

2017

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## Recommended Citation

42 T. Marshall L. Rev. 203 (2017)

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# ANTI-PROFANITY LAWS AND THE FIRST AMENDMENT

DAVID L. HUDSON, JR.<sup>1</sup>

Many people assume that the First Amendment protects profane speech, at least for adults outside of special settings.<sup>2</sup> The United States Supreme Court contributed to this understanding with its celebrated decision in *Cohen v. California*, colloquially known as the "Fuck the Draft" case.<sup>3</sup> By a single vote, the Court overturned the conviction of Paul Robert Cohen, convicted of disturbing the peace for wearing a jacket bearing the words "Fuck the Draft."

Writing for the majority, Justice John Marshall Harlan II wrote that "[s]urely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us."<sup>4</sup> He also warned that government officials "might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views."<sup>5</sup> Most famously, he declared that "one man's vulgarity is another's lyric."<sup>6</sup>

Profanity generally should be protected by the First Amendment. After all, the First Amendment protects a great deal of offensive, obnoxious, and even repugnant speech. It is anathema to a free society for the government to punish people for offensive language.

However, as this essay explains, anti-profanity laws still exist on the books of many states.<sup>7</sup> Furthermore, individuals often are convicted of breach of the peace, disorderly conduct, or some other similar type law for uttering profane words. This essay first examines several state laws that prohibit profanity under certain circumstances. It then details a few recent cases in which individuals were convicted for uttering profanity. The next section explains how profanity can be a part of an unprotected category of speech, such as fighting words, true threats, or harassment. Finally, the essay

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1. David L. Hudson, Jr. is a Visiting Associate Professor of Legal Practice at Belmont University College of Law. He also is a Justice Robert H. Jackson Fellow for the Foundation for Individual Rights in Education (FIRE).

2. Public school students (K-12) do not have a right to engage in profanity on school grounds. See *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986). Likewise, a public employer could discipline a public employee for profane statements at work.

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

4. *Id.* at 25.

5. *Id.* at 26.

6. *Id.* at 25.

7. David L. Hudson, Jr. "Curses! Blasphemy, profanity laws still on the books," First Amendment Center, Aug. 11, 2009, at <http://www.firstamendmentcenter.org/curses-blasphemy-profanity-laws-still-on-the-books/>.

examines whether such laws and cases comport with First Amendment principles.

#### ANTI-PROFANITY LAWS

Many anti-profanity laws have their origins in blasphemy laws, as colonies and states passed laws prohibiting individuals from talking ill of the church. Take this Massachusetts law as an example:

Whoever willfully blasphemes the holy name of :God by denying, cursing or contumeliously reproaching God, his creation, government or final judging of the world, or by cursing or contumeliously reproaching Jesus Christ or the Holy Ghost, or by cursing or contumeliously reproaching or exposing to contempt or ridicule, the holy word of God contained in the holy scriptures shall be punished by imprisonment in jail for not more than one year or by a fine of not more than three hundred dollars, and may also be bound to good behavior.<sup>8</sup>

Michigan still has a blasphemy law on the books. It provides: "Any person who shall willfully blaspheme the holy name of God, by cursing or contumeliously reproaching God, shall be guilty of a misdemeanor."<sup>9</sup>

Other states have general anti-profanity laws. A Rhode Island law, first passed in 1862, provides: "Every person who shall be guilty of profane swearing and cursing shall be fined not exceeding five dollars (\$5.00)."<sup>10</sup> Mississippi's law provides: "If any person shall profanely swear or curse, or use vulgar and indecent language, or be drunk in any public place, in the presence of two (2) or more persons, he shall, on conviction thereof, be fined not more than one hundred dollars or be imprisoned in the county jail not more than thirty (30) days or both."<sup>11</sup> Alabama's disorderly conduct statute includes "in a public place uses abusive or obscene language or makes an obscene gesture."<sup>12</sup> Idaho's disturbing the peace statute encompasses "us[ing] any vulgar, profane or indecent language within the presence or hearing of children."<sup>13</sup> South Carolina's law prohibits "the use [of] obscene

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8. ALM GL ch. 272, § 36 (2017).

