First Amendment Protects Objectionable Content

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AUTHOR'S WARNING: **This article quotes and displays potentially offensive language and images. If you do not want to be offended, "turn the page."[1]**

Due to the extremes of partisan animosity in the recent presidential election, many election signs contained offensive words and messages. I have placed a photo of one the signs displayed in my town in the endnotes.[2] When residents saw the offensive signs, instead of talking to the person displaying the sign, they called the police department, the mayor, other council members, and the city manager. Because I am the city attorney for a small town, staff sought legal advice from one me. For once, being a one-person legal department paid off, as everyone who asked for advice received the same answer: the signs are protected by the First Amendment and the city cannot ask that the signs be taken down. The calls also gave rise to this article, which is a short explanation of how the First Amendment pertains to printed words and visual images in areas that can be viewed by the public.

Profanity Versus Fighting Words

In 1971, the Supreme Court had the privilege of deciding whether the word "f*ck" is a fighting word.[3] In the case, *Cohen v. California*, Mr. Cohen was convicted of disturbing the peace for wearing a jacket that said "F*ck the Draft".[4] Previously, in *Chaplinsky v. New Hampshire*, the Court had defined fighting words "as those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[5] For example, in *Chaplinsky*, the Supreme Court held that the words "damned fascist" were "fighting words" because they were "face-to-face" words likely to provoke an average person to retaliate.[6] However, Mr. Cohen neither directed his profanity at any person nor directed it into the privacy of a person's home.[7] Therefore, "F*ck the Draft," in the Cohen context, are not fighting words.[8] The Court explained that people are often subject to objectionable speech once outside of the home and the government cannot shut off discourse to protect others from hearing objectionable words or viewpoints.[9] People need only avert their eyes to avoid printed words.[10]

Obscenities

Can a city ban the term "f*ck" if the city defines the term as obscene? Obscene material is not protected by the First Amendment.[11] However, in order to enact a law that restricts obscene language in a constitutional manner, the law must be "limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value."[12] It would be difficult for one word standing by itself to fit that long, vague, complex definition.[13] In *Cohen*, the court stated that "[w]hatever else may be necessary to give rise to the States' broader power to prohibit obscene expression, such expression must be, in some significant way, erotic."[14] The Court found that Mr. Cohen's "vulgar allusion to the Selective Service System" was not erotic.[15]

Why Are Profanity and Other Offensive Expressions Protected?

The answer to this question is two-fold: (1) the First Amendment prohibits the government from abridging a citizen's speech; and (2) the very function of free speech is to invite dispute.[16] In 1949, the Court invalidated a city ordinance that defined "breach of the peace" as misbehavior that "stirs the public to anger, invites dispute, [or] brings about a condition of unrest . . ."[18] The Court

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1. Bob Seger, Turn The Page (Capitol Records 1972).
2. 

3. *Cohen v. California*, 403 U.S. 15 (1971).
4. *Id.* at 16.
5. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); *Cohen*, 403 U.S. at 20 (paraphrasing *Chaplinsky*).
6. *Chaplinsky*, 315 U.S. at 573-74.
7. *Cohen*, 403 U.S. at 20-21; see also *Rowan v. U.S. Post Office*, 397 U.S. 728, 738 (1970) (explaining that resident's statutory right to use postmaster to help exclude objectional materials from home does not violate mailer's right to communicate); see also *Frisby v. Schultz*, 487 U.S. 474, 487 (1988) (explaining that targeted picketing of one residence holds resident captive, leaving no means of avoiding unwanted speech).
8. *Cohen*, 403 U.S. at 20.
9. *Id.* at 21.
10. *Id.*
11. *Miller v. California*, 413 U.S. 15, 23 (1973).
12. *Id.* at 24.
13. I do not intend for this sentence to be a challenge for my readers to think of such a word.
14. *Cohen*, 403 U.S. at 20.
15. *Id.*
16. U.S. Const. amend. I; *Cox v. Louisiana*, 379 U.S. 536, 551 (1965).
17. *Terminiello v. City of Chicago*, 337 U.S. 1, 3 (1949).
18. *Id.* at 4; *Cox*, 379 U.S. at 551-52.

stated that the function of free speech is to invite dispute and that in order for ideas to be accepted or for ideas to force change, speech sometimes has to create dissatisfaction or stir people to anger. Censoring ideas or allowing public officials to decide which expressions will be permitted stifles the intent of the First Amendment.[19]

Non-Profane, But Still Offensive, Examples of Protected Expressions

The Supreme Court has also found that other objectionable methods of expression are protected. In *Erznoznik*, a town in Florida prohibited drive-in theaters from showing films in which the human "bare buttocks, human female bare breasts, or human bare public [sic] areas are shown, if such motion picture . . . is visible from any public street or public place."[20] Mr. Erznoznik, a drive-in movie theater manager, was charged with this offense, but prosecution was withheld while the constitutionality of the ordinance was decided.[21] The Court held that the ordinance was unconstitutional because the prohibition was based on the content of the image and because the erotic images were not being broadcast to captive audiences in the privacy of homes. [22] Also, people on adjoining streets could avert their eyes to avoid inadvertent viewing.[23] Unlike the protagonist in *A Clockwork Orange*, people in public areas are not forced to watch or look at unsettling images.[24]

