paragraph is the best part of the opinion. On the other hand, I did not, and still do not, understand why the phrase “within established limits” improves the opinion. Given Harlan's natural tendency to avoid sweeping statements that might be susceptible to an absolutist reading, I think the best interpretation is that the addition of this phrase was simply “Harlan being Harlan” (or correcting a clerk's oversight, if one prefers!).

One other thing about the opinion will puzzle me forever. When the Justice told me that I was to write an opinion finding *Cohen*'s conviction could not stand under the First Amendment, he told me to make the opinion “Elizabethan.” I had no idea what he meant and still do not. Harlan was quite an Anglophile, so his direction did not startle me. But, unless I got that part right by accident, how an opinion in this case in 1971 from the Supreme Court of the United

I thought the opinion in *Cohen v. California* was right when Justice Harlan filed it, continued to believe it was right during the thirty years that I taught constitutional law at several law schools, and still think the opinion achieves a proper outcome and rests on sound reasoning. Thus, I am more certain of my ability to revisit *Cohen* than I am of my claim to be able to reexamine it; nevertheless, I am going to try to do both and have set forth a series of retrospective criticisms of *Cohen* in Part IV.A. Finally, in some of the footnotes, I will explain some of the internal deliberations that led the Court to its resolution of the case and Justice Harlan to his filing of this opinion.<sup>9</sup> Occasionally, I confront mysteries about certain aspects of the case, mysteries that I think will never be “solved.”<sup>10</sup>

### I. “F . . .”

The facts that gave rise to *Cohen* are quite simple. In one respect, deceptively so. Cohen did wear his jacket, knowing what was written on it.<sup>11</sup> He wore that jacket in a courthouse, where, as observed below, “[t]here were women and children

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States might be “Elizabethan” eluded me. Shakespeare frequently employed bawdy language and allusions, but I knew Harlan did not want an opinion peppered with obscenities. I took him to mean something like, “Tend to err on the side of using florid and fancy phrases, and avoid vulgar or common words when writing about this vulgar thing.” Many people have asked me where the phrase, in Part II of the opinion, that “it is . . . often true that one man’s vulgarity is another’s lyric,” *id.*, originated. I suspect that was me trying to be Elizabethan! (There is a similar phrase in *Winters v. New York*, 333 U.S. 507 (1948), a case with which I was familiar. It goes, “What is one man’s amusement, teaches another’s doctrine.” *Id.* at 510. This may well have subconsciously triggered the “vulgarity . . . lyric” phrase.) More helpfully, it has been suggested to me by one who reviewed this Article that Harlan simply meant to have in mind that we tend to revere the Elizabethans today more for their literary styles than for the content of their plays and poems. I like that interpretation. In any event, I thought the more important stylistic point was to do what one always did in drafting an opinion for Justice Harlan’s eyes—to make everything about it judicious, even-tempered, legally grounded, historically accurate, and logically rigorous. Those were some of his finest personal qualities and all his clerks hope those qualities shine through in all his opinions.

<sup>9</sup> See, e.g., *supra* notes 5, 8; *infra* notes 18, 19, 26, 95, 138, 140 and 143. Most of what I recount there comes from public records, such as the briefs, transcripts of oral arguments, and public papers of the Justices. Some, however, are remembrances of conversations I had with Justice Harlan. I have no doubt that I was under a strict cloak of confidentiality when I had these conversations and that my obligation to keep quiet about them stayed with me after I finished my clerkship. I also believe, however, that this “law clerk privilege” does not survive forty years later, when all the participants are dead, and most of the participating Justices have left their working papers pertaining to this case in public libraries. At some point, it seems to me, the values of unobstructed historical inquiry outweigh the privacy or secrecy interests of deceased Justices. Just where this point arises probably varies with the matter under discussion. Here, I believe that the few incidents, not already in the public realm, that I reveal have no capacity to harm anyone and may help current readers understand some aspects of the process of case resolution at the Supreme Court forty years ago.

<sup>10</sup> See, e.g., *supra* note 8; *infra* notes 95, 112, 138.

<sup>11</sup> *Cohen v. California*, 403 U.S. 15, 16 (1971).

present . . . .”<sup>12</sup> Cohen was charged under an archaic, catch-all “offensive conduct” statute<sup>13</sup> and, at trial, testified 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.”<sup>14</sup>

Readers today probably have a sense, even if only from their history courses, of the depth of divisions within American society over the war in Vietnam, especially during the period—1968–1971—between Cohen’s arrest and the reversal of his conviction. Americans were not only deeply divided over the conduct of the war, but by this time all were accustomed to, if not necessarily supportive of, vigorous public antiwar protests. That antiwar protests were fully protected by the First Amendment was a comparatively recent development in U.S. constitutional jurisprudence, but it was firmly established by the time Cohen put on his jacket.<sup>15</sup>

What readers of this Article may not fully comprehend, from our current vantage point, is just how extraordinarily unusual it was then to hear or see the word “fuck” uttered in public.<sup>16</sup> Indeed, quaint or even sexist as these facts may appear today, the word was rarely spoken by women or employed by men when women were present, even in private settings. It was not merely that the “F word” was not spoken on radio or television; in conventional American society, “fuck” was not spoken where people whom the speaker did not know might overhear it.

Chief Justice Warren E. Burger was never accused of being a broad-minded person, so perhaps his reactions are not strong evidence here. But, at the outset of oral argument in *Cohen*, Burger sought to avoid having “The Word” spoken by telling counsel for Cohen that there was no need to recite the facts of the case.<sup>17</sup> And

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<sup>12</sup> *Id.* (quoting *People v. Cohen*, 81 Cal. Rptr. 503, 505 (Ct. App. 1969)).

<sup>13</sup> *Id.* at 16 n.1 (quoting CAL. PENAL CODE § 415 (West 1970)).

<sup>14</sup> *Id.* at 16 (quoting *Cohen*, 81 Cal. Rptr. at 505).

<sup>15</sup> *See, e.g.*, *Bachellar v. Maryland*, 397 U.S. 564 (1970) (reversing convictions of antiwar protestors for disturbing the peace); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (holding unconstitutional the suspension of students who wore black armbands to school in protest of the Vietnam War); *Bond v. Floyd*, 385 U.S. 116 (1966) (holding unconstitutional the Georgia legislature’s refusal to seat a legislator because of his opposition to the Vietnam War); *see also infra* text accompanying notes 34–39.

<sup>16</sup> I believe that this is the hardest point about trying to see *Cohen* from a perspective forty years later. One is tempted to ask why all this agonizing over something that was bound to pass. From the standpoint of 1970, however, “fuck” was not obviously bound to become as ubiquitous in public dialog as it is today. Nor was it likely that more than one or two of the nine men then on the Court, all born before World War I, could possibly have foreseen such a development.

<sup>17</sup> Transcript of Oral Argument, *Cohen v. California*, 403 U.S. 15 (1971), *reprinted in* 70 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 828 (Phillip B. Kurland & Gerhard Casper eds., 1975) [hereinafter Transcript]. Notwithstanding the Chief Justice’s suggestion, Cohen’s counsel, in response to the first question asked of him, uttered the phrase. *Id.* Counsel for Cohen, Melville Nimmer, is deceased. His son, David Nimmer, then sixteen years old, accompanied Melville to the oral argument. David Nimmer recalls that on the plane ride home, Mel Nimmer told his son that he had expected the Court marshals “to jump up, yelling ‘He said FUCK in the Supreme

the day the opinion in *Cohen* was to be announced, Burger told Harlan that Burger wished that Harlan, in announcing the case in open court, would not “use that word,” opining that it “would be the end of the Court” if he did.<sup>18</sup> Justice Black had a reputation for being somewhat more tolerant of dissenting views, yet his clerks reported, when asked why Black voted to affirm the conviction, that Black was aghast at the thought that his wife might have seen the jacket or might come to see him at the Court and confront “that word.”<sup>19</sup>

Today, one of the popular songs at the top of the charts is titled “Fuck You.”<sup>20</sup> Recently, a musician, being presented with an award on network television, described the recognition as “really, really fucking brilliant.”<sup>21</sup> University of Maryland basketball fans wore T-shirts at televised games saying “Fuck Duke” until someone figured out that it might be cleverer to say “Fuke Duck.”<sup>22</sup> In today’s linguistic environment, it might be hard to imagine, thinking back to 1968–71 when all this unfolded, just what an outlier Cohen appeared to be. Nevertheless, the fact remains that it was completely credible then that Cohen meant to say something extremely dramatic, offensive, and distasteful when he used the “F word” as he did. This is not to say that what Cohen did was unprecedented, but it was highly unusual for the time,<sup>23</sup> and certainly unusual outside the context of antiwar protest.<sup>24</sup>

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Court, grab him!” Email from David Nimmer to Thomas G. Krattenmaker, author (Aug. 16, 2011, 15:25 EST) (on file with author).

<sup>18</sup> Conversation between Justice Harlan and author (June 1971); *see also infra* note 143 (explaining that Burger floated past the conference, but did not file, a dissent describing Cohen as a “juvenile delinquent[ ]” and Cohen’s act as an “emotionally unstable outburst”).

<sup>19</sup> Conversation between Justice Black’s law clerks and author (1971); *see also infra* note 137. Conversely, one of Harlan’s clerks (not I) from that Term recalls Justice Harlan saying that he would not mind telling his wife or the clerk’s wife what the case was about. Perhaps no two recollections do more than those to explain the 5–4 outcome in *Cohen*. Voting as he did in *Cohen* put Justice Black in a somewhat awkward legal position, as described *infra* note 137.

<sup>20</sup> CEE LO GREEN, *Fuck You, on THE LADY KILLER* (Elektra Entertainment 2010), available at [http://www.ceelogreen.com/videos,fk-you\\_15.htm](http://www.ceelogreen.com/videos,fk-you_15.htm).

<sup>21</sup> Complaints Against Various Broad. Licensees Regarding Their Airing of the “Golden Globe Awards” Program, 19 FCC Rcd. 4975, 4975–76 & n.4 (2004).

<sup>22</sup> The phrase is often rendered as “Duck Fuke.” Search either phrase online and you will find dozens of offers to purchase T-shirts or other items with that inscription. *E.g.*, CAFE PRESS, <http://www.cafepress.com/+duck-fuke+t-shirts> (last visited Mar. 15, 2012).

<sup>23</sup> The best I can suggest by way of current comparison is “cunt.” How surprised would you be to see that word displayed, publicly, in a protest message today? A whimsical comment on how “fuck” has become a more commonly deployed word in our conversations comes from Nora Roberts, writing as J.D. Robb in her novella *Haunted in Death*. A character, speaking to a police officer, says, “I sure did fall for him. . . . Got married, got pregnant. . . . Divorced him—hired a fucking shark lawyer—excuse the language.” Her listener replies, “No problem. Cops hear words like *lawyer* all the time.” J.D. ROBB, *Haunted in Death, in THREE IN DEATH* 227, 248 (2008) (emphasis in original).

<sup>24</sup> The author’s observations in the late 1960s were that it was not stunningly unusual to see a sign or even a forehead that employed the word “fuck” at antiwar protests. In fact, it

As far as anyone can tell, to every member of the Court this case was about that word. As someone who lived through it has said to me, had Cohen's jacket said, "God damn the draft to hell," he probably would have won easily, perhaps even at the state court level. It was the presence of the "F word," at that precise time that made unavailable a simpler, more traditionally doctrinal resolution of Cohen's claims.

## II. NOT

The *Cohen* opinion spends almost as much time telling us what the case is not about as it does resolving the issues that the Court confronted in fact. "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."<sup>25</sup> The simple reason for this is that the typical reaction, at first encounter with the case, of many Court personnel was that *Cohen* was a simple matter because it involved only the application of well-established precedent to show that Cohen's acts were not protected speech.<sup>26</sup> Indeed, Justice Blackmun and two of his colleagues (Burger and Black) took this position throughout the case.<sup>27</sup> According to Part I of the opinion, then, it is first necessary to know what the case is *not* about.<sup>28</sup>

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may be that the "F word" was, by 1971, a good deal more commonplace in teenage discourse than even I, then twenty-eight years old, recognized. Certainly, none of the Justices would have recognized this.

<sup>25</sup> *Cohen v. California*, 403 U.S. 15, 18 (1971). This is the opening paragraph of Part I of the opinion.

<sup>26</sup> Certainly, this was the immediate reaction of Justice Harlan when I first briefed him on the case. During the 1970 Term, Justice Harlan's method of preparing for a case about to be argued was to have one clerk, who was randomly assigned to that case, study the briefs, opinions of the court(s) below, and any relevant precedents and then summarize these orally for the Justice, reading aloud entire sections of briefs or opinions at Harlan's discretion. This method of preparation was driven largely by the fact that Justice Harlan's eyesight was failing—we could read to him faster than he could read to himself—and he tended to preserve his time for reading for when he was alone at home. I was the clerk who randomly drew the *Cohen* case. Consequently, I came to have a series of conversations about the case with Justice Harlan before he decided how he would cast his vote in the matter. For cases, like *Cohen*, that had been set for full briefing and oral argument, Harlan's habit was to read, think, and talk about the case—usually with the assigned clerk present—until making up his mind the day before the conference at which the Court was to vote on the matter. In the *Cohen* case, Justice Harlan's immediate reaction was to dismiss it as not worthy of his time and certainly deserving affirmance of the conviction below. It was only by working through these various potential grounds for affirmance, and seeing that each was flawed when examined carefully, that he came to believe the case was both difficult and important.

