Supreme Court of the United States

OCTOBER TERM, 1970

In the Matter of:

Docket No. 299

PAUL ROBERT COHEN,

Appellant

vs.

THE STATE OF CALIFORNIA,

Appellee

Place Washington, D. C.

Date February 22, 1971

ALDERSON REPORTING COMPANY, INC.

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The above-entitled matter came on for argument at 1:05 o'clock p.m., on Monday, February 22, 1971.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

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On behalf of Appellee

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Number 299: Cohen against California.

Mr. Nimmer, you may proceed whenever you are ready. I might suggest to you that, as in most cases, the Court is thoroughly familiar with the factual setting of this case and it will not be necessary for you, I am sure, to dwell on the facts.

ORAL ARGUMENT BY MELVILLE B. NIMMER, ESQ.

ON BEHALF OF APPELLANT

MR. NIMMER: Thank you, Your Honor.

Mr. Chief Jusice, and may it please the Court:

This case is, of course, here on appeal from a judgment of the Court of Appeals, State of California, upon this Court's order postponing jurisdiction pending hearing on the merits.

At Mr. Chief Justice's suggestion I certainly will keep very brief the statement of facts, but fundamentally we do have here the Appellant charged and convicted of engaging in tumultuous and offensive conduct in violation of the California Disturbing the Peace Statute: Penal Code, Section 415. And, although there was a reversal upon the first level of appeal held by the Superior Court it was then certified by the Court of Appeals which vacated and affirmed the judgment. The California Supreme Court refused to hear it in a 4 to 3

decision on that.

And of course, fundamentally, may it please the Court, what this young man did was to walk through a courthouse corridor in Los Angeles County on his way to a courtroom where he had some business.

Q What business did he have?

A Mr. Justice, although it was not in the record, he was called there as a witness in a case which he was not involved in himself. Then, while walking through that corridor he was wearing a jacket on which were inscribed the words: "Fuck the draft." Also inscribed were words "Stop War," and several peace symbols.

When he entered the courtroom he took off his jacket and held it folded. When he left the courtroom he was arrested for disturbing the peace; specifically engaging in tumultous and offensive conduct.

Q When he took the jacket off did he put in in a place where it was prominently on view?

A No, Mr. Justice Stewart, he held it folded over his arm and it was not on view there. Furthermore, the policeman who observed him walking through the corridor before he went into the courtroom -- this is in the record -- requested the judge in the courtroom to hold the young man in contempt. The judge refused to hold the young man in contempt because there was nothing to be seen in the courtroom -- I shouldn't

say that. I don't know what he would have done if he did see anything, but there was nothing to be seen. And then he left and at that point he was arrested.

Q So the conviction rests basically upon his wearing it in the corridor of the building?

A Precisely, Mr. Justice Stewart; yes.

Q Inthis respect it is no different, is it, from what it would be if he had been picked up on the street in front of the building or in any other public place?

A Exactly, Mr. Chief Justice. I think that's the point --

Q The courthouse atmosphere has nothing to do with it?

A I think it is not an issue in this case; yes, Your Honor.

Q Well, wouldn't you think that there are some things people couldn't do in a courtroom that they could do at other places?

A Mr. Justice Black, I would think there are some things that in the courtroom itself while court is in session, would be improper, consistent with the First Amendment. I don't think that arises in this case.

Q You said he did not wear this jacket in the courtroom?

A That is correct, Your Honor.

I would make the distinction: if, hypothetically, something had occurred in the courtroom while court was in session, it might be a different case. That is not this case, Your Honor.

Q If he did it right at the front door of the courtroom while the court was in session --

A Your Honor, as far as the record is concerned --

Q -- I'm not talking now about the merits of your case --

A Yes.

Q But, do you not think that the court could have something to say more than they would if it was -- if a man was walking down the street?

A Mr. Justice Black, I think that when you get into the question contempt, which that really raises, this Court's standard that has been adopted in numerous cases, namely: that there must be a showing that the speech creates a clear and present danger of interference with the judicial process, would apply. And, conceivably, in given facts where these words do appear during the session of the court, not merely in the physical courtroom, but while court is in session, conceivably that would apply; but that is not this case, with all respect, Your Honor.

