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Cohen v. California: Inconsequential Cases and Larger Principles Favorite Case Symposium

Ronald J. Krotoszynski Jr.
University of Alabama - School of Law, rkrotoszynski@law.ua.edu

Cohen v. California: "Inconsequential" Cases and Larger Principles

Ronald J. Krotoszynski, Jr.*

The editors of this law review have vexed me with the task of identifying my "favorite" case. At the outset, it seems worthwhile to identify what this task does *not* entail. It does not require identifying a "most important" or "most significant" case.[1] Nor does it oblige me to identify a "most infamous" or "most dubious" case.[2] Instead, I am to identify a case for which I have a particular fondness—a task that involves more than a little bit of caprice.[3]

Although I am partial to many cases, I must confess a particular affection for *Cohen v. California*,[4] commonly known in law schools as the "fuck the draft" case. I like the case because it speaks eloquently to values that transcend its facts, and does so in a way that vindicates core civil liberties—liberties that are plainly essential to maintaining our democracy.[5] *Cohen* also serves as an exemplar on the importance of careful judging.

Judges—even good judges—sometimes allow the seemingly insignificant facts of a particular case, or their emotional response to those facts, to distract them from the larger legal issues that a case presents.

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* Assistant Professor of Law, Indiana University. B.A., M.A. 1987, Emory University; J.D., LL.M. 1991, Duke University.

1. There are a number of good candidates for this distinction. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Brown v. Board of Educ., 347 U.S. 483 (1954); Baker v. Carr, 369 U.S. 186 (1962); Griswold v. Connecticut, 381 U.S. 479 (1965).

2. Again, a number of cases immediately come to mind. *See, e.g.*, Dred Scott v. Sandford, 60 U.S. 393 (1856); Plessy v. Ferguson, 163 U.S. 537 (1896); Korematsu v. United States, 323 U.S. 214 (1944); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

3. As Justice Scalia wryly noted in Pope v. Illinois: *"De gustibus non est disputandum,"* which means, roughly, "In matters of taste, there is no disputing." 481 U.S. 497, 505 (1987) (Scalia, J., concurring).

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

5. *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26-27 (1948) ("The principle of the freedom of speech springs from the necessities of the program of self-government. It is not a Law of Nature or of Reason in the abstract. It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage."); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245 (arguing that the First Amendment "protects the freedom of those activities of thought and communication by which we 'govern.'"); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 18-23 (1990) (arguing that the First Amendment's system of free expression serves as the foundation of a process that secures and maintains the central constitutional goal of creating a deliberative democracy).

Indeed, Justice Harlan recognized this phenomenon in the opening lines of his majority opinion in *Cohen*: "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."[6]

In fact, *Cohen* involves nothing less than the scope of the First Amendment's protection of core political speech and the ability of the government to prohibit disfavored means of political expression. That Justice Harlan recognized this gives strong testament to his ability to see the forest in a tree.

The facts of the case are relatively straightforward. Mr. Cohen wore a jacket emblazoned with the words "Fuck the Draft" while standing in a corridor of the Los Angeles County Courthouse. Although no violence or disturbance ensued, the State of California charged Cohen with "maliciously and willfully" disturbing the peace. Following his conviction on this charge, Cohen was sentenced to thirty days imprisonment.[7]

In an opinion that turns only square corners, Justice Harlan reversed the conviction on First Amendment grounds. He began his analysis by describing what the case was *not* about: it was not about maintaining decorum in the courtrooms of California, it was not about obscenity or fighting words, and it was not about foisting vulgarities on an unwilling audience.[8] "Against this background, the issue flushed out by this case stands out in bold relief."[9]

For Justice Harlan, the issue was a simple one: "[W]e deal here with a conviction resting *solely* upon 'speech,' not upon any separately identifiable conduct . . . ."[10] California had attempted to "excise, as offensive conduct, one particular scurrilous epithet"[11] from the marketplace of ideas; the Court's task, therefore, was to determine whether the government may "properly remove this 'offensive word' from the public vocabulary."[12] For Justice Harlan, the answer to this question was a resounding "no."

Justice Harlan takes the juvenile antics of a scruffy antiwar demonstrator and, performing constitutional alchemy, places them at the very core of our project of democratic self-government:

> 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

6. *Cohen*, 403 U.S. at 15.
7. *Id.* at 16-17.
8. *Id.* at 18-22.
9. *Id.* at 22.
10. *Id.* at 18 (emphasis added) (citation omitted).
11. *Id.* at 22.
12. *Id.* at 23.

> 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.[13]

Justice Harlan was able to separate the larger legal principle from the particular facts before the Court.