<sup>27</sup> *See Cohen*, 403 U.S. at 27–28 (Blackmun, J., dissenting). Justice White also dissented, but limited his dissent to urging that the case be sent back down to the California courts for reexamination. *Id.* at 28 (White, J., dissenting); *see also infra* note 138 (speculating about White's motives in voting that way).

<sup>28</sup> *See Cohen*, 403 U.S. at 18 (majority opinion).

*A. Speech or Conduct?*

First, as reflected in Justice Blackmun's dissent, there is a tendency, initially, to think that the case concerned conduct, not speech, by Cohen.<sup>29</sup> After all, he was convicted of engaging in "offensive conduct," not of offensive speech.<sup>30</sup> The case was all about his behavior—walking into a courthouse wearing a jacket.

But, of course, what Cohen did was "offensive conduct" because, and only because, of the words on the jacket—that is, because of what Cohen communicated, because of the statement he made through his jacket. One might say, quite rightly, that Cohen could have communicated by different words or that his communication was offensive conduct to those who witnessed it. These responses, however, just define the speech issue, they do not make it go away or resolve it. Maybe offensive language can be banned under the First Amendment so long as alternative language, having the same meaning, is available, as Justice Stevens opined years later.<sup>31</sup> Or perhaps a statute aimed only at conduct—such as starting fires in public places—may permissibly be used to punish someone who engages in the conduct as a means of protest—for example, burning an American flag.<sup>32</sup> But, in neither of these cases can we say that the freedom of speech is not implicated. Rather, precisely what we mean by "the freedom of speech" is at issue.

Surely, Justice Blackmun notwithstanding, the Court correctly started its analysis with the observation that Cohen's "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."<sup>33</sup>

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<sup>29</sup> *Id.* at 27–28 (Blackmun, J., dissenting).

<sup>30</sup> *See id.* at 16–17 (majority opinion) (explaining that the part of the statute under which Cohen was convicted proscribes "offensive conduct" and that the California Court of Appeal described his actions as "conduct").

<sup>31</sup> *See FCC v. Pacifica Found.*, 438 U.S. 726, 743 n.18 (1978) ("A requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language.").

<sup>32</sup> Presumably, Justice Fortas meant to say something like that in his otherwise incomprehensible dissent in *Street v. New York*. 394 U.S. 576, 616 (1969) (Fortas, J., dissenting) ("If, as I submit, it is permissible to prohibit the burning of personal property on the public sidewalk, there is no basis for applying a different rule to flag burning."). The problem with Fortas's syllogism is that the statute forbade only contemptuous acts (e.g., mutilating or casting contempt) directed at the flag of the United States. *Id.* at 577–78 (majority opinion). The State's professed concern, then, was not with public burning but with disrespectful burning, and only where the disrespect was directed at the American flag. *See id.*

<sup>33</sup> *Cohen*, 403 U.S. at 18. Perhaps the most powerful explanation for why Cohen's conviction rested on "speech" rather than "conduct" came, oddly enough, from the brief for Appellee, the City of Los Angeles, defending the conviction. The City argued that Cohen's behavior "consisted of 'speech' and 'nonspeech' elements. The 'nonspeech' element consisted of walking through a public building with the premeditated intent of attracting the



### B. *Unlawful Advocacy?*

Further, thanks in part to some rather valiant work by Justice Harlan in the 1950s,<sup>34</sup> he was able to state simply that California “certainly” could not punish Cohen for advocating against the draft, absent proof of incitement.<sup>35</sup> The “bad tendency” standard—by which government could punish any political speech that might have a tendency to lead its hearers to engage in bad conduct<sup>36</sup>—had been finally and firmly discarded before *Cohen* reached the Supreme Court.<sup>37</sup> Tepid criticism of the military draft in World War I was punished with jail time and the Supreme Court gleefully affirmed such convictions.<sup>38</sup> Sixty years later, First Amendment law in that regard had taken a 180 degree turn.<sup>39</sup>

### C. *Incidental Restriction on Speech?*

One way to understand the *Cohen* opinion is to read it as stating a general method of analyzing First Amendment issues. The analysis, as employed in *Cohen*

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attention of others to the message on his jacket.” Brief for Appellee at 15, *Cohen v. California*, 403 U.S. 15 (1971) (No. 299). During oral argument, the City again stated that the “conduct” was the display of the words, Transcript, *supra* note 17, at 843, which counsel clarified subsequently as the display of “‘A’ word.” *Id.* at 846. As Professor Daniel Farber so aptly put it in referring to Justice Blackmun’s characterization of the case as involving “mainly conduct and little speech,” *Cohen*, 403 U.S. at 27, Blackmun’s characterization “makes little sense unless Blackmun thought Cohen was conducting a sort of protest march through the courthouse.” Daniel A. Farber, *Civilizing Public Discourse: An Essay on Professor Bickel, Justice Harlan, and the Enduring Significance of Cohen v. California*, 1980 DUKE L.J. 283, 290 (1980) (citing *Cohen*, 403 U.S. at 27 (Blackmun, J., dissenting)). Below, I suggest a somewhat more sophisticated (or convoluted, if one prefers) version of the argument that the State was not regulating speech. One might say that the State was indifferent to the content or communication of the words, but not to the means by which the communication was made—i.e., the choice of words. I argue that Part II of the *Cohen* opinion explains why this argument rests on a false distinction between language and content. *See infra* text accompanying notes 173–83.

<sup>34</sup> *See, e.g.*, *Yates v. United States*, 354 U.S. 298 (1957) (overturning Smith Act convictions of second-tier leaders of the Communist Party and holding that the evidence was insufficient to support the convictions under stringent legal standard adopted in this case, as a matter of statutory interpretation).

<sup>35</sup> *Cohen*, 403 U.S. at 18.

<sup>36</sup> *See* LUCAS A. POWE, JR., *THE SUPREME COURT AND THE AMERICAN ELITE, 1789–2008*, at 190–91 (2009) (discussing early cases that permitted punishment of speech that might inspire ill thoughts of government war efforts).

<sup>37</sup> *See* *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (establishing that advocacy, even of unlawful action, is constitutionally protected unless it is directed toward inciting imminent lawless action and is likely to produce such action).

<sup>38</sup> *See, e.g.*, *Debs v. United States*, 249 U.S. 211 (1919).

<sup>39</sup> *See* POWE, *supra* note 36, at 255–57; *see also* *Bachellar v. Maryland*, 397 U.S. 564 (1970) (reversing convictions of antiwar protesters for disturbing the peace).

goes as follows: we first ask whether the government intervention had the effect of punishing the freedom of “speech.”<sup>40</sup> Here, as described above,<sup>41</sup> the answer is plainly yes, Justice Blackmun notwithstanding. Therefore, we then ask whether the substantive message of the speech could be banned constitutionally. As the Court said, that was “certainly” not the case here; advocacy of opposition to the draft was not fair game for prosecutors.<sup>42</sup> Those twin conclusions, then, lead to a further one: the speech is presumptively protected. Nevertheless, the government may still prevail by showing that the regulation was designed to punish conduct, not speech—that it merely imposed an incidental (and not overly broad or unduly vague) restriction on the time, place or manner of speaking.<sup>43</sup> The conviction may be upheld if the law merely imposed a restriction that was reasonably well-tailored to achieve a permissible governmental interest that was unrelated to the substantive message of that speech.<sup>44</sup> Part I of the *Cohen* opinion works its way through a series of contentions that Cohen’s conviction entailed only an incidental permissible restriction on speech.<sup>45</sup>

### 1. Place?

As with the speech/conduct issue, most people upon first confronting the *Cohen* case at the time it arose, quickly assumed that Cohen’s conviction could be sustained as a permissible time, place or manner regulation.<sup>46</sup> Again, however, that first thought tends to fall apart on analysis. Yes, Cohen wore his jacket in a courthouse. Yes, the State can proscribe language inside a courthouse. A courthouse is a special place. “Order in the court” is not an unconstitutional prior restraint, but an incidental restriction on the time and place of speaking that is surely (usually) necessary to carry out the compelling governmental interest in enforcing its laws.

But, apart from the fact that merely wearing clothing inscribed with words is not necessarily disruptive to any judicial or courthouse function,<sup>47</sup> the *Cohen* opinion

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<sup>40</sup> *Cohen*, 403 U.S. at 18 (distinguishing “speech” from “conduct”).

<sup>41</sup> *See supra* Part II.A.

<sup>42</sup> *Cohen*, 403 U.S. at 18.

<sup>43</sup> *Id.* at 24 n.5.

<sup>44</sup> *See id.* at 19.

<sup>45</sup> In what follows, I lump “obscenity” regulation in with incidental manner restrictions. This is because it seems to me that the best way to explain the exemption, from First Amendment protection for obscenity, is that this manner of speaking is beyond the pale, rather than that such “speech” is not really “speech” but “conduct” or “nonspeech.”

<sup>46</sup> For example, early in the oral argument, Justice Black asked a series of questions that appeared to indicate concern that Cohen’s behavior was unprotected because it occurred in a courthouse or courtroom. *See* Transcript, *supra* note 17, at 829–30.

<sup>47</sup> *Cf.* *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (finding that wearing a black armband to public school to protest the Vietnam War was not disruptive to the classroom or its educational function). Interestingly, when Cohen entered the courtroom, he removed his jacket. *Cohen*, 403 U.S. at 19 n.3. Meanwhile, a police officer sent the

quickly observed that there was nothing in the California statute to suggest that a courthouse-specific rule was being applied.<sup>48</sup> Speakers are entitled to due process before they get censored. If the rule is: “Go ahead and say what’s on your mind, but not in a courthouse,” then the rule has to say (something like) that.<sup>49</sup> Simply saying “Do not engage in offensive conduct” does not, in the words of the *Cohen* opinion, “sufficiently . . . inform the ordinary person” that the State means to say it will not tolerate “otherwise permissible speech” in “certain places.”<sup>50</sup>

## 2. Obscene?

Perhaps the most common off-the-cuff reaction to, as Justice Blackmun pithily described it, “Cohen’s absurd and immature antic”<sup>51</sup> was that the words on his jacket were obscene. In popular parlance, perhaps “fuck” was (and maybe still is) an obscenity.<sup>52</sup> Apparently, this is the basis on which the trial judge found Cohen guilty, holding that the words “Fuck the Draft” were obscene.<sup>53</sup>

First Amendment law was clear that, if speech was “obscene,” it could be proscribed without any further showing, such as a tendency to cause illegal acts, or its being thrust upon unwilling persons, or distributed to minors.<sup>54</sup> Moral opposition to obscenity was a sufficient basis to punish its publication.<sup>55</sup> But as a matter of constitutional law, rather than dictionary usage, by the time of *Cohen*, “obscenity” had become a legal term of art, confining the scope of communication that government could censor just for the joy of censoring it.<sup>56</sup> For example, to fall into the legal category of obscene communication, the words or images had to appeal to the “prurient interest.”<sup>57</sup>

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presiding judge a note suggesting that Cohen be held in contempt. *Id.* The judge declined to do so and Cohen was arrested by the officer after he left the courtroom. *Id.*

<sup>48</sup> *Cohen*, 403 U.S. at 19.

<sup>49</sup> *Cf.* *Snyder v. Phelps*, 131 S. Ct. 1207, 1218 & n.5 (2011). At issue in *Snyder* was a damages award for intentional infliction of emotional distress, entered in favor of the father of a deceased serviceman against picketers at a military funeral in Maryland. *Id.* at 1214. The Court pointedly noted that “Maryland law prohibits picketing within 100 feet of a funeral service or funeral procession” and the picketing in this case took place outside such a zone. *Id.* at 1218 n.5. The *Snyder* case is discussed further *infra* notes 62, 77, 154, 163 and text accompanying notes 66 and 158–65.

<sup>50</sup> *Cohen*, 403 U.S. at 19.

<sup>51</sup> *Id.* at 27 (Blackmun, J., dissenting).

<sup>52</sup> *See supra* Part I.

<sup>53</sup> *See* Brief for Appellant at 8, 23, *Cohen v. California*, 403 U.S. 15 (1971) (No. 299). So far as we can learn from the papers in this case, the trial court did not render a written published opinion.

<sup>54</sup> *See, e.g.*, *Roth v. United States*, 354 U.S. 476, 485–87 (1957).

<sup>55</sup> *See id.* at 488–89.

<sup>56</sup> *See id.* at 487–88.

<sup>57</sup> *See id.* at 489; *see also* *Jacobellis v. Ohio*, 378 U.S. 184, 191 (1964). Counsel for Cohen, Melville Nimmer, is deceased. His son, however, recalls that his father often

Or, as *Cohen* phrased it, to be constitutionally obscene, “expression must be, in some significant way, erotic.”<sup>58</sup> “Fuck the Draft” was undeniably offensive to some people, but certainly neither erotic nor an appeal to anyone’s prurient interest.

That the speech was not “obscene” in the constitutional law sense did not, of course, mean that it might not be subject to proscription as profanity or indecent or offensive speech for the same reasons why obscenity is unprotected. In fact, this was the issue that occupies most of Part II of the *Cohen* opinion.