So that this young man was arrested while walking in

the corridor, and I think it is vital to point out to the Court that there were --

Q What courthouse was this?

A It was in the Los Angeles County Courthouse, Mr. Justice Brennan.

Q That's not the very large one; is it?

A It is, yes. That is a very large one.

Q Is that the one with the 100 courtrooms?

A Something like that, Your Honor; yes. It, incidentally is not a courtroom where draft cases are tried. It's not the Federal Court; it's the State Court.

Well, I think it's important at the outset to point out to the Court that there was no violence, no component of violence present. It is stated in the several statements signed by the trial judge that the Appellant did not engage in violence, did not threaten violence; that no one observing him engaged in violence or threatened violence. So the violence component is completely out. And I suggest that that is terribly significant, for the broader significance of this case, pointing out as it does, as it can do, depending upon this Court's decision, the very vital distinction between dissent, which may be offensive to people. Some people may not like it, but nonviolent dissent and violent dissent; a distinction that all too often members of the younger generation tend to forget. They tend to equate violent dissent and

dissent that may be regarded as objectionable or offensive.

It is terribly important, we submit, Your Honors, that this Court make clear that distinction; that this Court, by its very nature, involves the right to be offensive. Non-offensive dissent is almost a contradiction in terms, because if it's nonoffensive it means that you agree with it. But, on the other hand, violent dissent is something quite different. And the facts of this case point out precisely that distinction, yet the trial court, first of all, erroneously, we submit quite clearly erroneously, ruled it was completely unnecessary to show any component of violence in connection with this statute. And that's set forth, I think at Appendix 19, where they said that the trial judge said that simply if it's offensive, that's enough.

We submit that that clearly is unconstitutional, given the First and 14th Amendments.

Beyond that, the Court of Appeals, when it came to rule in this case and affirmed the decision below, was not prepared to go that far, indicated that there was a necessity for a violence component. But it's very interesting to note the way they handled that. What they said was -- first they quoted Appellant's position that there must be a likelihood of violence arising from offensive conduct. And the Court of Appeals, State Court of Appeals opinion in the beginning says: "That's right; we subscribe to that view; there must be a

likelihood of violence arising from the offensive conduct.

But then, in the course of the opinion they go on to say: "It's sufficient if there is a tendency to violence; if a violent act might occur." And then they say this might occur because a man walking with his wife and children, seeing these words on the jacket, might -- emphasize -- it's my emphasis -- might resort to violence to attack this man who is exhibiting this word that is found offensive.

Q Would it be your position that your client could have had a First Amendment right to say these words orally, face-to-face, to any person in the hall outside the courtroom?

A Mr. Justice White, I don't think the distinction lies in whether it's oral or written, but if you are suggesting a distinction based upon --

Q I'm not suggesting anything. I just asked a question. Would your position be the same?

A If you used these precise words, namely: relating to the draft --

Q Yes, to any person face-to-face in the hallway, you think he has got a First Amendment right to do that?

A Yes, I do, Your Honor.

Q And if he didn't you might have some trouble in this case?

A I don't offhand see a viable distinction between the written and the oral; yes.

But, Your Honor, I think it's terribly important -- you are not suggesting, but it suggests to me the "fighting words" concept taken from the Chaplinsky case, decided by this Court some years ago, where this Court suggested that in certain circumstances the words may be regarded as fighting words because men will reasonably know that they will result in violence and hence, that those words are part of the First Amendment.

Q Is your view of fighting words different than -- do you think fighting words are different than insulting words?

A No, Your Honor; that's precisely my point; I think they are synonomous, and hence these are not fighting words because they are -- well, perhaps I should be more specific. Insulting words, insulting the hearer, insulting the person to whom the words is addressed is what the basic concept of fighting words refers to, as in Chaplinsky: "Damned racketeer, and fascist." Here there was no attack of the hearer; there was opposition, verbal attack, if you will, on an institution, the Selective Service System, but not as against any of the viewers of the sign. Hence, we submit, this does not at all come under the Chaplinsky fighting words concept.

Q Well, let's go back to what Mr. Justice White

was addressing himself to. You haveindicated that your case is the same situation as it would be if he walked through the corridors chanting or shouting these words and let's say that you would have a miscellany of people that might include members of the draft board, members of the American Legion, soldiers from the -- members of the Armed Forces, parents with young children, do you suggest that these might not be fighting words in the context of that kind of an audience, potential audience?

