

Fromm/Great Free Speech Cases/Carcieri/Session 3 Offensive Speech and Fighting Words

“Ask yourself whether our language is complete; whether it was so before the symbolism of chemistry and the notation of the infinitesimal calculus were incorporated in it; for these are, so to speak, suburbs of our language....

Our language may be seen as an ancient city: a maze of little streets and squares, of old and new houses, and with houses with additions from various periods”

“It is difficult as it were to keep our heads up ... and not go astray and imagine that we have to describe extreme subtleties, which in turn we are after all quite unable to describe with the means at our disposal. We feel as if we had to repair a torn spider’s web with our fingers...

The more narrowly we examine actual language, the sharper becomes the conflict between it and our requirement.... We have got on to slippery ice where there is no friction and so in a certain sense the conditions are ideal, but also, just because of that, we are unable to walk. We want to walk: so we need friction. Back to the rough ground!”

Ludwig Wittgenstein

Chaplinsky v. New Hampshire (1942)

“... it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or “fighting words,” those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that can be derived from them is clearly outweighed by the social interest in order and morality.”

Cohen v. California (1971)

F/P: In 1968, Cohen was observed in the corridor of the Los Angeles County Courthouse wearing a jacket bearing the words “Fuck the Draft.” Women and children were present, and Cohen was arrested and charged under a local law which prohibits “maliciously and willfully disturbing the peace or quiet of any neighborhood or person by offensive conduct.” Cohen 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. Cohen did not engage in, or threaten to engage in, nor did anyone as a result of his conduct in fact commit or threaten to commit, any act of violence. Nonetheless, Cohen was convicted and sentenced to thirty days’ imprisonment, and the State appellate court affirmed.

A) Justice Harlan's First Layer of Analysis – What is Not Presented

- 1) The conviction is based on speech, not conduct.
- 2) The statute makes no distinction concerning the location of banned speech.
- 3) The facts present neither obscenity, privacy concerns, nor fighting words, "those personally abusive epithets which, when addressed to the ordinary citizen, are inherently likely to provoke violent reaction."

B) Thus, the issue: "Whether California can excise, as "offensive conduct," one particular scurrilous epithet from the public discourse, either on the theory of the court below that its use is inherently likely to cause violent reaction or upon a more general assertion that the States, acting as guardians of public morality, may properly remove this offensive word from the public vocabulary. The rationale of the California court is plainly untenable...."

C) Second Layer of Analysis

- 1) "Most situations where the State has a justifiable interest in regulating speech will fall within one of the various established exceptions"
- 2) Free speech is powerful medicine in a large, diverse society, and the "verbal cacophony" of open debate is a sign of strength, not weakness.

D) Third Layer of Analysis

- 1) "The principle contended for by the State seems inherently boundless.... (O)ne man's vulgarity is another man's lyric."
- 2) Speech has a dual communicative function – emotive as well as cognitive.
- 3) Forbidding particular words risks suppression of ideas and unpopular views.

E) Holding: Cohen's speech is protected by the First Amendment; conviction reversed.

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Feiner v. New York (1951)

F: Feiner was a young veteran, with three years of service in the U.S. armed forces in World War II, and was attending university in Syracuse, New York, on the GI Bill. In 1949, he addressed a crowd of 75 to 80 persons, black and white, on a street corner in a predominantly black section of Syracuse. Soon after he began, two policemen, summoned by a telephone complaint, arrived to investigate and found the crowd filling the sidewalk and spreading into the street. Feiner made derogatory comments about President Truman and the Mayor of Syracuse, calling them both "bums," and the American Legion "a Nazi Gestapo." He also said "the Negroes don't have equal rights; they should rise up in arms and fight for them." According to witnesses, Feiner "stirred up a little excitement," and there was "some pushing and shoving and milling around" in the crowd. After Feiner had spoken for twenty minutes, one onlooker said to one of the policemen, "if you don't get that son of a bitch off, I will go over there and get him off there myself." The policeman thereupon asked Feiner three times to stop speaking. When Feiner ignored the request for the third time, he was arrested, charged with, and convicted for disorderly conduct.

I: Whether Feiner's conviction on these facts violated his First Amendment rights.

H: No (Chief Justice Vinson, writing for the Court majority):

R: "There was no evidence ... that the acts of the police were a cover for suppression of Feiner's views and opinions. (He) was thus neither arrested nor convicted for the making or the content of his speech. Rather, it was the reaction it actually engendered. This Court respects the interests of the community in maintaining peace and order on its streets. We cannot say that the preservation of that interest here encroaches on the constitutional rights of (Feiner)."

R: "Where as here the speaker passes the bounds of argument or persuasion and undertakes incitement to riot, (the police are not) powerless to prevent a breach of the peace."

Justice Black, dissenting

R: One isolated threat to assault the speaker is not an imminent threat of riot.

R: While time allows, the police are obliged to do all they can to protect an unpopular speaker.

R: While time allows, courtesy and explanation of commands are basic elements of good official conduct in a democratic society.

Terminiello v. Chicago (1949)

F: Terminiello delivered a speech under the following circumstances: "The auditorium was filled to capacity with over 800 persons present. (Outside,) a crowd of about 1000 persons gathered to protest against the meeting. A cordon of policemen was assigned to maintain order, but they were not able to prevent several disturbances. The crowd outside was angry and turbulent." Members of the crowd threw stink bombs and broke windows. Terminiello goaded his opponents, referring to them as "slimy scum," "snakes," and "bedbugs." In his condemnation of various political and racial groups, Terminiello "followed, with fidelity that was more than coincidental, the pattern of European fascist leaders." On this basis, Terminiello was charged and tried for disorderly conduct under a breach of the statute.

At trial, the judge instructed the jury that it could convict Terminiello under this law if it found that his speech included expression that "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance." The jury convicted him, but the Supreme Court reversed. For the majority, Justice William O. Douglas wrote that

"a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. (That) is why freedom of speech, though not absolute, (is) nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."

Fromm/Great Free Speech Cases/Carcieri/Session 3, cont'd

***Snyder v. Phelps* (2011)**

F: The Westboro Baptist Church is a religious organization known for its members' public protests of homosexuality in the United States. For 20 years, Westboro members have traveled to military funerals to express their belief that God hates the United States for its tolerance of homosexuality and that God is killing American soldiers as punishment for the Nation's sinful policies. In 2006, Westboro staged a picket near the funeral of a Marine killed in the line of duty in Iraq. The picketing was peaceful and took place on public land 1,000 feet from the funeral. Church members carried signs with statements like "God Hates Fags" and "Thank God for Dead Soldiers."

A Maryland jury held Westboro liable for \$2.9 million in compensatory damages and \$8 million in punitive damages for the torts of intentional infliction of emotional distress (IIED), intrusion upon seclusion, and civil conspiracy. The trial court remitted the punitive damages, but Westboro (Fred Phelps) sought review from the Supreme Court on the free speech issue.

I: Whether otherwise lawful picketing on matters of public concern can nonetheless be subject to civil damage awards where it is designed to, and in fact does, cause extreme emotional distress.

H: No (Chief Justice Roberts, for the majority):

R: Though morally repugnant, this is speech on public matters.

R: This is so even though the context is that of plaintiff's son's military funeral.

R: The law on which the damage award was based contained no time/place/manner restriction, e.g., one singling out military funerals for special protection.

R: The damage award was thus based on the content of the speech in question.

"Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and – as it did here – inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course – to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case."

Justice Alito, dissenting

“This Court has recognized that words may by their very utterance inflict injury When grave injury is intentionally inflicted by means of an attack like the one at issue here, the First Amendment should not interfere with recovery.”