### 3. Fighting Words?

Decades before *Cohen*, the Supreme Court had described yet another category of apparently completely unprotected language, “fighting words.”<sup>59</sup> Change “the draft” to “you” and we probably have the most obvious example of fighting words in mid-twentieth-century America. But that, of course, was the State’s problem. *Cohen* did not say “Fuck you” or “Fuck you, General Hershey”<sup>60</sup> or “Fuck you, the members of my draft board.” As the Court put it, *Cohen*’s pithy epithet was not “directed to the person of the hearer” or a “direct personal insult” to anyone who saw the phrase.<sup>61</sup>

With just a couple strokes of the pen, then, the *Cohen* Court confined the “fighting words” doctrine to a fairly meaningless little rule that addressed a very narrow range of conduct. “Fighting words” was not about the State’s interest in promoting civilized discourse, but was simply a phrase to explain why simple private insults, even if they happened to be uttered when others could overhear them, were not constitutionally protected speech.<sup>62</sup>

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encapsulated the case by saying, “Mr. Cohen was not actually advocating sexual intercourse with the Selective Service.” Email from David Nimmer, *supra* note 17.

<sup>58</sup> *Cohen v. California*, 403 U.S. 15, 20 (1971) (citing *Roth*, 354 U.S. 476). The Court reaffirmed this limitation on the scope of obscenity law this past Term in *Brown v. Entertainment Merchants Ass’n*, 131 S. Ct. 2729, 2734 (2011), citing this passage in *Cohen* for support. *Id.*

<sup>59</sup> For this proposition, the *Cohen* Court cited *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) and *Cantwell v. Connecticut*, 310 U.S. 296, 309 (1940). See *Cohen*, 403 U.S. at 20.

<sup>60</sup> At the time of the case, the head of the Selective Service System was General Lewis Hershey. See *Selective Service System: About the Agency*, <http://www.sss.gov/previousdir.htm> (last visited Mar. 15, 2012).

<sup>61</sup> *Cohen*, 403 U.S. at 20 (citation omitted).

<sup>62</sup> For a more contemporary application of this point, see *Snyder v. Phelps*, 131 S. Ct. 1207 (2011). Petitioners there protested on a public place adjacent to a public street during a funeral for a Marine who was killed in the line of duty in Iraq. *Id.* at 1213. Petitioners’ picketing, said the Court, “is certainly hurtful and its contribution to public discourse may be negligible.” *Id.* at 1220. However, although the speech “inflict[ed] great pain” on the Marine’s family, “we cannot react to that pain by punishing the speaker.” *Id.* In fact, one might well argue that *Snyder* goes beyond *Cohen* in this regard. Petitioners in *Snyder* meant to inflict harm on precisely the people against whom they targeted their message.

#### 4. Stronger Time, Place, and Manner Contentions

Although I have expressed, with some whimsy, the answers to common contentions that *Cohen* involved speech that was unprotected because it took place in a courthouse, or because it was obscene, or because its message was one of fighting words, I think one might conclude in fact that *Cohen* laid those contentions to rest both sensibly and importantly. To call “Fuck the Draft” fighting words would have elevated a very small point—that sometimes speech is uttered in public that has nothing to do with public discourse—into a much broader one without any careful inspection of the issue. To label Cohen’s jacket “obscene” would not only call into question the doctrine that obscenity required appeal to the prurient interest, but also would simply lead to the question of how one could claim that Cohen’s protest “utterly” lacked serious social value.<sup>63</sup> And to allow the State to justify treating speech as impermissibly offensive because of where that speech was uttered, without ever delineating in the statute a concern with location, seems obviously indefensible.<sup>64</sup>

In two other respects, however, it seems to me a closer question as to whether *Cohen*’s treatment of the time, place or manner issues has withstood the test of time. First, although his expression was not “fighting words” within the precise meaning of the narrow bounds of that category, perhaps free speech jurisprudence needs to provide broader powers to government to control hurtful speech, powers that *Cohen* does not recognize and perhaps even disparages. Second, what about those unwilling to confront, or to be assaulted by, Cohen’s crude commentary? One can imagine—which may be to say “can take judicial notice of that fact that”—there were probably many people in that courthouse that day who did not want to be there and who did not go there either to hear an antiwar draft protest or to be assaulted by vulgar language. Did they just have to sit there and take it?

##### a. “Fighting Words” Redux?

In my judgment, it is the burden of Part II of the opinion to describe how to analyze government’s powers, beyond the narrow “fighting words” doctrine, to control hurtful or shameful or personally disturbing speech.<sup>65</sup> Similarly, the current Court, when confronted with protests at a military funeral that were calculated to be hurtful to the deceased’s family, did not think it useful to analyze the case as one involving

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<sup>63</sup> See *Memoirs v. Massachusetts*, 383 U.S. 413, 419 (1966) (clarifying that to be obscene, a work must be “utterly without socially redeeming value”).

<sup>64</sup> The statute under which Cohen was convicted is terribly difficult to parse. But it seems rather clearly to forbid, on public highways or public streets, using “vulgar, profane or indecent language within the presence . . . of women or children,” but only where this is done “in a loud and boisterous manner.” *Cohen*, 403 U.S. at 16 n.1 (citing CAL. PENAL CODE § 415 (West 1970)). One might say that Cohen was saved by his jacket. The statute also forbids “trading,” whatever that is. The statute is quoted in full in *Cohen*. *Id.* 403 at 16 n.1.

<sup>65</sup> The point is discussed in some detail, *infra* Part IV.A.3.

“fighting words.”<sup>66</sup> Rather, today’s Justices—like those on the *Cohen* Court, and perhaps following the lead of *Cohen*—saw the need to examine the issue critically rather than simply throwing some old hoary cleverly labeled doctrine at the case.

*b. Captive Audience?*

What about the unwilling listeners? *Cohen* provides a response to that contention that is at least somewhat unsatisfactory. To dispose of this issue, the opinion lays down a general principle and then highlights four facts about the case.<sup>67</sup> The general principle starts with the proposition that there is no rigid rule specifying when the unwilling listener can demand to be left alone. Rather, at least outside the home, we often must put up with speech we would rather not hear.<sup>68</sup> To determine when or where government can act, we must ask whether “substantial privacy interests are being invaded in an essentially intolerable manner.”<sup>69</sup>

Why was this not such a case? The Court listed four facts. (1) Cohen’s entire communication was written, so people in the courthouse who saw his jacket could avoid further offense “simply by averting their eyes.”<sup>70</sup> Surely, to some people, this was an assault on their emotions, but the method Cohen used to communicate was comparatively non-obtrusive and short-lived. (2) Cohen spoke in a public place; maybe the courthouse is not a public park, but neither is it a private home.<sup>71</sup> One cannot go to court with the expectation that only civil behaviors, civilly expressed, will be on the agenda.<sup>72</sup> (3) There was no evidence in the record that anyone “powerless to avoid appellant’s conduct did in fact object to it.”<sup>73</sup> (4) The statute under which Cohen was convicted says nothing about captive audiences.<sup>74</sup> There is no requirement that the speaker be invading someone else’s privacy, nor does it matter where the speech took place. Rather, the statute “indiscriminately sweeps within its prohibitions all ‘offensive conduct’ that disturbs ‘any neighborhood or person.’”<sup>75</sup>

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<sup>66</sup> See *Snyder*, 131 S. Ct. at 1215 n.3; *supra* text accompanying note 62.

<sup>67</sup> *Cohen*, 403 U.S. at 21–22; see also *infra* notes 70–75.

<sup>68</sup> *Cohen*, 403 U.S. at 21.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 21–22.

<sup>72</sup> Indeed, a friend of mine who has litigated many cases (and also knows the *Cohen* case quite well) tells me that he once heard a judge say, “The only word that’s too obscene to be spoken aloud in a courtroom is ‘insurance.’”

<sup>73</sup> *Cohen*, 403 U.S. at 22. The arresting officer, I suppose, must be taken to be an objector, but he or she was a state actor. See *supra* note 47 and accompanying text.

<sup>74</sup> See *Cohen*, 403 U.S. at 16 n.1 (quoting in full CAL. PENAL CODE § 415 (West 1970)).

<sup>75</sup> *Id.* at 22 (citing *Edwards v. South Carolina*, 372 U.S. 229 (1963)). Another section of the statute under which Cohen was convicted proscribed using “vulgar, profane, or indecent language within the presence . . . of women or children” but only where this was done “in a loud and boisterous manner.” *Id.* at 16 n.1.

So, what is the answer to the State's "captive audience" contention? We have an apparently infinitely elastic theory ("substantial privacy interests . . . invaded in an essentially intolerable" way<sup>76</sup>), onto which are tossed a hodgepodge of facts, whose relative significances are never measured and against which no countervailing facts (such as the capacity of the speech to inflict harm) are laid. One might say that only a parent could love such a creation. Or, one might say, can someone else do better? On those facts, in that case, at that time was there a single determinative fact? I think not. Just saying one could avert one's eyes is not a satisfactory response all by itself. But, taken together with the other facts, why not?

*Cohen's* treatment of the captive audience problem is not satisfactory, I think, because it appears to leave so little direction to lower courts or guidance for future cases. In *Cohen*, the presence or absence of a speaker's "captive audience" is portrayed as an intensely factual matter, dependent on all the circumstances of the case, less susceptible to clear-cut rules than the concepts of "fighting words" or "obscenity" or "conduct, not speech." But unless we are to say that "captivity" is limited to invasions of the home, I doubt that a more hard-and-fast rule is or was available for that issue.<sup>77</sup>

In another respect, the captive audience discussion seems much like its treatment of "fighting words" or "obscenity." For each of these issues, the Court appears to be saying, "Don't dismiss this apparently inconsequential case with a slogan or a platitude that does not fit. Think about it. And, when you think about it, you may be in for a surprise." At any rate, I suspect that this is one illustration—Part II of the opinion being the other—of what led Justice Harlan to add its opening line to the draft of the opinion: "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."<sup>78</sup>

Meanwhile, I believe that Part I of *Cohen* makes important contributions to a wide range of First Amendment issues. These include the proper definition of "speech," the bounds of the "obscenity" and "fighting words" exceptions, the limits of using a

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<sup>76</sup> *Id.* at 21.

<sup>77</sup> Forty years after *Cohen*, the Court decided *Snyder v. Phelps*, 131 S. Ct. 1207 (2011). There, members of the Westboro Baptist Church protested at the funeral of a Marine killed in the line of duty in Iraq, deliberately employing particularly hurtful language. *Snyder*, 131 S. Ct. at 1213. The protest took place near the funeral but at a public place adjacent to a public street. *Id.* The Marine's father won a tort suit for, among other things, "intrusion upon seclusion." *Id.* at 1214. The Court overturned that award, rejecting a captive audience rationale almost dismissively. *Id.* at 1219–20. The Court quoted *Cohen's* general principle requiring "a showing that substantial privacy interests are being invaded in an essentially intolerable manner," noted that the case did not involve picketing at a residence, and then simply stated that "[w]e decline to expand the captive audience doctrine to the circumstances presented here." *Id.* at 1220. Forty years after *Cohen*, then, the Court is comfortable with a "captive audience" doctrine that is peculiarly fact-specific and appears to lack anything like a set of clear rules or compelling norms.

<sup>78</sup> *Cohen*, 403 U.S. at 15. Unquestionably, this statement reflects the evolution of Justice Harlan's views on this case. See *supra* note 26 and accompanying text; see also *supra* note 8.

general statute to impose a specific “place” restriction on speech, and a framework for analyzing “captive (or “unwilling”) audience” issues. All these aspects of the *Cohen* opinion appear to be virtually hornbook law in current First Amendment jurisprudence; they were, however, far from settled before *Cohen* was announced.

### III. POWERFUL MEDICINE

#### *A. Teeing up the Issue*

Part I of *Cohen* seems plainly to say that, perhaps surprisingly, there is no well-established line of First Amendment law, doctrine or theory that, when we reflect upon it, will permit an easy affirmance of Cohen’s conviction. But the surprise, I think, should have been present only for those who did not think critically about the case. Examining forthrightly what Cohen did ought to lead one to the conclusion that uttering “fuck” was communicative speech—it should not responsibly or honestly be brushed off as “mainly conduct and little speech,” as the dissent would have it.<sup>79</sup> Moreover, at least when employed in a public discussion of public issues, *Cohen*’s speech/diatribe simply did not appear to fit into the rationales underlying any of the existing time, place or manner exceptions.

These conclusions do not mean, however, that Cohen’s conviction had to be reversed, only that to affirm required that some rule be expressed that covered Cohen’s behavior, that some rationale be articulated that explained why his punishment was not inconsistent with the First Amendment. So, as the Court described it at the beginning of Part II of the opinion, the question becomes whether to fashion a new rule (or, if one prefers, announce a previously unannounced rule) for “fuck,” or for dirty words or offensive speech generally.<sup>80</sup> Given that flatly banning this word is not a permissible restriction under the existing time, place and manner rules, then the question becomes, as the opinion states, whether California may, consistent with the First Amendment, “excise, as ‘offensive conduct,’ one particular scurrilous epithet from the public discourse . . . .”<sup>81</sup>

#### *B. Avoiding Violence?*

The California appellate court that upheld Cohen’s conviction held that it was permissible to outlaw Cohen’s offensive utterance, “Fuck the Draft,” because it “was certainly reasonably foreseeable that such conduct might cause others” to act violently toward Cohen or try to “forcibly remove his jacket.”<sup>82</sup> The appellate court seemed

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<sup>79</sup> *Cohen*, 403 U.S. at 27 (Blackmun, J., dissenting).