A Mr. Chief Justice, first of all, in terms of the fighting words, I don't see any likelihood of the facts constituting those fighting words, but in any event, I think the fundamental point is it is the burden of the state to show that under given circumstances -- the circumstances were such that these were fighting words; that is, given the factual situation that you describe, of servicemen around and so on, that it's a factual burden on the state to show that in those particular circumstances there was the likelihood of violence. No such showing was made in this case.

Beyond that, perhaps I should further elucidate on the possible distinction between oral and written. It is certainly true that there may be some nonspeech interests that arise in connection with an oral statement that may not arise with a written statement.

For example, you spoke of enchanting; well, if there

were a constant oral kind of communication that became a disturbance, then regardless of the content of the speech that might be grounds for the state moving in and stopping this. So, in that sense there can be a distinction between oral and verbal, but I don't make the distinction in terms of the intellectual content of what is said.

Well, the Court of Appeals, the California State Court of Appeals, attempted to defend the lower court's decision on the grounds that there was a possibility it might have happened that there would be violence, despite the fact that the settle(?) statement clearly says, signed by the Court judge, that there was no violence and no likelihood of violence, either by the Appellant or by anyone hostile to him or with him, viewing him.

And so this was quite contrary to the facts of the record.

Beyond that, quite apart from that, the standard adopted by the Court of Appeals is quite improper in view of the carefully worked out doctrine that this Court has enunciated through the years about the First Amendment.

Note the possible implications, for example in cases like Edwards versus South Carolina, where Negro demonstrators peacefully present their views to the Statehouse. Now, one could certainly say there that it is possible, given the Southern atmosphere, it is possible there might be someone in

the audience, a white person observing who might resort to violence. That's possible, but this Court has made very clear that that's not enough of a standard, the mere possibility. There must be a likelihood, a real likelihood and an imminence in order to justify a breach in freedom of speech. That standard was certainly not met here or there is nothing in the record to reflect such a standard here.

Q You seem to be, at least if I follow you, what you are really saying is that this is an absolute right under the First Amendment, in the context of either speaking it, as long as it is not shouted; speaking it or carrying a picket sign or having it on a jacket in the corridor of the courthouse.

A Mr. Chief Justice, it is not our position that because it happens to be profanity, automiatically there is absolute right; no, Your Honor. We certainly recognize that in given circumstances the issuance of profanity may cases a clear and present danger of a violent reaction and if those are the circumstances then a profanity can be prohibited. It is also conceivable that in given circumstances the profanity will be used in an obscenity setting as this Court has defined obscenity.

Again, under this Court's decision, the First Amendment would not apply. It is also possible that profanity or whatever is said may be used in circumstances where the person

had no right to be where he was, a la the Adderly doctrine and that again the mere fact that he was using profanity does not give him an absolute right to speak. But, in a situation where the various contexts that this Court has found justify not applying the First Amendment, where those contexts do not arise, I say, do not arise here, then we submit, Your Honors, that the mere fact that this happens to be profanity does not justify the State from coming in and stopping the statement.

We submit, Your Honors, that there are very serious and important First Amendment implications here that should be realized and I would like at this point then to trace them, because, having passed the point and I would certainly be happy to come back if any of the Court wishes, on any of these various exclusionary grounds why the First Amendment does not apply, assuming that none of those pertain and we submit they do not, as set forth in the whole part 1 of our brief, going to part 2 of our brief, why is profanity itself worthy of protection?

Well, one really doesn't have to put it in that context because the First Amendment says speech is protected; you don't have to justify it on any other grounds. But, let's look for a moment at the policy reasons which underlie the First Amendment if we may, and see why they do apply in the area of profanity as well as elsewhere. We know that one fundamental reason, as Justice Brandeis pointed out in his famous Whitney concurrence, one fundamental reason why free speech is

important is because of its contribution to the democratic dialogue. A self-governing people can govern wisely only if they deal with all material, all data, from all sources.

And this Court made that point again only most recently in the Red Lion case.

Q Now, what does this have to do with communicating dialogue or discussion of public issues?