Captive Audiences

But what if there is a captive audience in a public area and people cannot simply avert their eyes or stop up their ears? The Supreme Court has drawn a line at aggressive behavior occurring close to an unwilling subject.[25] In *Hill v. Colorado*, patients and others were subjected to "sidewalk counseling" while trying to enter a medical clinic that provided abortions.[26] Sidewalk counseling included yelling, thrusting signs in patients' faces, displaying signs with images of bloody fetuses, and yelling "you are killing your baby."[27] All patients and their companions were subject to this unsolicited counseling, regardless of the fact that only seven percent of patients attended the clinic to obtain abortions.[28] In response, Colorado enacted a statute restricting the proximity of an active protestor to an unwilling listener.[29] The Supreme Court upheld the statute as a valid time, manner, and place restriction.[30]

Our Modern Supreme Court

Six of the cases discussed so far were decided prior to 1980. Does the present, more conservative, Supreme Court still hold that profanity and other objectionable images and terms are protected? In 2017, the Supreme Court found, in *Matal v. Tam*, that specific language in the federal trademark law's disparagement clause violated the Constitution.[31] Before a trademark can be registered, the Patent and Trademark Office (PTO) must determine if the trademark "Consists of … matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs … or bring them into contempt, or disrepute … "[32] Simon Tam attempted to trademark his rock band's name, The Slants. Mr. Tam chose the name to reclaim the term "slants" and remove its racist meaning.[33] No matter the purpose of Mr. Tam's choice, the PTO denied Mr. Tam's application for a federal trademark under the disparagement clause because the term "slants" is a derogatory term for people of Asian ancestry.[34] The Court held that the challenged wording was unconstitutional because the clause leads the PTO to deny trademark registration based on viewpoint.[35]

Two years later, in *Iancu v. Brunetti*, the Court struck down more wording in the disparagement clause due to its overly broad prohibition of registering trademarks that "consist[s] of or comprise[s] immoral . . . or scandalous matter".[36] Mr. Brunetti was seeking trademark protection for his clothing line FUCT. [37] Mr. Brunetti, an avid free speech advocate, chose the name FUCT to confuse people who were trying to pronounce the name of his streetwear/skater brand design company.[38] The Court held that "There are a great many immoral and scandalous ideas in the world (even more than there are swearwords) and the Lanham Act covers them all. It therefore violates the First Amendment.[39]

In 1982, The Clash sang "You have the right to free speech, as long as you're not

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19. *Cox*, 379 U.S. at 557-58.
20. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 206-07 (1975).
21. *Id.* at 206 n.1, 207 (the movie was *Class* of '74).
22. *Id.* at 211; see also *Fowler v. Rhode Island*, 345 U.S. 67, 69-70 (1953) (stating that government cannot prevent specific religions from holding services in public park).
23. *Erznoznik*, 422 U.S. at 211.
24. Anthony Burgess, A Clockwork Orange, 116-17 (W.W. Norton and Company, Inc. 1963) ("they put clips on the skin of my forehead, so that my top glazzlids were pulled up and I could not shut my glazzies"); see also *Hill v. Colorado*, 530 U.S. 703, 708-09 (2000) (casually agreeing that signs containing images of bloody fetuses are protected).
25. *Hill*, 530 U.S. at 718 (discussing listeners that cannot avoid unwanted sights or sounds).
26. *Id.* at 710 n.7, 715.
27. *Id.*
28. *Id.* at 711.
29. *Id.* at 707.
30. *Id.* at 730.
31. *Matal v. Tam*, 137 S.Ct. 1744, 1764 (2017).
32. 15 U.S.C. §1052(a) (2006).
33. *Tam*, 137 S.Ct. at 1751; *see also* Simon "Young" Tam, *The Story of the Slants*, http://www.theslants.com/biography/ (last visited Feb. 18, 2021).
34. *Tam*, 137 S.Ct. at 1751.
35. *Tam*, 137 S.Ct. at 1751, 1764; see also *Iancu v. Brunetti*, 139 S.Ct. 2294, 2297 (explaining Tam).
36. 15 U.S.C. §1052(a) (2006); *Brunetti*, 139 S.Ct. at 2302.
37. *Brunetti*, 139 S.Ct. at 2297 (Friends U Can't Trust).
38. Samuel Hine, *How O.G. Streetwear Brand FUCT Took a Free Speech Case All the Way to the Supreme Court*, https:// www.gq.com/story/fuct-erik-brunettisupreme-court-case (last visited Feb. 24, 2021).
39. *Brunetti*, 139 S.Ct. at 2302.

dumb enough to actually try it."[40] As this brief article illustrates, the Supreme Court has consistently attempted to prevent that statement from being accurate. What remains in play are the parameters of the Free Speech clause. "'Your right to swing your arms ends just where the other man's nose begins.'"[41] In the case of free speech and drawing the line between what is said and what is heard, the preservation of individual liberty can and must favor the person who speaks over the person who listens.[42]

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40. The Clash, Know Your Rights (Epic Records 1982).
41. Zechariah Chafee, Jr., F*reedom of Speech in War Time*, 32 Harv. L. Rev. 932, 957 (June 1919) (quoting fictional judge).
42. *Id.*

Editor's Note: We requested permission to reprint this article because League attorneys have received multiple calls from municipalities concerned with signs identical or similar to those discussed in this article. Although municipalities can enact content-neutral sign regulations, regulations aimed at content deemed offensive or profane are subject to strict scrutiny by courts and rarely pass muster because of First Amendment protection. In addition to the laws discussed in this article, Wisconsin municipalities should be aware that Wis. Stat. § 66.0107(3) prohibits municipalities, by ordinance, from prohibiting conduct which is the same as or similar to conduct prohibited by Wis. Stat. § 944.21 which regulates obscene material or performance.

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