<sup>80</sup> *Id.* at 22–23 (majority opinion).

<sup>81</sup> *Id.* at 22.

<sup>82</sup> *Id.* at 17 (citing *People v. Cohen*, 81 Cal. Rptr. 503, 506 (Ct. App. 1969)).



unconcerned with whether there was a factual basis for concluding that Cohen intended to incite violence or for concluding that, in the particular circumstances of the case, violence was imminent or likely.<sup>83</sup>

The Supreme Court majority, of course, dismissed this violence rationale without inquiring into such matters as intent or imminence.<sup>84</sup> Rather, the claim was summarily rejected on the ground that allowing the violence justification would permit the State lawfully to censor speakers because otherwise violent and lawless people would silence the speech themselves.<sup>85</sup> Were the justification tendered here accepted, the State could, in effect, bootstrap itself into justifiable censorship.

Surely, the right of freedom of speech includes the right to utter speech that is disagreeable. To say that the State's power to censor grows as the speech becomes more powerful or more moving, so long as the speech does not seek to incite violence, would be to stand the First Amendment on its head. *Cohen* treated this point as being almost self-evident. The opinion noted that there was no evidence that Cohen sought to provoke others to attack him or that anyone was about to do so. In these circumstances, the Court said it was a "self-defeating proposition" to argue that government could effectuate the censorship that a hypothetical angry listener threatened.<sup>86</sup> Catering to the whims of violent lawbreakers is not what is meant by a compelling governmental interest.<sup>87</sup>

That reasoning, together with all of Part I of the opinion, apparently brought the *Cohen* Court to the real question presented by Cohen's behavior, the question that surely drove all the instinctive reactions dismissed in Part I: Why can't the State simply take out of the public vocabulary this one word, or perhaps a series of "dirty words," in order to raise the level of public discourse or to protect public morality?<sup>88</sup>

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<sup>83</sup> See Brief for Appellant, *supra* note 53, at 11–17.

<sup>84</sup> *Cohen*, 403 U.S. at 20.

<sup>85</sup> *Id.* at 23.

<sup>86</sup> *Id.*

<sup>87</sup> Perhaps at some extreme we could posit a case justifying restraining the speaker, where there is clear and overwhelming evidence that (a) a speaker is deliberately inciting a crowd to attack him or her, and (b) only intervention to remove the speaker, rather than to restrain the listeners, can avoid real physical violence. That scenario is arguably consistent with the way in which the Court explained why Cohen could not be sanctioned for threatening to instigate violence, *see supra* text accompanying note 85, and nothing on the facts of *Cohen* remotely resembles that scenario. *See also infra* note 92 and accompanying text (explaining how an amicus brief in support of Cohen argued this point precisely and forcefully). In *Feiner v. New York*, 340 U.S. 315 (1951), the Supreme Court upheld a conviction for inciting a breach of the peace, against a soap-box orator in Syracuse who had inflamed some in a crowd that gathered to hear him, where at least one onlooker threatened to attack Feiner, who nevertheless refused a police order to step down. *See Feiner*, 340 U.S. at 321. It would seem that this portion of *Cohen* implicitly limited *Feiner* to something like the hypothetical sketched at the outset of this note or, alternatively, implicitly overruled that case. In any event, it would probably be fair to say that *Cohen*'s curt dismissal of the State's argument was not completely respectful toward that argument or toward the *Feiner* precedent.

<sup>88</sup> *See Cohen*, 403 U.S. at 22–23.

Are we to believe that statesmen wrote the First Amendment, and patriots fought for it, so that “fuck” could be bandied around in public just as freely as “peace, love, and brotherhood?” After all, the Court had said, unanimously, in dictum published many years before *Cohen*, that profanity was unprotected by the First Amendment.<sup>89</sup>

### C. An Overbroad Statute?

Here, however, the American Civil Liberties Union of Northern California (NACLU) entered this courtroom drama, explaining that there was yet another narrower issue that might dispose of the case, albeit in Cohen’s favor. Indeed, the NACLU filed an amicus brief encouraging the Court *not* to address what the Union called “The Profanity Issue.”<sup>90</sup> The NACLU argued, “with some force”<sup>91</sup> as the Court put it, that because the California courts had construed the statute to punish only communicative conduct that might cause listeners to react violently—but had not so construed that statute before Cohen’s arrest and, in affirming his conviction, never required that there be any evidence of the likelihood of violence introduced at trial—the statute was therefore unconstitutionally overbroad.<sup>92</sup> Further, NACLU argued that neither the act nor the conviction could be upheld by some other rationale having nothing to do with violent reactions because California courts had definitively

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<sup>89</sup> See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (“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. . . . [S]uch 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.”) (footnotes omitted). By the time *Cohen* was decided, the Court had already retreated from *Chaplinsky*’s simplistic, talismanic approach to obscenity and to libel. See, e.g., *Memoirs v. Massachusetts*, 383 U.S. 413, 418–20 (1966) (finding that obscenity is unprotected only under narrow conditions); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (holding libelous utterances concerning public figures engaged in official duties are protected unless published with malice). *Cohen*, then, can be viewed as the next evolutionary step in that part of constitutional jurisprudence concerned with forms of speech that *Chaplinsky* (and the New Deal Court) sought to handle by categorically excluding them from First Amendment protection. As discussed below, the arguments we make today for and against protecting Cohen’s vulgarity closely reflect the considerations *Chaplinsky* set forth—“inflict injury” by “their very utterance,” “essential part of any exposition of ideas,” “value as a step to truth,” “[weighed against] the social interest in order and morality.” *Chaplinsky*, 315 U.S. at 572.

<sup>90</sup> Brief for American Civil Liberties Union of Northern California as Amicus Curiae Supporting Appellants at 10, *Cohen v. California*, 403 U.S. 15 (1971) (No. 299) [hereinafter Brief for NACLU].

<sup>91</sup> *Cohen*, 403 U.S. at 23 n.5.

<sup>92</sup> See Brief for NACLU, *supra* note 90, at 21–26.

construed the statute, at least insofar as it applied to disturbing the peace by offensive conduct, to reach only that which threatened to provoke violent retaliation.<sup>93</sup>

Why the NCACLU wanted (or hoped) to settle for a pee-wee victory and refused to engage on the merits is anyone's guess. Certainly, at the time, it was puzzling to the Court. In retrospect, at least, it is somewhat ironic that, while the Supreme Court uttered one of its most speech-protective opinions of the past fifty years, one very large branch of the American Civil Liberties Union (ACLU) sat on the sidelines, publicly urging the Court to stay its hand and say nothing. Counsel for Cohen refused to consent to the filing of the NCACLU brief.<sup>94</sup> One is tempted to assume that consent was withheld because of the amicus brief's apparent timidity about confronting what Cohen—and a majority of the *Cohen* Court—thought was the real issue in the case.<sup>95</sup>

In fact, unbeknownst to the Court, the intrigue at work here was somewhat deeper. Counsel for Cohen, both in the California courts and at the Supreme Court, was Melville Nimmer, then a professor of law at the University of California, Los Angeles (UCLA), now deceased. The briefs that Nimmer filed in the Supreme Court did not disclose any of his professional affiliations, listing only his home address.<sup>96</sup> Thus, nothing in his papers revealed what Nimmer's son recently explained: Cohen,

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<sup>93</sup> *Id.* at 22.

<sup>94</sup> *Id.* at 2.

<sup>95</sup> Without testimony from the parties, one can only guess at motivations. Perhaps the likeliest candidate is that the NCACLU feared that the Court, were it to confront the question of the First Amendment and profanity, would rule for the State. Why that would deter the ACLU from pressing what the organization, dedicated to free speech advocacy, claims it thought was a correct rule would remain a mystery. *See infra* notes 99–104 and accompanying text. In any event, a narrower ruling was proposed. According to Justice Harlan, at the Court's conference after the Justices voted 5–4 to reverse Cohen's conviction, Justice Douglas, the senior Justice in the majority, immediately stated that he would assign the opinion to Justice Harlan. Harlan then replied that he might limit the grounds for reversal to the "procedural" aspects of the case, by which he meant limiting the grounds of reversal to overbreadth or vagueness; but Justice Stewart then immediately replied that this more limited ruling would not be sufficient for him. In this fashion, Douglas and Stewart both did their best both to lock Harlan into the majority and to prevent him from returning with a "pee-wee" opinion. (These recollections of the developments at conference stem from Justice Harlan's conversation with the author immediately after the conference.) No votes changed from that initial 5–4 conference vote until the opinion came down over three months later. In effect, the conference discussion disposed of the case and the opinion was a bit of a formality (although hopefully the opinion contributed to the development of the law beyond the specific facts of *Cohen*).

<sup>96</sup> Email from David Nimmer to Thomas G. Krattenmaker, author (Aug. 22, 2011, 12:58 EST) (on file with author). That Nimmer's brief did not carry the ACLU or SCACLU title is not unusual. Norman Dorsen, who was general counsel to the national ACLU at the time, has told me that this is customary when the ACLU is directly representing a party rather than acting as amicus curiae. Email from Norman Dorsen, Stokes Professor of Law & Counselor to the President, N.Y. Univ., to Thomas G. Krattenmaker, author (Sept. 26, 2011, 19:39 EST) (on file with author).

once charged, came to the Southern California ACLU (SCACLU) seeking assistance.<sup>97</sup> Mel Nimmer was on the executive committee of the SCACLU and agreed to handle Cohen's case, which he then took through the California courts and to the Supreme Court.<sup>98</sup> Thus, there were, in effect if not in form, two ACLU briefs in the *Cohen* case—one filed by the NCACLU as amicus, the other written by Cohen's counsel.

In any event, before presenting its overbreadth argument, the NCACLU brief went to some pains to explain, quite eloquently, why breach of the peace laws (as one might fairly characterize the statute under which Cohen was convicted) "are the sinks of American criminal and constitutional jurisprudence."<sup>99</sup> The brief, however, then urged the Court *not* to issue a broad ruling condemning such statutes.<sup>100</sup> In that same spirit of avoiding issues, the NCACLU then asked the Court not to address "the question whether, consistently with the First and Fourteenth Amendments, a State may punish the utterance of a class of non-obscene 'profane' speech."<sup>101</sup> The NCACLU described this as "a question of considerable importance, fraught with the gravest difficulties."<sup>102</sup> As the NCACLU's brief explained, the Court might avoid these "difficulties," by noticing that "[s]ince California has not chosen to punish appellant for profanity," but instead for uttering words likely to lead to violence against him, "its constitutional power to do so is not at issue here."<sup>103</sup> That one very active branch of the ACLU, historically committed to a very speech-protective view of the First Amendment, was overwhelmed by these "difficulties" remains, in my judgment, an extraordinary aspect of the case.<sup>104</sup>

This does not mean, however, that the NCACLU's overbreadth argument was frivolous by any means. It was not. The statute as written, and as applied to Cohen, required no finding of violence or its likelihood, and the trial judge had found no such evidence in this case. Therefore, the statute appeared to condemn peaceful offensive

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<sup>97</sup> Email from David Nimmer, *supra* note 17.

<sup>98</sup> *Id.*

<sup>99</sup> Brief for NCACLU, *supra* note 90, at 3.

<sup>100</sup> *Id.* at 8–10.

<sup>101</sup> *Id.* at 10.

<sup>102</sup> *Id.* Later, the brief described the issue as "vexing." *See id.* at 11.

<sup>103</sup> *Id.* at 10, 13. In fact, Cohen's case had an odd trip through the California court system—conviction, reversal, reinstatement of conviction, refusal of Supreme Court review. I have omitted all these details, but they are relevant to grasping just how powerful the NCACLU's claim was that Cohen's conviction was affirmed only by a kind of gerrymandering of the issues. A very good description of how this case rose through the California courts is provided by Farber, *supra* note 33, at 286–88.

<sup>104</sup> The most common response is to assume that the NCACLU wanted the Court to duck the issue because the Union feared that the Court would, if it confronted the matter, rule for the State. However, this would be an odd position for a public interest advocate to take; there was nothing evident in law or politics in 1971 that suggested the Court was more likely to be receptive several years later. Meanwhile, a refusal to obtain Supreme Court reversal stands, as a practical matter, only slightly apart from an affirmance in the signals that it sends to lower courts.

communicative conduct, so long as someone else later determined, without trying the facts, that violence might have ensued.<sup>105</sup>

Cohen's brief, too, argued powerfully that the statute, as construed by the California courts, was unconstitutionally overbroad and vague.<sup>106</sup> In Cohen's case, however, the argument was put in as the very last point, occupying fewer than four pages of a brief almost forty-nine pages long.<sup>107</sup> Cohen's lawyer plainly sought what the NCACLU did not—a ruling on whether the State of California could issue a flat ban on public speech containing the word “fuck.”<sup>108</sup>

Given the power of the overbreadth and vagueness contentions, on the particular facts of this case, one might conclude that the Court's opinion somewhat eagerly reached out to get to the cleansing public discourse<sup>109</sup> (or, “why not a flat ban on profanity?”) argument. The opinion states that because the California court construed the statute to “impose, in effect, a flat ban on the public utterance” of the word “fuck,” it did not “seem inappropriate” to ask whether any rationale other than the violence-instigating argument “might properly support” the conviction.<sup>110</sup> The NCACLU's brief, then, forced the Court to stretch to get to the merits.