A Your Honor, I understand the argument can be made and perhaps you, by implication, are making it; why did he have to use these words? Why couldn't he simply have said, "I hate the draft,"and have put forth the democratic dialogue equally as well.

We have a severalfold answer to that. First of all, on a more superficial level, if you will, if this Appellant had used the more laundered form of expression, if he had said, "I hate the draft," then the self-governing people, the people who must make the decisions based upon freedom of speech and what they hear from that freedom of speech, would be somewhat less wise than they are.

Now, what do I mean by that? I mean by that that the the mere fact that this young man chose to use a word which many people would no doubt find disagreeable, and no question of that. The mere fact that he chose to use that word is important data for the self-governing people to know; to know that he feels this deeply about this subject -- if he had used the

more laundered form of expression: "I hate the draft," they would have been ignorant to a degree.

Dr. Meiklejohn said in his famous work, following the Brandeis formula: the self-governing people must know, must have access to all material and all data. Now, if they didn't know about his depth of feeling that was evidenced by this word, or knowing that, what are the consequences? Well, there could be any one of a number; maybe the self-governing people decide that if that's the attitude of the young people, the penalty for avoiding the draft must be made more severe, or on the contrary it might be repeal of the draft, or any one of a number of other possibilities. The point is they know somewhat less by the State stepping in and changing that kind of expression. A little more profoundly, though --

Q Why did he take the jacket off when he entered the courtroom?

A Mr. Justice Marshall, he took the jacket off because he was wearing the jacket as one would ordinarily wear the jacket: he was somewhat chilly. He knew that the sign was on there and he knew that this showed the depth of feeling of young men, but he wasn't there to demonstrate or parade, and that's the point that the Court of Appeals makes in the course of their argument -- in the course of their opinion -- pardon me --

Q I think you missed the import of my

question.

A I'm sorry, Your Honor.

Q He was willing to do all this demonstrating but he wasn't willing to do it in the courtroom.

A Well, Your Honor he was not --

Q Does that lead me to believe he knew exactly what he was doing?

A Your Honor he --

Q That he knew better than to wear it in the courtroom?

A That he knew --

Q That he knew better than to wear it in the courtroom?

A Perhaps he knew it would be improper to wear it in the courtroom. I have never questioned him on that and there is nothing in the record on that. I don't know.

Q Well, it should put emphasis that he folded it up.

A Yes, indeed.

Q But he still has the right to parade around the courthouse halls, knowing that that building had nothing to do with the draft in any form or fashion; am I right?

A You are quite right, Your Honor.

Q And you emphasize that?

A Yes, Your Honor.

Q And my question is: why?

A Your question is --

Q Why did you emphasize that?

A Because I want to make the point that this does not get into the area of possible contempt of court. This is an ordinary free -- exercise in freedom of expression; certainly one is not limited in one's freedom of expression --

Q Well, could he have stood in the court hallways and yelled those words?

A Certainly not. That would have been highly improper, Your Honor. That raises another --

Q Well, the fact that he has it emblazoned on his jacket, we can't tell whether that's loud or quiet; can you?

A Well, Your Honor, it was on his jacket, which meant that a person, if he wishes to, could see it on his jacket and a person was not forced to continue to observe that as in terms of a loud voice --

Q Well, walking up the halls directly behind him couldn't help from seeing it.

A For the moment, but obviously --

Q Obviously that's why he did it.

A Yes, sir.

Q You mean he didn't want people to see it?

A No; I'm certainly not saying that at all.

Quite definitely he did want to pass that message, but it's a somewhat different question, one: what his motive was in wearing it, and in part it was to convey this message, although he was not parading or picketing or anything of the sort; he was making his way to the courtroom and then made his way back. But, he did want people to see sthis.

On the other hand, it's a different question to conclude whether or not people had to see it for any considerable period of time and we would respectfully suggest that was not necessary under the circumstances. It is true that some people momentarily probably couldn't avoid seeing it, but there was no continuing requirement at all, and that gets to this Captive Audience Doctrine; it was a kind of fleeting contact as one has if one walks through a Hyde Park-type area where you may have fleetingly offensive sounds but they are no more than fleeting.