Harlan's opinion, much like the famous Holmes and Brandeis opinions in *Abrams v. United States*,[14] *Gitlow v. New York*,[15] and *Whitney v. California*,[16] is a celebration of the values implicit in the First Amendment.[17] "To many, the immediate consequence of this freedom [of expression] may often appear to be only verbal tumult, discord, and even offensive utterance."[18] However, "[t]hese are . . . in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve."[19] Accordingly, "[t]hat the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness, but of strength."[20] This rhetoric reflects the very best of the "marketplace of ideas" paradigm first espoused by Justice Holmes in *Abrams*.[21]

Justice Harlan offers a stern warning to those who, like the dissenters, would dismiss the case based on its sophomoric facts: "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."[22] At bottom, Justice Harlan recognized that the state cannot ban the use of particular words without "running a substantial risk of suppressing ideas in the process."[23] One need look no further than George Orwell's anti-utopian masterpiece *1984* to find strong support for this kind of concern. Ultimately, the ability to define language becomes the ability to control thoughts. Justice Harlan

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13. *Id.* at 24.

14. 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

15. 268 U.S. 652, 672 (1925) (Holmes, J., dissenting).

16. 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

17. *See* WILLIAM W. VAN ALSTYNE, INTERPRETATIONS OF THE FIRST AMENDMENT 34-35, 107 n.38 (1984) (citing *Cohen*, *Abrams*, *Gitlow*, and *Whitney* for the idea that extreme and offensive speech is valuable because of its ability to grab attention and force debate on difficult issues); *see also* William W. Van Alstyne, The Enduring Example of John Marshall Harlan: Virtue as Practice in the Supreme Court, 36 N.Y.L. SCH. L. REV. 109, 119-20 (1991) ("The appreciation of First Amendment core principles is represented as straight forwardly in Harlan's opinion in *Cohen* as in the best opinions decades earlier by Holmes and Brandeis.").

18. Cohen v. California, 403 U.S. 15, 24-25 (1971).

19. *Id.* at 25.

20. *Id.*

21. Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting); *see also* SUNSTEIN, *supra* note 5, at 24-26 (describing and analyzing Holmes's marketplace metaphor).

22. *Cohen*, 403 U.S. at 25.

23. *Id.* at 26.

recognized this fact, and interposed the First Amendment as an impediment to any such project.

The first time I read *Cohen*, I was impressed that Justice Harlan could recognize and relate Cohen's "absurd and immature antic"[24] to the public debate that is essential to maintaining a healthy democracy. By distinguishing the question of full and free public debate from the particular content of the message (or the nature of the messenger), Justice Harlan vindicated the individual citizen's right to hold and share political views within the marketplace of ideas, and to communicate those ideas in unconventional—or even patently offensive—ways.[25] All the more remarkably, he did so without lionizing or embracing Mr. Cohen's specific behavior.[26]

Justice Harlan plainly recognized that the relative insignificance (or low value) of the particular political expression at issue did not affect the importance of the larger First Amendment principles that Cohen's message implicated. Jurists sometimes take too lightly the doctrinal importance of "inconsequential" cases.[27] The result is bad law.[28]

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24. This is how three dissenting Justices, in their two paragraph opinion, describe the case. *Id.* at 27 (Blackmun, J., dissenting). For the dissenters, the phrase "fuck the draft" fell outside the First Amendment because it either constituted conduct rather than speech or fell within the "fighting words" doctrine (which Justice Blackmun does not bother to explicate, apparently deeming the matter self-evident). *Id.* (Blackmun, J., dissenting). There was probably a good dissent to be written in *Cohen*; in some respects, it is a shame that the dissenters deemed the case too picayune to warrant more consideration than two paragraphs.

25. As Justice Harlan put it, "[O]ne man's vulgarity is another's lyric." *Id.* at 25. Antiabortion protestors provide a modern day analog to Mr. Cohen's behavior. Plainly, displaying photographs of aborted fetuses to unsuspecting passersby while screaming "murderer" is not the kind of behavior that Judith Martin would sanction. *Cf.* JUDITH MARTIN, MISS MANNERS' GUIDE FOR THE TURN-OF-THE-MILLENNIUM (1990). Whether we extol or excoriate this kind of social protest, the First Amendment, as interpreted in *Cohen*, gives protestors broad latitude to select the means of communicating their point of view. Whether the means selected are persuasive, or even minimally effective, is entirely beside the point, at least insofar as the First Amendment is concerned. "[T]he State has no right to cleanse public debate to the point where it is grammatically [or graphically] palatable to the most squeamish among us." *Cohen*, 403 U.S. at 25.