The amicus brief had another consequence as well—it made filing an intellectually honest opinion in support of affirmance terribly difficult, if not impossible. The dissent in *Cohen* dealt with the vagueness and overbreadth contentions, as well as the actual grounds for affirmance put forward by the California reviewing court, by ignoring them—whether this was by accident or design one cannot say. Why at least one of the four dissenters did not concur in reversing the

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<sup>105</sup> Brief for NCACLU, *supra* note 90, at 22–23. Here, the amicus brief cleverly (and probably correctly) argued that “[f]or this reason, *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 91–92 (1965), palpably compels reversal.” *Id.* at 23.

<sup>106</sup> Brief for Appellant, *supra* note 53, at 45–49. As Cohen's brief put it, the Court below apparently held that words alone, without any evidence of actual or threatened violence, could amount to “offensive conduct” and the statute thus “‘may truly mean all things to all men.’ Here is vagueness in its most rampant form.” *Id.* at 46–47. If, on the other hand, a law punishing all public use of profanity would be constitutional, that would not save from overbreadth “a statute which purports to punish any words which others might find offensive.” *Id.* at 47. In sum, “[i]f all words that anyone may regard as constituting profanity may be denied First Amendment protection, then the category is surely defective as overbroad. If something less than such a broad category is intended, then the statute is defective for vagueness.” *Id.* at 49.

<sup>107</sup> *See id.* at 45–49.

<sup>108</sup> Cohen's counsel, Professor Nimmer, made this clear at oral argument. During his rebuttal time, Cohen's counsel stated that he agreed that the case could be decided on “the narrow grounds suggested by [the NCACLU],” but went on to urge the Court “to go further, and make clear that the language of profanity is not outside the scope of the First Amendment, simply because it's offensive.” Transcript, *supra* note 17, at 850.

<sup>109</sup> *Cohen v. California*, 403 U.S. 15, 25 (1971).

<sup>110</sup> *Id.* at 23–24 n.5.

conviction, but by invoking these more limited grounds,<sup>111</sup> is another mystery surrounding this case.<sup>112</sup>

*D. Protecting Public Profanity—“One Man’s Vulgarity . . .”*

Thus, the Court reached the climactic issue in *Cohen*, the issue Cohen’s counsel briefed extensively, the issue the NCACLU virtually begged the Court not to address, the issue that the State of California said was not presented by the record: Did the First Amendment disable the states from making it a crime to utter publicly the word “fuck”? One could say that the Court reached this issue by first carefully and sensibly pruning away a series of deceptively appealing but ultimately false issues,<sup>113</sup> by reaching out while virtually ignoring an obviously simpler rationale for disposing of the case,<sup>114</sup> or by ignoring the record.<sup>115</sup> By whatever means, the Court got there.

Broadly speaking, there seem to be two different types of rationale that might support a state ban on dirty words. First, one might put forward what I would call an aesthetic or non-instrumental justification, a reason not necessarily rooted in any goal other than the state’s desire to further decency and civility, pure and simple. Perhaps one might combine—with the sense of shock, outrage, and concern for vulnerable recipients of tawdry messages that such language produces—the undoubtedly accurate observation that no one involved in conceiving, drafting or ratifying the First Amendment probably ever meant to bring cussing within its protections.

Second, one might assert as well, or instead, a more conventionally instrumental justification for banning expletives from public discourse: If coarse, base, and humiliating language are to be let in, surely this will tend to drive away from the public

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<sup>111</sup> *Id.* at 28 (White, J., dissenting).

<sup>112</sup> Equally puzzling is this sentence from a short memo that Justice Blackmun wrote, presumably only for his own use, and left in his papers: “Incidentally, I find the amicus brief almost offensively arrogant in its approach.” Memorandum from Harold A. Blackmun to the Conference (undated) (on file with Library of Congress, Manuscript Division, Papers of Harold A. Blackmun, Box 127, folder 5) [hereinafter Blackmun Papers]. One is tempted to conclude that this simply reflects how conflicted Blackmun was in voting to affirm this conviction under that statute, but perhaps this is merely a reflection of my own judgment that the NCACLU’s position, tepid as it was, was very strong on the grounds it presented for reversal. If the test of a well-reasoned position is that it draws blistering criticisms from both its conservative and liberal opponents, then the NCACLU’s brief deserves high marks; both Blackmun and Cohen’s counsel objected strongly.

<sup>113</sup> As explained in Part II, *supra*, I believe that this is the better view.

<sup>114</sup> As explained in Part III.C, *supra*, this was the view of the NCACLU.

<sup>115</sup> This is how I would explain the view of the State of California, which contended both that Cohen did not engage in speech, *see supra* note 33, and that he was convicted only for behavior that was highly likely to lead to violence, even though none occurred in this case, nor was there any evidence introduced at trial on this issue. *See supra* note 105 and accompanying text.

forum those who cannot or will not tolerate dialogue infected by this kind of speech. The net result would be to bias public discussions toward those who would degrade and devalue those discussions, lowering analytical rigor, without producing any offsetting benefits. Cohen could say what he meant in words that permit others to engage his ideas, rather than force them to flee his words. For civilized discourse to take place, some manner(s) of speech must be out of bounds. Having a kind of Robert's Rules of Order to govern the civility and inclusiveness of public rhetoric should properly be seen as an attempt to improve public discourse,<sup>116</sup> not to degrade or censor it. Taking "fuck" out of the public debate, on this view, is akin to preventing shouting down a speaker who properly has the platform.

The Court majority responded to these contentions with a variety of objections.<sup>117</sup> Each has the capacity to generate very strong speech-protective rules. First, the Court stated, without citation, that the First Amendment compels a "usual rule that governmental bodies may not prescribe the form or content of individual expression."<sup>118</sup> The rule, of course, had exceptions. However, according to the *Cohen* majority, a body of law already described most exceptions to the rule.<sup>119</sup> The opinion had already examined those exceptions that might be relevant here—captive audience, fighting words, obscenity, non-communicative conduct—and found them incapable of justifying Cohen's conviction.<sup>120</sup> Thus, the State, in effect, carried a burden to explain why government required yet another exception to that "usual rule."

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<sup>116</sup> See generally HENRY M. ROBERT, ROBERT'S RULES OF ORDER (1915) (outlining "rules of order" for deliberative assemblies).

<sup>117</sup> Anyone who reads *Cohen* might observe that the opinion has a somewhat academic air about it. The opinion contains much about theories and values surrounding freedom of speech and little about social reality, interpersonal behaviors, markets, or incentives. Such an academic air probably permeates the opinions in most cases that require the Court to reflect on the nature of freedom of speech. But something else was at work here, too; a confluence of law professors played a large role in this case. The NCACLU's brief was signed by, among others, Anthony G. Amsterdam, then a professor at Stanford Law School. See Brief for NCACLU, *supra* note 90. Amsterdam was well-known as a distinguished scholar in both First Amendment and criminal law and procedure; he probably was the principal author for the NCACLU. Cohen's lawyer, who briefed the case on his behalf, and as an attorney affiliated with the SCACLU, was Melville B. Nimmer, then a professor at UCLA School of Law and a very highly regarded academic in the fields of freedom of expression and its closely related cousin, intellectual property. I too was a law professor, although certainly not in the league of Amsterdam or Nimmer. But I was, when clerking, on leave from the University of Connecticut School of Law, where I had taught both constitutional law and constitutional adjudication for the previous two years. I was steeped in the cases cited in those briefs before I ever read counsels' arguments. It is fair to ask, I think, whether *Cohen* might have been different, in result or, perhaps more likely, in style of exposition, had it not been for this extensive involvement by leading and fledgling First Amendment academics.

<sup>118</sup> *Cohen v. California*, 403 U.S. 15, 24 (1971).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

## 1. “Powerful Medicine”

Why was the Court both insistent on starting from the premise of no regulation of the form and content of speech and also not receptive to establishing another exception? Because to do so would not be faithful to the purpose or spirit of the First Amendment. Said the Court,

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.<sup>121</sup>

The Court then explained its “powerful medicine” metaphor. The offensive language bandied about by Cohen, the “verbal tumult [and] discord” we often see, are,

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.<sup>122</sup>

We do not honor or applaud Cohen for what he did. But we need to understand that to punish him is to betray commitments expressed in the First Amendment. Holding to those commitments can be wrenching. They disable government—that is, democratic society—from voluntarily taking steps that are designed to further the common welfare. But giving those means of regulation to the state risks more than it accomplishes. We risk deeply undermining citizens’ capacities to develop and articulate their ideas, and we lose the fundamental commitment to individual autonomy and self-worth on which the First Amendment rests. “Powerful,” yes. But it is “medicine,” not poison.<sup>123</sup>

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<sup>121</sup> *Id.* Here, the Court cited passages to the same effect from an opinion by Justice Brandeis. See *Whitney v. California*, 274 U.S. 357, 375–77 (1927) (Brandeis, J., concurring).

<sup>122</sup> *Cohen*, 403 U.S. at 24–25.

<sup>123</sup> Perhaps this takes the metaphor too far, but at some point, powerful medicine can have such side effects that the medicine is not worth it. The example most likely to occur to free



## 2. “Otherwise Inexpressible Emotions”

However persuasive this logic may be, the Court appears to realize that it does not necessarily govern this particular issue. We still do not know why the First Amendment means that the State cannot tell its citizens to “Just say no to ‘fuck.’” “Powerful medicine” to protect “broader enduring values” may bring us a “verbal cacophony,” that as individuals we need to tolerate, but why must democracy tolerate gross excesses to achieve a “perfect polity” or to honor “individual dignity and choice”?<sup>124</sup> Why must we allow individuals to make *those* choices, to make the choice that Cohen made?

*Cohen* responds with yet another interesting observation about the function of freedom of speech. This observation is bracketed by two slippery slope arguments.

The centerpiece observation, which was very well articulated in Cohen’s brief,<sup>125</sup> is the Court’s statement 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.”<sup>126</sup> It was imperative that the freedom of speech encompass the emotive, as well as the cognitive function, of speech.

Surrounding this observation were two slippery slopes. First, “the principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive word?”<sup>127</sup> The opinion went on to say (in a passage the final six words of which Walter Cronkite read on the CBS Evening News the night the opinion was announced) “while the particular four-letter word being litigated here

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speech theorists today is not profanity, but rather hate speech directed at powerless minorities. As discussed below, where the speech addresses a matter of public interest and concern, and is not directed as a private, personal insult, *Cohen* seems to explain why the jurisprudence of the First Amendment suggests that government should not be empowered to censor that speech, either. See *infra* notes 174–83 and accompanying text; see also Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 305–11 (1991).

<sup>124</sup> See *supra* notes 121–22 and accompanying text.

<sup>125</sup> See Brief for Appellant, *supra* note 53, at 32–35. Professor Nimmer’s brief for Cohen on every issue raised by this case was of the highest quality. Unquestionably, however, his greatest contribution to the outcome in *Cohen* was his stunningly astute and well-documented argument, as stated in his summary, that,

[I]f the state could censor the emotive content of speech, even though it did not censor the intellectual content, the state could thereby to a large extent determine to which members of the public a given speech will appeal, and could thus largely influence whether a particular idea will prevail in the marketplace [of ideas]. For this reason it is clear that speech to be protected by the First and Fourteenth Amendments need not be “polite.”

*Id.* at 10. Compare that statement with the one from the Court’s subsequent *Pacifica* opinion, quoted *supra* note 31.

<sup>126</sup> *Cohen*, 403 U.S. at 26.

<sup>127</sup> *Id.* at 25.

is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric."<sup>128</sup> This is why the First Amendment "leaves matters of taste and style so largely to the individual."<sup>129</sup>

The second slippery slope seems to be a derivative of the first, as well as a specific recognition of what the opinion calls the "emotive function"<sup>130</sup> of speech. If punishment turned on the offensiveness of speech, "governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views."<sup>131</sup> It was "facile" to assume "that one can forbid particular words without also running a substantial risk of suppressing ideas in the process."<sup>132</sup>

### 3. "Not a Sign of Weakness, but of Strength"

*Cohen* is a short opinion. Summarizing it may be pointless. Taking that risk, Harlan appears to say that although the manner in which Cohen spoke was coarse, offensive, and outside the pale of usual civilized discussion, it was nevertheless constitutionally protected.<sup>133</sup> The First Amendment requires a commitment to let individuals alone as they determine how to express themselves on important matters of public interest and concern and, when this results in distasteful rhetoric, we have to understand that tolerating that rhetoric is, for many reasons, preferable to censoring it. The "freedom of speech" that the First Amendment enshrines includes freedom to express emotions as well as positions or observations that can be mapped with formal logic. Powerful medicine does not necessarily taste good, but in a pluralistic, open, democratic society taking that medicine is preferable to making the speaker a criminal.

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<sup>128</sup> *Id.* This passage from *Cohen* seems to have endured more strongly than any other. One of my commenters helpfully suggested a possible reason. Perhaps the quoted argument is not just a statement about the relativity of aesthetic judgment, but about the fact that, at least at that moment, there were raging conflicts between subcultures and political movements. For some speculation on what triggered the impulse to draft that phrase, see *supra* note 8.