Well, I started to get to what -- if I may -- to what I think is the more profound reason why this Court must recognize that the First Amendment goes not only to offensive content, and certainly this Court has made clear over and over again, that no matter how offensive the idea conveyed, it still is protected. The writings of Adoph Hitler and Joseph Stalin certainly are far more offensive to many people than the word before this Court in this case that appears in seven out of 10 of the best selling works of 1969, as indicated in the appendix

of our brief.

Certainly offensiveness per se does not derogate from the right to speak under the First Amendment. But then the question comes back: what about the form of the offense, if offensiveness comes in form rather than substance. And I made one point on that, knowing the depth of feeling, this is data that the public is entitled to know is a more profound point, if I may, and that is: linguists tell us that language performs two functions.

There is the emotive content of language and there is the intellectual content of language and that these intersperse; that is that intellectual content is that which carries the message per se. The emotive content of language is that which persuades. We are all human beings; we are all moved to a degree by emotional considerations as well as by intellectual considerations and that the emotive content is also important.

Now, we get to what the First Amendment is all about, and what it is all about, of course, is competition in a marketplace of ideas and what ideas are going to prevail. We subscribe to the democratic faith that the ideas that prevail for a majority are the ideas which should be followed, but in order for that system to work it's important that the State not step in and try to censor either emotive content or intellectual content because, depending on the emotive content, particular emotive content, it will appeal, the message will

appeal to various groups of citizens and by determining what -- by censoring the emotive content, even if not the intellectual content the state is thereby enabled to a great degree to determine what group will buy this idea; to what group this idea will appeal, and hence, ultimately will be able to determine what ideas prevail in the competition of the market.

And so for that reason, we submit to the Court, respectfully, that emotive content, just as much as intellectual content, or to put another way: that the offensiveness of form, no less than offensiveness of substance, must be preserved by the First Amendment if the First Amendment is to be meaningful.

Now, I should like to, if I may, with the Court's permission, point out another aspect and that has to do with the hostile audience veto that was referred to a little bit in the last case. This is another element that comes into play in this case. The Court could reach a decision here without deciding that, but we submit it would be both proper and desirable for the Court to get into this issue.

What that has to do with is the Court of Appeals' decision saying there was a likelihood of violence, not from those who were following, followers of the defendant here, but from those who were hostile to what he had to say. They might resort to violence. And the question was posed: even if there was such a likelihood, even a mere tendency is a sufficient

standard, is it enough to put down the speaker because those who dislike what he says may resort to violence?

As Professor Chaffee said, as quoted more accurately in my brief: can a man be arrested because his neighbors don't have enough self-control to stop themselves when they hear something or read something they don't like? We suggest that the time has come when this Court should make very clear, as it has in part, in Edwards and in Cox, that a hostile audience, at least if the police can control the hostile audience, is not sufficient to stop the speaker. This becomes a very current issue on college campuses today, where many members of the Government and other established people cannot go on campus because the college audiences are sufficiently hostile so that they attempt, sometimes, by violent acts, to stop the speaker.

This is wrong; this is contrary to the First Amendment, and this is the time for this Court to say so. There was a lower court case cited in our brief in Stacy versus Williams in which precisely that issue pertaining to the college campus was decided by a Federal District Court in Mississippi, overruling a state regulation stating that if -- that a speaker might not come on a college campus if there is a likelihood that the students will resort to violence.

The Court said not so; the police must put down the mob, not the speaker. Well, that, too, is involved in this case and we submit that this is an opportunity for this Court to

make clear the nature of free speech for students, as well as for others.

With the Court's permission I should like to reserve the remainder of my time for rebuttal.

Q Before you sit down, Mr. Nimmer, may I ask you to comment, because you haven't made one, on the Bushman case in California since this one was decided?

A Yes, Your Honor.

Several points, if I may, Mr. Justice Blackmun: first of all, it's to be noted that the Bushman case, further construed by the California Supreme Court the very statute we have here, that occurred after the decision by the Court of Appeals here and after the California Supreme Court refused to hear our case.

There, the Bushman case, per Mr. Chief Justice Traver, construed Section 415 and the offensive conduct. Now, that construction is somewhat ambiguous, it seems to me, because part of the opinion speaks of the requirement of a clear and present danger that the offensive -- that offensive conduct will produce violence. Elsewhere in the opinion it speaks of a tendency to produce violence. And so on the very issue I have suggested I think there is some ambiguity.