9. MCLS § 750.102 (2017).

10. R.I. Gen. Laws § 11-11-5 (2017).

11. Miss. Code Ann. § 97-29-47 (2017).

12. Code of Ala. § 13A-11-7 (2017).

13. Idaho Code § 18-6409.



or profane language" within "hearing distance of any schoolhouse or church."<sup>14</sup>

#### CHALLENGES TO ANTI-PROFANITY LAWS

Courts have either upheld convictions or rejected civil rights claims for arrests under these antiquated anti-profanity laws. In *United States v. Flowers*, a federal district court in North Carolina upheld the conviction of Danial Flowers for violating a North Carolina law prohibiting profane and indecent speech on a public highway.<sup>15</sup>

Officers observed a group of people with tables, beer coolers, debris, and a parked truck in a road that runs through the Fontana Village Resorts in the Great Smoky Mountains National Park.<sup>16</sup> Officers approached the driver of the vehicle to see if he would move the vehicle.<sup>17</sup> Mr. Flowers, who was not the driver, approached an officer and called him "a dickhead."<sup>18</sup> He then called the officers "f---ing assholes."<sup>19</sup> The officers separated Mr. Flowers from the rest of the people and he continued to insult the officers.<sup>20</sup> They arrested him under several laws, including the anti-profanity law, which prohibits the use of "indecent or profane language" on a public highway "in the hearing of two or more persons."<sup>21</sup>

Flowers argued the law was facially unconstitutional. The state countered that the anti-profanity law applied only to unprotected fighting words under the U.S. Supreme Court's longstanding precedent of *Chaplinsky v. New Hampshire*.<sup>22</sup> The federal district court accepted the limiting construction, applied the law only to fighting words, and rejected the facial challenge.<sup>23</sup> The federal district court also addressed Flowers' as-applied challenge to his conviction. The court reasoned that Flowers' actions of

14. S.C. Code § 116-17-530(b).

15. *United States v. Flowers*, No. 2:06CR30, 2007 U.S. Dist. LEXIS 83211 (W.D.N.C. Nov. 8, 2007).

16. *Id.* at \*3.

17. *Id.*

18. *Id.*

19. *Id.* at \*4.

20. *Id.* at 5.

21. N.C. Gen. Stat. § 14-197.

22. *United States v. Flowers*, at \*18-19.

23. *Id.* at \*20.

cursing the police in front of many people at a late-night hour "created a clear and present danger of inciting a conflict."<sup>24</sup>

*Johnson v. Quattlebaum* concerned a civil rights challenge to an arrest under South Carolina's anti-profanity law.<sup>25</sup> Krystal Johnson called police out to the home that she was residing in Saluda, South Carolina.<sup>26</sup> She sought police assistance in obtaining the keys to her vehicle from a family member.<sup>27</sup> The home was only 50 to 60 yards from a church.<sup>28</sup> During the encounter, Johnson allegedly said: "[t]his is some motherfucking shit."<sup>29</sup> The officer arrested her under South Carolina's anti-profanity law.<sup>30</sup> A trial court granted Johnson's motion for a directed verdict, ruling that her speech did not qualify as profane language.<sup>31</sup>

Johnson later filed a civil rights action over her arrest.<sup>32</sup> A federal district court dismissed the lawsuit. On appeal, the Fourth U.S. Circuit Court of Appeals affirmed.<sup>33</sup> Johnson had argued that the anti-profanity law was both overbroad and vague.<sup>34</sup> However, the Fourth Circuit reasoned the law applied only to unprotected fighting words under the U.S. Supreme Court's unprotected category created in *Chaplinsky v. New Hampshire*.<sup>35</sup> Because of this narrowing construction, the 4<sup>th</sup> Circuit reasoned that the anti-profanity law covered "only constitutionally unprotected speech."<sup>36</sup>

Johnson also argued that the statutory terms "profane speech" and "hearing distance" were too vague. The Fourth Circuit reasoned that the narrowing construction of the law to apply only to fighting words also rendered the vagueness challenge unpersuasive.<sup>37</sup> The Fourth Circuit concluded the law "forbids a narrow category of unprotected speech—fighting words – and only when that speech occurs within hearing distance of a school or church."<sup>38</sup>

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24. *Id.* at \*24-25.

25. 664 F. App'x 290 (4th Cir. 2016).

26. *Id.* at 291.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 294, citing *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

36. *Id.*

37. *Id.*

38. *Id.* at \*13.