<sup>129</sup> *Cohen*, 403 U.S. at 25.

<sup>130</sup> *Id.* at 26.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* Using somewhat different language, the point was forcefully argued in the NCACLU's amicus brief:

[A]ny crime which is constituted entirely by words—perhaps by a single word—creates inordinate possibilities of overreaching and abuse. One need not suppose that policemen are more frequently perjurious than other men to realize that, like other men, they may hear what they want to hear in the course of an excited conversation.

Brief for NCACLU, *supra* note 90, at 11. Of course, in this case, there was no doubt what Cohen said. He wore the jacket with those words and testified that he meant it. *Cohen*, 403 U.S. at 16 (quoting *People v. Cohen*, 81 Cal. Rptr. 503, 505 (Ct. App. 1969)). Still, one might ask what would have happened had a police officer in April 1968 heard someone on a street corner, outside the courthouse, say "Fuck all those antiwar draft dodgers."

<sup>133</sup> *See Cohen*, 403 U.S. at 26.

## IV. THE DISSENT THAT WASN'T

Justice Blackmun filed a two-paragraph dissent.<sup>134</sup> The first paragraph argued that “Cohen’s absurd and immature antic . . . was mainly conduct and little speech.”<sup>135</sup> He thought that the case fell well within the “fighting words” exception and found “this Court’s agonizing over First Amendment values . . . misplaced and unnecessary.”<sup>136</sup> In this, he was joined by Chief Justice Burger and Justice Black.<sup>137</sup> Blackmun’s second paragraph, which Justice White joined as a fourth dissenter,<sup>138</sup> argued that the case should be sent back to the California courts to see whether an intervening decision by the California Supreme Court had altered the meaning of the statute under which Cohen was convicted.<sup>139</sup>

The Blackmun dissent is tepid to the point of virtual nonexistence. He might as well simply have written, “I dissent. Don’t ask me why, but I disagree with this misplaced agonizing over First Amendment values in a case involving nothing more than

<sup>134</sup> *Id.* at 27–28 (Blackmun, J., dissenting).

<sup>135</sup> *Id.* at 27.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* Justice Black, of course, had often proclaimed himself an absolutist with respect to the First Amendment’s protection of freedom of speech. For example, in a comparatively early obscenity case, he wrote, “I believe the Federal Government is without any power whatever under the Constitution to put any type of burden on speech and expression of ideas of any kind (as distinguished from conduct) . . .” *Ginzburg v. United States*, 383 U.S. 463, 476 (1966) (Black, J., dissenting). As that passage indicates, Justice Black simultaneously believed that “conduct” was not “speech” or “expression of ideas.” For example, in a case involving civil rights picketers, Black wrote, “Picketing, though it may be utilized to communicate ideas, is not speech, and therefore is not of itself protected by the First Amendment.” *Cox v. Louisiana*, 379 U.S. 536, 578 (1965) (Black, J., concurring and dissenting) (citations omitted). Apparently, then, Black’s joining Blackmun’s dissent can thus be understood only on the grounds that “fighting words” were not “speech.” How certain “words” were not “speech”—and how to tell which were speech and which were not—was something only Justice Black knew and understood. For a simpler explanation of Justice Black’s view on the *Cohen* case, see *supra* text accompanying note 19.

<sup>138</sup> *Cohen*, 403 U.S. at 28. One of the little mysteries about the *Cohen* case, to me, is why Justice White dissented. I have no direct knowledge about this. One of his clerks from another Term pointed out to me that on free speech cases, Justice White generally preferred narrow grounds. *See, e.g., Broadrick v. Oklahoma*, 413 U.S. 601, 611–12 (1973) (writing for the Court and taking a narrow reading of a statute and its application to challengers, to avoid invalidation on vagueness or overbreadth grounds). I think this may be both the best and the simplest explanation for why the most accomplished and experienced athlete ever to sit on the Court found it impossible to sign onto an opinion permitting Cohen to say “fuck” outside a locker room. According to Justice Brennan’s note on the Court’s conference at which the justices voted, Justice White stated that the case had “no significance for first amendment values.” Brennan Papers, *supra* note 5. One can easily imagine that Justice White refused to agree to the first paragraph of the Blackmun dissent because he saw the force behind the ACLU’s argument that the statute was fatally vague and overbroad and so affirming the conviction was out of bounds, although his *Broadrick* opinion gives some caution against that explanation.

<sup>139</sup> *Cohen*, 403 U.S. at 27–28 (Blackmun, J., dissenting).

an absurd and immature antic.”<sup>140</sup> Perhaps this was a brilliant move on Blackmun’s part, using such a simple dissent dramatically to trivialize the majority opinion. For whatever reason, he and his colleagues simply refused to engage the majority.

Suppose one set out to critique *Cohen* more squarely and more forcefully. As I see it, one can legitimately criticize *Cohen* from two different perspectives. From one perspective, one might note that *Cohen* does not make explicit use of several obvious features of the case—that Cohen employed a fairly traditional means of protest, that he utilized a means of communication likely to have minimal reach, and that Cohen’s communication clearly addressed a matter of public interest and concern. Noting these omissions, I argue that *Cohen* might be read to promise more or less than it delivered. That is, a dissent at the time might have been of the variety, “If this is right, and you mean what you say, what are you going to do about X, Y, and Z?”

Another criticism takes on *Cohen* squarely on its own logic and rhetoric, as applied to the specific facts of this case. This critique argues that *Cohen* overstates the value of protecting Cohen’s “absurd and immature antic,” as Justice Blackmun described it.<sup>141</sup> What Blackmun and his fellow dissenters described as the Court’s “agonizing over First Amendment values” is either “misplaced,” as Blackmun viewed it,<sup>142</sup> or wrong-headed and counter-productive to the welfare of society.<sup>143</sup>

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<sup>140</sup> Personally, I had two moments of panic during the course of preparing the *Cohen* opinion. The first came when Justice Harlan had reviewed and edited the opinion and had it prepared for circulation to the other Justices. For Harlan’s edits, see *supra* note 8. He told me one evening, however, that I was not to distribute the proposed opinion. He wanted to take it home and study it again to satisfy himself that the draft could be squared with his views on obscenity. Justice Harlan had, from the very beginning, consistently taken the position that the First and Fourteenth Amendments imposed virtually no limits on the states in their regulation of obscenity, leaving them (but not the federal government) to regulate erotic speech in the interest of public morality. *See, e.g.*, *Memoirs v. Massachusetts*, 383 U.S. 413, 456–58 (1966) (Harlan, J., dissenting); *Roth v. United States*, 354 U.S. 476, 500–03 (1957) (Harlan, J., concurring and dissenting). As I recall, I had almost no sleep that night as I tried to think of arguments I had not already put into the draft. I failed utterly. Justice Harlan walked into chambers the next morning, put the draft on my desk, and said, “I am satisfied. Send it around.” Somehow, I managed to suppress what would have been a very big sigh of relief.

The second moment of panic was when I opened the envelope containing Justice Blackmun’s circulation of his dissent. I knew quite well that a very powerful dissent could have been written. Had just one person in the majority been persuaded our opinion would be a dissent! (Unless the person persuaded was Justice Harlan!) I did permit myself a sigh of relief when I saw that, for whatever reason, Justice Blackmun had decided not to write a substantial dissent.

<sup>141</sup> *Cohen*, 403 U.S. at 27 (Blackmun, J., dissenting).

<sup>142</sup> *Id.*

<sup>143</sup> A stronger version of this position appears in an unpublished dissent by Chief Justice Burger. After Justice Harlan circulated his opinion, Burger circulated to the other Justices a typewritten letter containing a short opinion that he said he would “probably” file in *Cohen*. The key sentence was: “It is nothing short of absurd nonsense that juvenile delinquents and their emotionally unstable outbursts should command the attention of this Court.” Memorandum from Chief Justice Warren E. Burger to the Conference, Blackmun Papers, *supra* note 112.

*A. Cohen's Sins of Omission*

I believe it can fairly be said that several important criticisms of *Cohen* arise from the observation that the opinion was insufficiently explicitly self-conscious about the particular facts that gave rise to the case. By failing to tie the outcome of the case, as well as the doctrines announced in the opinion, to precisely what happened in that courthouse in 1968, *Cohen* may paradoxically have weakened its force by failing to explain what the opinion did not address. Alternatively, *Cohen* may appear more powerful than it is, promising more than it delivered. I see three aspects of apparent short-sightedness, accidental or intentional, in the *Cohen* opinion that give rise to questions about just what the Court did and did not mean to do when it announced why it reversed Cohen's conviction, or about how broadly *Cohen* seems to set out a coherent theory, not tethered to the specific facts of the case, about First Amendment controls on the regulation of speech.

## 1. Speech v. Conduct and Legitimate v. Illegitimate State Interests

First, Cohen engaged in "pure speech," both in the sense that the State cared only about the communicative aspects of his jacket, and in the sense that it is simply impossible to imagine the State having any concern with the conduct underlying the communication. Who cares if someone wears a jacket in a courthouse corridor (especially when he takes it off upon entering a courtroom)?

This case was all about the writing on the jacket, writing that had no effect in the world except insofar as it conveyed a message to other people's cognition. The opinion to some extent rests on these facts, yet makes little of them. But what if Cohen had said "Fuck the Draft" not by printing it on his jacket, but by burning his draft card? That is not a hypothetical question. Only two Terms earlier, the Court had almost unanimously upheld the conviction of David O'Brien for burning his draft card in protest of the war in Vietnam, and in violation of a congressional statute proscribing draft card burning.<sup>144</sup>

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Burger added that he would dismiss the appeal for lack of a substantial federal question. *Id.* One suspects this is, at the very least, a rare instance of a person trained in law describing one of Justice Harlan's opinions as "absurd nonsense." I do not specifically recall Harlan's reaction to the letter, but I do know that in a full year of working in that office, often under quite a lot of pressure, I never heard him say a derogatory word about anyone. It just was not done in Harlan's Chambers. The dissent that Blackmun circulated initially contained a third paragraph making the Chief Justice's argument in more restrained tones. It said, in part: "The importance of this litigation escapes me. I do not understand the Court's eagerness to take a case such as this." *Id.* Cohen had been sentenced to thirty days in jail. The *Cohen* case was argued and decided during Blackmun's first full Term on the Court. In light of Blackmun's subsequent tenure there, it is perhaps interesting that he found the thirty-day jail sentence for wearing an offensive piece of clothing unimportant.

<sup>144</sup> See *United States v. O'Brien*, 391 U.S. 367 (1968).

How was what O'Brien did any different from what Cohen did—and why is the *Cohen* opinion silent on this matter? The *O'Brien* opinion is, as it should be, deeply troubling to anyone concerned with the value of freedom of speech.<sup>145</sup> By ignoring *O'Brien*, *Cohen* seems to convey that the cases are somewhat different, so that *Cohen* poses no challenge to *O'Brien*, but without ever explaining why.<sup>146</sup> At a very simple level, one might say that *Cohen* concerned speech while *O'Brien* concerned conduct. But that is too facile. In fact, all speech is to some extent conduct and conduct is frequently expressive, sometimes powerfully so. Of course, *O'Brien* involved a governmental regulation that, on its face, had to do entirely with the conduct part of O'Brien's communication (i.e., “don't burn”), not its content. Yet, given *Cohen*'s loud paean to unrestrained individualistic public discourse, why should that simple fact be dispositive?

*Cohen*, I would argue, shows why the *O'Brien* Court should have looked more carefully at the government's assertedly nonspeech related justifications for punishing O'Brien for engaging in behavior that, in its communicative aspects, was indistinguishable from Cohen's actions. One can fairly criticize *Cohen*, in my judgment, for failing to make that point. Perhaps more dramatically, how can one extol the virtues of uncensored emotive outbursts on public issues without even noting that this appears to be precisely what *O'Brien* involved, too?<sup>147</sup>

## 2. Is the Medium (Partly) the Message?

A second criticism notes that Cohen's protest was entirely conventional in the sense that he stood in public and displayed his objections to passersby—and no one

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<sup>145</sup> For a trenchant critique, see LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 324–28 (2000). As Powe explains in more detail, O'Brien plainly meant his act to convey opposition to the war; Congress had banned draft card burning precisely to stifle that sort of dissent; and, although the statute arguably had a “content neutral” justification (or pretext, if one prefers), in the desire to have draft-eligible men keep cards on their persons, the opinion nowhere explains why this was a sufficient justification for the restriction on O'Brien's speech, particularly when before the statute was passed a Selective Service regulation already required young men to carry their draft cards. *See id.* at 324–26.

<sup>146</sup> Subsequently, in *Texas v. Johnson*, 491 U.S. 397 (1989), the Court, in a 5–4 opinion, overturned a conviction for flag burning. Johnson had burned an American flag to protest the Reagan Administration. *Id.* at 399. He was convicted of violating a Texas flag desecration statute that made it a crime to “damage” the flag “in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.” *Id.* at 400 n. 1 (quoting TEX. PENAL CODE ANN. §42.09 (1989)). The majority opinion, by Justice Brennan and joined by Justice Blackmun, virtually tracks the reasoning of *Cohen*, without citing *Cohen*. *Id. passim*. Reading *Cohen* and *Johnson* together suggests that *O'Brien* is at best a very weak precedent today.