Beyond that, it is interesting to note that the Supreme Court opinion in Bushman cites this case, Cohen, as standing for the position, for the proposition that there was a

likelihood of violence here, where there is absolutely nothing in the record to support that, and to the contrary, in the settle statement, page 20 of the appendix, a statement directly countering that.

Q Do you feel that the California Court, in Bushman, disapproved of the holding of the Court of Appeals in the present case?

A Your Honor, I have to conclude that the California Supreme Court approved the holding because they cited, apparently with approval, the Cohen case as standing for the correct proposition: namely that there must be a likelihood of violence in order to justify convicting a speaker for the use of words under the Offensive Conduct Section of 415.

Q Then my next question is: do you feel that the Bushman construction of the statute meets Federal Constitutional standards?

A Your Honor, I think it comes a lot closer to meeting it than does the Court of Appeals' opinion in this case. I would still suggest, with respect, Your Honor, that it does not meet Federal standards for several reasons: first of all, because it is ambiguous, as I say, on the question of whether on the one hand there must be a clear and present danger of violence arising from the words which constitute offensive conduct, or whether there would merely be a tendency; that's one point.

The second point is that the California Supreme Court, in Bushman, in no way goes into this hostile audience doctrine, indicating that the statute would not apply if the likelihood of violence arises from a hostile audience. And, indeed, the California Supreme Court in People versus Davis, which is cited in our colleague's brief, took the contrary position; not on this same statute, but on a anti-riot statute, saying that even if the danger comes from a hostile audience that's still enough to abridge the speech.

So, the suggestion is that the California Supreme Court does not recognize that doctrine.

Q Then you would see no point in our remanding this case for reconsideration in the light of Bushman?

A I certainly do not, Your Honor. First of all, of course it would go back to the Court of Appeals and the Court of Appeals would look at the Bushman opinion and see the California Supreme Court's citation of Cohen as having been correctly decided and that there would be nothing further for them to do but reaffirm. And then perhaps ultimately it would come back here again. It would simply be a delay if the Court is of the view that there were improper standards applied by the lower courts in California.

Q Mr. Nimmer, I take it from your earlier remarks that you think the situation might be different if he wore his jacket in the courtroom?

A Your Honor, if he wore the jacket in the courtroom during court proceedings --

Q Yes. Well, why would that -- why would wearing the sign on his back in the courtroom be any more vulnerable to attack --

A Your Honor, I should further qualify that. I could then see the possibility of a charge on contempt. I would still say that it was improper to charge him under this statute --

Q Why? Why?

A Well, I am only looking at the possibility. There I could see the possibility of the Court's concluding that the use of that word in the presence of the judge, so interfered with the decorum of the courtroom that it did create a clear and present danger of --

Q Of what?

A -- of interfering with justice. Now, I'm only -- perhaps taking the devil's advocate there -- I can see that as a possibility, but even if it is a possibility --

Q Do you think it would be different if, in the courtroom he -- the sign on his jacket was "I hate the draft?"

A Perhaps not, Your Honor, but the courtroom is no place to go around making speeches, either written or verbal, during trial proceedings.

Q Okay, thank you.

MR. NIMMER: Your Honor, does that mean that my time is up?

MR. CHIEF JUSTICE BURGER: It is, but we will see if we can do something about that.

MR. NIMMER: Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Sauer.

ORAL ARGUMENT BY MICHAEL T. SAUER, ESQ.

ON BEHALF OF APPELLEE

MR. SAUER: Mr. Chief Justice, and may it please the Court:

As an issue developed in Appellant's opening argument, I don't believe there is any difference whether the Appellant wore it in a courtroom or in a corridor. If the defendant were protesting the decisions of this Court and carried a similar sign and walked across the plaza, up the marble staircase and down the corridor here, I don't think it would be any different if he stopped and took his jacket off at the curtain or if he entered the courtroom here with the same type sign. I believe the same violation would have occurred, that thatwould have been in engaging in offensive conduct, or if the man wore it in a public street, I would say the same type of conviction should stand.

Q Well, there is a difference between what goes on in the courtroom and what goes on in the corridor. Surely you can't read newspapers in the courtroom; you can certainly

read them outside the courtroom if you want to.