The Fourth Circuit's ruling is troubling. Ms. Johnson was not cursing at the police officers to start as fight, she was merely upset with her stressful situation. Her specific usage of profanity was not fighting words.<sup>39</sup>

#### PROFANITY AS PART OF UNPROTECTED CATEGORIES OF SPEECH

General anti-profanity laws are troubling from a free-speech perspective. They clearly target speech based on content or perhaps even viewpoint. The Supreme Court in *Cohen* warned that government officials might use profanity as an excuse to silence unpopular viewpoints. But, the reality is that profanity isn't always protected speech.<sup>40</sup> Profanity can fall into the unprotected categories of fighting words, true threats, incitement to imminent lawless action, or harassment. As noted earlier, the U.S. Supreme Court created the fighting words exception in *Chaplinsky v. New Hampshire*, defining them as "those which by their utterance inflict injury or cause an immediate breach of the peace."<sup>41</sup>

In *Cohen*, the Court narrowed the fighting words doctrine to direct face-to-face personal insults.<sup>42</sup> Later, courts held that police officers are held to a higher standard when confronted with angry individuals who utter profanity.<sup>43</sup> The Supreme Court later declared bluntly that "the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers."<sup>44</sup>

39. See David L. Hudson, Jr. "Federal Appeals Court Upholds South Carolina Anti-Profanity Law," Newseum Institute, Nov. 16, 2016, at <http://www.newseuminstitute.org/2016/11/16/federal-appeals-court-upholds-south-carolina-anti-profanity-law/>.

40. David L. Hudson, Jr. "Remember Profanity Isn't Always Protected Speech," Newseum Institute, Oct. 6, 2011, at <http://www.newseuminstitute.org/2011/10/06/remember-profanity-isnt-always-protected-speech/>.

41. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

42. *Cohen*, *supra* note 3 at 20 ("No individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult.").

43. *Lewis v. City of New Orleans*, 408 U.S. 913, 913 (1972) (J. Powell, concurring) (Noting that "the situation may be different where such words are addressed to a police officer trained to exercise a higher degree of restraint than the average citizen."); *Brendle v. City of Houston*, 759 So. 2d 1274, 1282 (Miss. App. 2000) ("The police must expect that, as part of their jobs, they will be exposed to daily contact with distraught individuals in emotionally charged situations.").

44. *Houston v. Hill*, 482 U.S. 451, 461 (1987).

However, the fighting words doctrine remains a vibrant doctrine in the lower courts, particularly in cases involving juvenile defendants.<sup>45</sup> The aforementioned cases of Danial Flowers and Krystal Johnson decisions also show that the fighting words doctrine comes into play in adult cases.

True threats are another recognized categorical exception in First Amendment jurisprudence. The Supreme Court explained in *Watts v. United States* that true threats receive no free-speech protection.<sup>46</sup> If an individual utters "I'm going to fucking kill you" to another, that likely is a true threat. In other words, individuals can use profanity in uttering a true threat.

Similarly, a related cousin in the First Amendment family is incitement to imminent lawless action. The Supreme Court explained in *Brandenburg v. Ohio* that there is a distinct difference between advocacy of illegal conduct and incitement to imminent lawless action.<sup>47</sup> If an individual yells "kill the police" before a group of people, encouraging such murderous conduct, the individual is not protected by the First Amendment. The same principle applies to harassment.<sup>48</sup> Individuals can engage in a pattern of harassing another person and such conduct may well include profanity. Thus, profanity can constitute a part of unprotected speech.

#### CONCLUSION

Profanity by itself is not unprotected speech though many states still have anti-profanity laws on the books. These antiquated laws are unconstitutional unless they have been narrowly construed to prohibit only unprotected fighting words. Furthermore, individuals in general society have a free-speech right to utter profanity unless such speech crosses the line into a narrow unprotected category of speech, such as fighting words, true threats, incitement to imminent lawless action, or harassment.

45. David L. Hudson, Jr. "Ohio court: Girl's Curses at Cops were Fighting Words," Newseum Institute, Dec. 20, 2012, at <http://www.newseuminstitute.org/2012/12/20/ohio-court-girls-curses-at-cops-were-fighting-words/>.

46. *Watts v. United States*, 394 U.S. 705 (1969).

47. *Brandenburg v. Ohio*, 395 U.S. 344 (1969).

48. For example, Title VII prohibits harassment on the basis of race, sex, or other protected criteria. First Amendment commentators have questioned the constitutionality of such regulations. Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992).



The Supreme Court recognized years ago that individuals may use profanity for its emotive appeal, as an amplifier of expression.<sup>49</sup> As Justice Harlan noted years ago: "The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours."<sup>50</sup> Or in the words of Paul Robert Cohen, "the government shouldn't be able to decide what speech individuals can or cannot speak."<sup>51</sup>

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49. Cohen, *supra* note 3 at 26 ("In fact, words are often chosen as much for their emotive as their cognitive force.").

50. Cohen, *supra* note 3 at 24.

51. David L. Hudson, Jr. "Paul Robert Cohen and His Famous Free-Speech Case," Newseum Institute, May 4, 2016, at <http://www.newseuminstitute.org/2016/05/04/paul-robert-cohen-and-his-famous-free-speech-case/>.