<sup>147</sup> Of course, realistically, revisiting *O'Brien* was not an option for the *Cohen* opinion. A majority of those in the *Cohen* opinion, including Justice Harlan, had voted with the majority to uphold O'Brien's conviction just three years earlier. *See O'Brien*, 391 U.S. 364. Nevertheless, as a matter of analytical rigor (or intellectual honesty) the criticism—how are you going to handle (or explain) cases like draft card burning?—seems quite legitimate.

else. His was just a good old-fashioned, one-person street protest moved indoors—and into a public corridor, at that. Cohen might as well have been carrying a placard in Hyde Park. Virtually all the precedents discussed in the portions of the *Cohen* opinion that deal with fighting words, captive audience and speech-conduct also arose from classic street protest behaviors.<sup>148</sup>

But, what if Cohen had broadcast his antiwar tirade over a radio or television station? As George Carlin famously said—and then proved in court—one cannot say “fuck” on radio.<sup>149</sup> Seven years after *Cohen*, a majority of the Supreme Court parodied, trivialized, and distinguished *Cohen* while holding that the Federal Communications Commission (FCC) had authority to ban expletives, including “fuck,” from radio broadcasts during times when children might be in the audience, because the words were “indecent.”<sup>150</sup>

Was *Cohen* in fact an opinion that was relevant only to antiquated methods of conveying political protests? Should it have been? When the Carlin case came to the Court seven years after *Cohen*, all of the Justices then sitting who had voted to overturn Cohen’s conviction sided with Carlin and against the FCC.<sup>151</sup> *Pacifica*, then, may say more about the Supreme Court appointment process than about limits or failures of the *Cohen* opinion. Certainly, one can read *Cohen* in vain for any suggestion that the Court believed the medium—a jacket—was crucial to the outcome.

The *Pacifica* Court sought to suggest that radio broadcasts somehow reached a “captive audience” in a manner, or to an extent, different from Cohen’s broadcast of his message.<sup>152</sup> One can only hope that part of the opinion was written in jest.<sup>153</sup> In

<sup>148</sup> See, e.g., *Terminello v. Chicago*, 337 U.S. 1 (1949); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

<sup>149</sup> See *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (regarding an FCC order stemming from a radio broadcast of Carlin’s monologue “Filthy Words”).

<sup>150</sup> See *id.* at 748–50. Just how broadly the Court meant to empower the Commission remains an open question. For example, in *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989), the Court unanimously invalidated a federal statute prohibiting the interstate transmission of “indecent” commercial telephone messages (so-called “dial-a-porn services”). I have expressed elsewhere my reasons for regarding *Pacifica* as an unfortunate precedent. See, e.g., THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., *REGULATING BROADCAST PROGRAMMING* 106–14, 196–202, 219–21, 317–19, 326 (1994).

<sup>151</sup> *Pacifica*, 438 U.S. 736 (Stewart, Brennan, Marshall, and White, JJ., dissenting).

<sup>152</sup> *Id.* at 748–49.

<sup>153</sup> The Court also suggested that because Cohen wrote his message while Carlin spoke his, the State had a greater interest in protecting children from Carlin than from Cohen. See *id.* at 749. I do not want to burden this Article with all of the objections I have published elsewhere respecting the Court’s *Pacifica* opinion and subsequent “indecent” cases. See, e.g., KRATTENMAKER & POWE, *supra* note 150, at 106–14, 196–202; Thomas G. Krattenmaker & L.A. Powe, Jr., *Televised Violence: First Amendment Principles and Social Science Theory*, 64 VA. L. REV. 1123, 1229–30 (1978). Suffice it to say here that only a Supreme Court Justice, who is allowed to invent facts about the world in which we live without any external review of those assertions, could describe a radio audience as “captive” or a child as incapable of

retrospect, however, one might wish that the *Cohen* opinion had mentioned, if only in passing, something like: “Obviously, this is not an opinion merely about First Amendment Jacket Law.” I do not mean to say that the *Cohen* Court should have foreseen the *Pacifica* case, although it was lurking just around the corner, but anyone thinking about profane or offensive or vulgar speech in 1971 surely might have thought about radio and television. Indeed, one might say that it has been a common failing of our free speech jurisprudence that it tends, without adequate justification, to place mass media in one pigeon hole and the lonely street speaker in another.<sup>154</sup>

Surely, a dissent in *Cohen* might well have asked what the Court intended to do about broadcast indecency and why. As it stands, *Cohen*, paired with *Pacifica*, protects only the least effectual sorts of communication. That’s “powerful medicine”? On the other hand, the Court has been rather speech-protective when it comes to communication over the Internet.<sup>155</sup> Something is at work here that seems not well explained by either *Cohen* or *Pacifica*.

### 3. Public v. Private Speech

Finally, *Cohen* was addressing one of the central divisive political issues of his day. If ever there was—in America, in 1968—a “matter of public interest and concern,” it was surely the United States military adventure in Vietnam and what then appeared to be necessary to that venture’s continuance: the draft. The *Cohen* opinion is not oblivious to this fact, saying more than once that *Cohen* was speaking in public on a public issue.<sup>156</sup> But the opinion, apart from its confinement of the “fighting words” doctrine to a more limited form,<sup>157</sup> does not seem centrally concerned with this aspect of the case. In fact, however, that aspect must be crucial if the opinion is to be convincing.

Certainly, what the Court said about “powerful medicine,” the risks of partisan enforcement, and the true meaning of “verbal tumult and discord” were all convincingly relevant only if the matter at stake was censorship of public discussion

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being offended by written words, but at grave risk if those same words are spoken to her or him. *See infra* note 193.

<sup>154</sup> This is one of the central arguments throughout KRATTENMAKER & POWE, *supra* note 150. In *Snyder v. Phelps*, Justice Breyer specifically raised the question of whether the decision, concerning offensive and personally hateful street picketing, was applicable to “television broadcasting” or “Internet postings.” *See* 131 S. Ct. 1207, 1221 (2011) (Breyer, J., concurring). It appeared important to Justice Breyer that the vulgar statements Westboro uttered were not widely disseminated and were conveyed through the simple medium of peaceful picketing from a place where picketing was lawful. *See id.*

<sup>155</sup> *See, e.g., Reno v. ACLU*, 521 U.S. 844 (1997) (holding unconstitutional provisions of the Communications Indecency Act of 1996 forbidding the sending of indecent communications over the Internet that are accessible by persons under eighteen).

<sup>156</sup> *See, e.g., Cohen v. California*, 403 U.S. 15, 22, 24 (1971) (“excise . . . from the public discourse” and “the arena of public discussion”).

<sup>157</sup> *See supra* Part II.C.3.



of matters of public concern. Had Cohen been publishing Internet falsehoods about a co-worker or verbally harassing a former lover, would the Court have rushed to his defense with an opinion that started from a presumption against state regulation of speech and then proclaimed that it was wrong to prevent Cohen from emoting as he chose?

Surely not. In fact, that is a central lesson of the recent case *Snyder v. Phelps*, involving picketing at the funeral for a service member killed in Iraq.<sup>158</sup> There, members of a religious order stood on public land, approximately 1,000 feet from the church where the funeral was held, and brandished signs stating “Thank God for Dead Soldiers,” “America is Doomed,” and “You’re Going to Hell,” among other things.<sup>159</sup> In *Snyder*, the Court reversed an award of damages to the deceased’s father for intentional infliction of emotional distress and intrusion upon seclusion, holding that these damage awards could not withstand First Amendment scrutiny.<sup>160</sup>

*Snyder* shows that *Cohen*, forty years after its release, is alive and well in the opinion’s conclusions that the picketing at issue “cannot be restricted simply because it is upsetting or arouses contempt”<sup>161</sup> and that “[s]peech is powerful. . . . On the facts before us, we cannot react, to [the] pain [it inflicted] by punishing the speaker.”<sup>162</sup> But *Snyder* also undertakes an analysis missing in *Cohen*—perhaps because it was unnecessary there?—by painstakingly examining the record to show, at least to the Court’s satisfaction, that the activity upon which the conviction was obtained was the public, not private, expression of political objection to a matter of public interest and concern.<sup>163</sup> References to the facts that the protestors’ “speech was at a public place on a matter of public concern” recur throughout the opinion.<sup>164</sup> *Snyder*, in short, makes clear that *Cohen* does not address the regulation of private, apolitical interpersonal speech and should not be taken to do so.<sup>165</sup> That *Cohen* itself does not make this point more forcefully is, I think, a justifiable criticism of the Court’s opinion.

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<sup>158</sup> 131 S. Ct. 1207 (2011). Some aspects of this case have been discussed above. *See, e.g., supra* notes 49, 62, and 77.

<sup>159</sup> *See Snyder*, 131 S. Ct. at 1213.

<sup>160</sup> *See id.* at 1219.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 1220.

<sup>163</sup> *Id.* at 1215–17. That is not to say that this issue is not without difficulty. For example, recall that the protestors in *Snyder* held up signs saying, inter alia, “Thank God for Dead Soldiers,” “You’re Going to Hell,” and “Fags Doom Nations.” *Id.* at 1216–17. One can imagine a court not unreasonably concluding that such comments do not appear to address public issues, but rather simply vent anger and hostility toward targeted recipients, whom the speakers intended to harm. The Court, however, came down forcefully on the view that the “speech was at a public place on a matter of public concern.” *Id.* at 1219. Perhaps a more compelling rationale for the result in *Snyder*, a rationale also foreshadowed by *Cohen*, is the almost open invitation to viewpoint discrimination in the application of the relevant standard employed in that case, “extreme and outrageous conduct,” when that standard is used to punish speech. *Id.* at 1215.

<sup>164</sup> *See, e.g., id.* at 1217–20.

<sup>165</sup> One might draw a somewhat different inference from this past Term’s opinion striking down California’s ban on renting or selling violent video games to people under eighteen.

In short, then, it seems to me that *Cohen* does not address—indeed, barely mentions—three problems that were substantially likely to arise in its wake. The opinion might be criticized fairly for failing to address those issues in any way—or to stake out a position that would govern when those problems arose. First, do we accord the same speech-protective analyses to offensive communication that also takes the form of conduct over which the State undoubtedly has legitimate regulatory concerns? The Court seemed to answer that question in the affirmative in *Texas v. Johnson*, when it held unconstitutional a statute prohibiting protests by burning the American flag.<sup>166</sup> Yet, *United States v. O'Brien*, upholding a federal law against draft card burning as a means of protest, remains on the books.<sup>167</sup> In First Amendment parlance, these cases might be reconcilable on the grounds that in *O'Brien*, but not in *Johnson*, the government had a legitimate and sufficiently strong interest, which was unrelated to the suppression of communication, in prohibiting the conduct.<sup>168</sup> Nevertheless, one wonders why the “powerful medicine” of the First Amendment was insufficient to overcome the State’s objection to offensive “tumult and discord” generated by one man’s vulgarity, but not another’s.

Second, *Cohen* does not address the problem of offensive speech that is much more broadly disseminated, particularly speech over media of mass communications. Nevertheless, if one takes seriously *Cohen*’s assertion that “the air may at times seem filled with verbal cacophony is . . . not a sign of weakness but of strength,”<sup>169</sup> it is at the very least not obvious why this should make a difference. Certainly, where the media employed permit audiences to refuse to listen to or view the offensive communication, *Cohen*’s doctrine, if embraced seriously, would seem to call for protecting the speaker rather than the censor.

Third, *Cohen* does not clearly articulate what, at least in retrospect, must be a central point of its argument: that the rules laid down there apply only to public

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In *Brown v. Entertainment Merchants Ass’n*, 131 S. Ct. 2729 (2011), the Court began its analysis by noting that “[t]he Free Speech Clause exists principally to protect discourse on public matters, but we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try.” *Id.* at 2733. Nevertheless, as *Snyder* shows—and as the entire line of cases dealing with libel law and the First Amendment confirm—where the State’s interest is in protecting an individual from personal harm from the utterance of another, it does make a difference whether the utterance was part of a “discourse on public matters” rather than mere private entertainment.

<sup>166</sup> 491 U.S. 397 (1989); see also *supra* note 146.

<sup>167</sup> 391 U.S. 367 (1968); see also *supra* text accompanying notes 144–47.

<sup>168</sup> In *O'Brien*, the Court seemed to find a permissible governmental interest in assuring that draft registrants had their draft cards with them at all times. However, there was already a regulation requiring registrants to carry their cards. See *O'Brien*, 391 U.S. at 380–81. Further, the statute at issue in *O'Brien* was not a toothless charade, but rather a purposeful attempt to squelch dissent. The law was passed to make illegal the most potent anti-draft, antiwar rhetoric then aimed at the U.S. involvement in the Vietnam conflict. See *id.* at 382–86; see also POWE, *supra* note 36, at 255–57 (discussing war-time First Amendment cases).