26. In this respect, there is a strong degree of consanguinity between *Cohen* and Justice Brennan's opinions in Texas v. Johnson, 491 U.S. 397 (1989), and United States v. Eichman, 496 U.S. 310 (1990). These opinions do an excellent job of vindicating important First Amendment values without endorsing the particular behavior at issue (flag burning). *See Johnson*, 491 U.S. at 419 ("The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong."); *Eichman*, 496 U.S. at 318-19 ("We are aware that desecration of the flag is deeply offensive to many. . . . [But p]unishing desecration of the flag dilutes the very freedom that makes this emblem so revered, and worth revering.").

27. Compare Justice Harlan's approach in *Cohen* with Justice Powell's offhanded abandonment of his decisive vote in *Bowers v. Hardwick*, which he derisively described as a "frivolous" case. JOHN C. JEFFRIES, JUSTICE LEWIS F. POWELL, JR. 530, 513-30 (1994); *see also* Bowers v. Hardwick, 478 U.S. 186, 197-98, 198 n.2 (1986) (Powell, J., concurring) (holding that there is "no fundamental right . . . such as that claimed by respondent Hardwick," to engage in consensual sodomy, and arguing that this should not be a cause for concern because "the history of nonenforcement suggests the moribund character today of laws criminalizing this type of private, consensual conduct").

28. At the risk of being overbold, I believe that the verdict of history will not be kind to *Bowers*.

Judges must be able to look beyond the importance of the particular case before them to the broader implications of their ruling. For example, at one level, *Marbury v. Madison*[29] is a case about whether Marbury would become the functional equivalent of a notary public in Washington, D.C.[30] Obviously, the legal principles involved in *Marbury* transcended the particular facts before the court, a point not lost on Chief Justice Marshall. A seemingly "inconsequential" case implicated nothing less than the proper institutional role of the Supreme Court in explicating the law. *Cohen* provides an excellent example of this phenomenon, for even Justice Harlan himself initially described the case as a "peewee."[31]

Justice Harlan's opinion in *Cohen* is also remarkable for its ability to get beyond the strong emotional pull of the facts before the Court. All too often, judges permit their emotional response to the facts of a case to control their legal analysis[32]—an intellectual trap that caught the four dissenting justices in *Cohen*.[33] Justice Harlan admirably resisted this temptation, hewing carefully to the larger First Amendment implications of permitting the state to criminalize the use of the word "fuck" in a political statement about the Vietnam War.

Finally, I am fond of *Cohen* because of its simplicity. The facts are straightforward; the issue is squarely presented. This factual and doctrinal clarity contributes not only to the opinion's persuasive force, but also helps to educate the citizenry about the importance of open debate in a democratic society. In language easily understood by most citizens, Justice Harlan explains—over the course of fewer than a dozen pages—why the First Amendment precludes the state from prohibiting a particular form of political expression. In this respect, the opinion is akin to a medieval morality play in which Everyman meets Free Expression. Too many of the

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29. 5 U.S. (1 Cranch) 137 (1803).

30. *See* William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1, 3-6.

31. BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 128 (1979). *The Brethren* provides an amusing history of the inside court politics associated with *Cohen*. *See id.* at 128-33.

32. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 421-30 (1990) (Rehnquist, J., dissenting) (resorting to poetry and patriotic sloganeering in a pathetic attempt to justify a purely emotional response to the facts of the case). *See generally* Calvin R. Massey, *The Jurisprudence of Poetic License*, 1989 DUKE L.J. 1047, 1052, 1047-52 (condemning the Rehnquist dissent as "emotion laden poetic fantasy"). Justice Stevens's vote in *Johnson* also bears all the indicia of the heart overbearing the head. *See Johnson*, 491 U.S. at 436 (Stevens, J., dissenting) ("Even if flag burning could be considered just another species of symbolic speech under the logical application of the rules that the Court has developed in its interpretation of the First Amendment in other contexts, this case has an intangible dimension that makes those rules inapplicable."); *see also* United States v. Eichman, 496 U.S. 310, 319-24 (1991) (Stevens, J., dissenting).

33. *See* Cohen v. California, 403 U.S. 15, 27, 27-28 (1971) (Blackmun, J., dissenting) (calling Cohen's behavior "absurd and immature").

Supreme Court's free expression cases—rife with three-part tests and various kinds of balancing contortions—obfuscate the basic political values embodied in the First Amendment.

In sum, *Cohen v. California* is one of my favorite cases because it vindicates an important aspect of individual freedom and demonstrates the importance of careful judging. Along the way, it provides a good lesson about the potential doctrinal importance of seemingly "insignificant" cases. It is an opinion worth celebrating, reflecting the best intellectual traditions of the federal bench.