<sup>169</sup> *Cohen v. California*, 403 U.S. 15, 25 (1971).

speech on matters of public interest and concern. The Court has subsequently clarified that point and articulated more fully how we are to analyze whether the speaker is engaged in public communication.<sup>170</sup> Where that is the case—and where the governmental interests at stake are not neutral with respect to speech and the speaker has not employed an electronic medium of mass communications—the Court has applied *Cohen*, resoundingly and recently and with near unanimity.<sup>171</sup>

### B. *Cohen's Sins of Commission*

The preceding arguments all identify arguable failures extrinsic to the *Cohen* opinion. They raise legitimate questions about whether the Court fully understood (or fully revealed) just how broad the ramifications of the opinion might be and whether the opinion promised too much (or too little) compared with what it delivered. A different criticism, I think, is the argument that confining oneself to the facts and to the case before it, the Court got it wrong. Surely, that was the point of Justice Blackmun's summary dissent, for example, no matter what particular objection he had to the opinion.<sup>172</sup>

Undoubtedly, a more powerful dissent than the pithy little Blackmun note could have been written.<sup>173</sup> Indeed, one might ask whether *Cohen* has withstood the test of time and the judgment of history fairly well in part because it was not squarely challenged when written. One could have argued forcefully, I think, that the State has a legitimate interest in establishing a series of ground rules for public discussion and debate. Properly constructed, these rules arguably should have nothing to do—at least on their surface or in their intents and purposes—with predetermining outcomes on public issues. Such ground rules might be designed solely to establish fairness and to ensure that all can participate fully and with pride, satisfaction, and a sense of ownership in the public dialogue.

Harm is done both to individuals and to society when language is used to degrade or to diminish the humanity or worth of any person in that society. It is not prudish to recognize that certain kinds of vulgarities—for example, referring to women by their bodily parts or describing entire classes of people by degrading racial or ethnic

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<sup>170</sup> See *Snyder v. Phelps*, 131 S. Ct. 1207, 1216 (2011).

<sup>171</sup> See *id.* at 1216–21.

<sup>172</sup> See *Cohen*, 403 U.S. at 27 (Blackmun, J., dissenting).

<sup>173</sup> What follows in this Part is my own attempt to construct a more forceful dissent from the *Cohen* opinion. In this endeavor, I have been helped by some of my generous commenters. For another, and truly excellent, attempt to explain why *Cohen* might be wrong, drawing heavily on the writings of Alexander Bickel, see Farber, *supra* note 33, at 295–302. Ultimately, Farber agrees with the *Cohen* majority's rationale. See *id.* at 302. Another excellent article addressing similar issues seeks to explain why maintaining a free and open public discourse may justify censoring racist speech, although the author ultimately rejects that position. See Post, *supra* note 123, at 305–11.

stereotypes—can wound people who are already among society’s least protected, most vulnerable members.<sup>174</sup> And permitting that sort of harm to individuals can harm our society as well, by further alienating or degrading those already at risk.

Robert’s Rules of Order might supply a proper analogy. Those Rules are meant, in part, to establish who may speak and when, with a view toward permitting all to speak in turn, not for the purpose of stifling ideas, but to channel speakers’ analyses in order to sharpen the discussion and broaden participation in it.<sup>175</sup> So might a code of civilized discourse be designed and intended to permit everyone to participate without anyone suffering harassment, shame, or a feeling of ostracism. (Here, it may be well to recall that we are talking about the use of the word “fuck” in a public place in 1968, when anathema toward that word was far more widespread than today.) Might we not see laws against vulgar invectives not as oppressing speakers, but as protecting listeners and others who want to participate in a public dialogue but, at this moment, operate from a position of relative disempowerment?

Indeed, one might even say that reasoning such as this explains why Justice Blackmun and the attorney for California were correct to say that the State was punishing “conduct” not “speech.”<sup>176</sup> As the attorney for the City of Los Angeles said during oral argument, the conduct involved was “[d]isplaying a term that we would contend is not accepted for public display.”<sup>177</sup> Publishing “fuck” was offensive regardless of the words surrounding—or not surrounding—it and regardless of the medium employed. One might concede that “displaying a term” is communicative “speech,” but if the purpose of banning that term is to permit civilized discourse, to avoid degradation of persons, and to prevent exclusion of sensitive people from public fora, why must we enslave our analysis, ritualistically or literally, by insisting that the case involves “the freedom of speech”?

#### V. REAFFIRMING *COHEN* IN RETROSPECT

At this point, I confess that, although I believe that the argument sketched above is powerful, I think *Cohen* got it right. And said it right. What does the First Amendment mean if not what *Cohen* says it does: a constitutional principle,

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

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<sup>174</sup> One might argue that the specific issue in *Cohen* particularly implicated interests of women in being free to participate without degradation in public discussions. Did the Court, in effect, commit a Freudian slip in referring to “one man’s vulgarity”?

<sup>175</sup> See Robert, *supra* note 116, at 13–14.

<sup>176</sup> See *Cohen*, 403 U.S. at 27 (Blackmun, J., dissenting).

<sup>177</sup> See Transcript, *supra* note 17, at 847.

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.<sup>178</sup>

“Fuck the draft” reflects individual dignity? No, but tolerating its utterance is “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.”<sup>179</sup>

Of course, the motive to protect innocent people from indecent speech is itself a decent motive and what Cohen did was, at least in 1968, plainly distasteful and abusive. But if we decide that this decent motive enables government to tell people that they cannot be trusted to determine for themselves what is and is not a permissible public utterance, will we not create a self-fulfilling prophecy of the worst sort? The argument for the State’s authority here seems not only to threaten unduly to aggrandize governmental power to act capriciously, but also to turn citizens, as they engage in public expressions, to simple agents of the State. Further, who are we to protect from whom? If silencing Cohen would empower those who cannot participate in a public debate littered with vulgar expressions, then would we simultaneously disempower those whose hurt, rage, or intellectual isolation require them to shock in order to be heard?

To say that such arguments appear to have little to do with the value of turning public debate into a cussing match, one might point out that “words are often chosen as much for their emotive as their cognitive force.”<sup>180</sup> We should not take a view of freedom of speech that disregards “that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.”<sup>181</sup> Just as, in this case, Cohen so testified.

But, surely, the “F” word (or, if you prefer, the “N” word or the “C” word) can be put out of bounds with little or no risk? Not if you ask how we will draw the line, who will draw it, how we will enforce that line fairly and without regard to the substantive position being advanced, and how we will monitor just what is inside and what is outside the line as social norms and speaking conventions evolve.<sup>182</sup> You

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<sup>178</sup> *Cohen*, 403 U.S. at 24 (majority opinion).

<sup>179</sup> *Id.* at 25.

<sup>180</sup> *Id.* at 26.

<sup>181</sup> *Id.*

<sup>182</sup> In answering these questions, I believe it is important not to assume that the decision-maker and enforcer is some sort of ‘Platonic Guardian,’ an all-wise, politically non-partisan intellectual giant who cares only for defending the purity of the English language. If there is such a person, and I doubt it, he or she would not want that job. Laws are enforced by the cop on the beat and by elected public officials, or, as in the *Snyder* case, by juries. It will not do, I would contend, to argue that a dispassionate highly educated official would have treated

know it and I know it, although we may not wish to admit it, but “it is nevertheless often true that one man’s vulgarity is another’s lyric.”<sup>183</sup> Listen to the language being spoken around us.

Finally, I think one might well demand to know why these kinds of arguments, and judicial resolution of them, are tolerated in a democratic society. Maybe we should ban “fuck” and maybe not, as the foregoing arguments illustrate. Why can’t the citizens decide, just as they decided we would drive on the right hand side of the road and not the left?<sup>184</sup> Are we compelled by *Cohen* to say that all “matters of taste and style,”<sup>185</sup> such as whether to have casual dress Fridays, are matters that must be left to individual choice and cannot be determined by majority vote? The short answer is that the First Amendment carves out only certain activities—speech, religion, petitioning, assembly, and publication—for special protection, not all forms of behavior.

*Cohen* does not undertake a defense of judicial review or of some subsidiary notion, such as the concept of “preferred freedoms.” But if ever there were an issue where the plain text and evident purpose of the Constitution was to take a matter out of the political arena and put it beyond simple majoritarian politics, isn’t this just about as good as any other—in fact, better than most?

At the same time, one must be careful in assessing just what it means to defend *Cohen*. As I noted at the outset,<sup>186</sup> “fuck” was much further removed from mainstream culture when *Cohen* was written than it is today. To some extent, this makes *Cohen* easier to defend because few today can feel the high level of emotion the case generated in 1971. But the change in the culture surely was not occasioned by *Cohen*, either in its result or its opinion. Whatever the Framers intended, today we accept that it is the Court’s job to interpret the Constitution in a manner that helpfully illuminates the document’s hopes and aspirations for a series of just governments. But this does not mean that the Court has the power to dictate cultural mores in the long run. Undoubtedly, the changes we observe in public dialectic are the product of many forces and we have no reason to think that *Cohen* is one of the most important of those.

I defend *Cohen* as explaining why it would not be an appropriate function of government to try to dictate the rhetoric of public debate. This is all that I mean when I say that I think the Court in *Cohen* got it right and said it right; indeed, I think it is all I could mean. We have no reason to believe that *Cohen* changed our public discourse, whether debasing or liberating it. But *Cohen* did articulate the values that I believe sensibly control the manner in which we think about the proper

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“Fuck the Draft” and “Fuck those North Vietnamese Commies” in precisely the same manner. Why would we expect a person likely to become a law enforcement official, or to be appointed as a member of a Civility Commission, or to be drawn by lot to serve on a jury, to do so?

<sup>183</sup> *Cohen*, 403 U.S. at 25.

<sup>184</sup> Unless of course it’s a one-way street.

<sup>185</sup> *Cohen*, 403 U.S. at 25.

<sup>186</sup> *See supra* Part I.

role of government in punishing public speech on the grounds that the speaker utters offensive words or ideas, saying things that we would be better off not hearing. At the same time, *Cohen* may have freed up a certain amount of aggressive speech by young antiwar protestors seeking voices with which to counter a loud and aggressive government policy of intervention in Southeast Asia. And *Cohen* may have provided some constitutional breathing space for burgeoning cultural forces to grow.

Admittedly, the argument for the value of *Cohen* is strongest in a case such as *Cohen*'s, where the use of criminal process—even a thirty-day jail term—is used to control impolite speech. Perhaps government has a claim to a greater legitimate role in regulating the public dialogue where its tools are less draconian and its goals seem more acceptable than simply to enforce a temporary majority's desire for cultural and ideological conformity. However, I have yet to see such a case.<sup>187</sup>

Today's Supreme Court seems comfortable with *Cohen*, but perhaps only the unselfconsciously limited version of that opinion. In 2011, seven of the Justices applied the principles of *Cohen* rather forthrightly and without complaint in another case of dreadfully offensive speech—mean-spirited, hateful picketing at a soldier's funeral.<sup>188</sup> That case also made clear that the freedom afforded to *Cohen* does not extend to private speech, to ad hominem verbal abuse or harassment.<sup>189</sup> At the same time, some of *Cohen*'s wider promises (or threats, if one prefers) have yet to be realized. Although *Texas v. Johnson* (flag burning)<sup>190</sup> is in good standing, so is *United States v. O'Brien* (draft card burning).<sup>191</sup> Attempts to make the Internet an adult-free zone, fit only for preteens, have failed thus far,<sup>192</sup> but *Pacifica* still tells us that we can censor radio so that this medium sets an acceptable standard of decorum for children too young to read.<sup>193</sup>

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<sup>187</sup> Undoubtedly, many others believe that the Federal Communications Commission's so-called "fairness doctrine" was an example of benign cultural engineering. The truth, I have argued, is quite different. See KRATTENMAKER & POWE, *supra* note 150, at 237–96; Thomas G. Krattenmaker & L.A. Powe, Jr., *The Fairness Doctrine Today: A Constitutional Curiosity and an Impossible Dream*, 1985 DUKE L. J. 151 (1985).

<sup>188</sup> See *Snyder v. Phelps*, 131 S. Ct. 1207 (2011); see *supra* notes 49, 62, 77, 158–63.

<sup>189</sup> See *Snyder*, 131 S. Ct. at 1215–16.

<sup>190</sup> 491 U.S. 397 (1989); see *supra* text accompanying notes 146 & 166.

<sup>191</sup> 391 U.S. 367 (1968); see *supra* text accompanying notes 144 & 167–68.

<sup>192</sup> See, e.g., *Reno v. ACLU*, 521 U.S. 844 (1997) (holding unconstitutional provisions of the Communications Indecency Act of 1996 forbidding the sending of indecent communications over the Internet that are accessible by persons under eighteen).

<sup>193</sup> See *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978) ("[B]roadcasting is uniquely accessible to children, even those too young to read. Although *Cohen*'s written message might have been incomprehensible to a first grader, *Pacifica*'s broadcast could have enlarged a child's vocabulary in an instant."). One wonders if the author of that passage ever watched a young child build her vocabulary. *Nothing* is acquired instantaneously, no matter how bright she is. Anyone doubting the validity of these assertions is welcome to join me in spending an afternoon with our granddaughter, Lily Catherine Krattenmaker, a bright, engaging five-year-old possessing an astounding vocabulary that was *not* acquired haphazardly or in an instant.

By all accounts, *Cohen* remains viable, at least in its narrow application to the paradigmatic example of the lone public protester employing a medium of communication that does not reach beyond her sidewalk. And *Cohen*'s rationale, I hope, stands as an attractive testimonial to the aspirations that gave rise to the First Amendment and ought to shape its content. Perhaps we may yet see the day when *Cohen* emerges from its cocoon as a case addressing only the limits of censorship of conventional street protests and realizes its promise as a protector of liberty throughout our public fora.