A That's true, Your Honor, but if the man were yelling the words, if the man spoke them in here, just say to someone else, or spoke them out in the hallway, I would still think it would be a violation., if he just said the same to someone next to him who might be offended by the terms and might react to the statement made tohim.

Whether the man folded over his jacket, we don't know. It says he went into the courtroom, but there is now showing whether the court was in session or whether somebody walked in here at a quarter to one and the Court is still in recess and had a sign and none of Your Honors were on the bench and no one saw the sign. I would say it would still be a violation, and say he entered the courtroom prior to opening it would still be --

Q It could be held as a violation, independent of what it might be as a contempt of the court or interference with judicial proceedings?

A Yes, Your Honor.

Q It might be a violation of the statute and a contempt citation?

A I would agree; yes. That would be our argument. Say the man was sitting here and none of Your Honors could see him. Everybody else in the courtroom say, might be offended, but I could be having a sign right now and none of

you could see my back and the argument goes on and say I wouldn't be held in contempt, yet I would still say it would be a violation because other people in the place might be offended by what was going on.

Q What would he be convicted of violating? A statute that says --

A Engaging in --

Q -- that persons then and there being present he then and there engaged in tumultous and offensive conduct; is that correct?

A Correct.

Q Are those the words we are dealing with here?

A Yes.

Q Tumultuous and offensive conduct with other people present?

A Right. That's correct.

Now, the statute in California says "tumultuous or" as -- in the complaint as "tumultous and" and I believe the opinion shows that we never contended that it was tumultuous. I believe we conceded that it was not tumultuous.

Q That there was offensive conduct.

A Correct. Conduct by displaying --

Q And "conduct" is what?

A Wearing the jacket and walking in the courtroom.

Q Well, wearing the jacket -- the conduct was precisely what?

A Displaying the sign on the jacket; by the fact that he was walking with the sign displayed on his back.

Q The walking wasn't offensive conduct; just the walking, was it?

A Walking with the sign. Merely walking; no.

Q No. And so what was the conduct?

A Displaying the sign.

Q Displaying --

A Yes; his conduct of displaying the sign.

Q The words were --

A Yes, where other persons were present --

Q -- were painted on or sewn on or whatever it was --

A Correct. They were painted on.

Q His jacket.

A Correct; that is our contention.

Q The display of the words.

A How long?

Q The record is devoid, Your Honor. All I can say is that the building at the main courthouse in Los Angeles County, it has nine stories; he was on the seventh story which means you can enter on the first, the second or the fourth. So, if he entered the closest floor up, he would have entered the

fourth; he would have had to have ridden down half a block and then ridden up three floors. So, unless he suddenly produced the jacket out of nowhere, he had to walk at least half a block.

Q How many people in the hallway?

A The record doesn't say. Division 20 in the City of Los Angeles is the main master calendar for all misdemeanors. On a normal day there probably, at any hour of the day there were probably 200 people there. We do not know how many were present at this time.

Q Well, wouldn't that be helpful to know how many were there?

A Unfortunately, the record as it came up, does not go into that. Apparently there were at least four people present.

Q Well, suppose this same man had used athe same words to one person in the corridor in a very quiet voice; would that have violated this statute?

A If he said it to someone who doesn't accept those words? I would say yes, that might be offensive conduct. But there is another part in the statute that says --

Q Would it violate this statute?

A I would say yes, Mr. Justice --

Q Why?

Q -- persons then and there present under the

statute, weren't there?

A WEll, one person's --

Q I'm just reading from your brief as to what the statute says.

A Well, "disturb the peace of any neighborhood or person," on page 7 of our brief, could be one person.

Q Well, Mr. Sauer --

A We quote the statute on page 7, Mr. Justice Stewart.

Q Well, what is there in the record, in testimony that shows that these words were offensive to any person in that building at that time?

A There is nothing in the record, Mr. Justice Marshall. We just said the effect on the average person. If I go back and read Chaplinsky there is no showing that Major Browerly(?), when the man yelled at him: "You damn fascist," or you "damned racketeer," was offended by this statement. There is no showing that Major Browerly was going to react against --

Q Well, who in the building was interested in the draft, does the record show?

A There is no showing. Even Appellant admits the man was there because just citizens who would be present --

Q Well, my difficulty is as to what the difference is as to the man whispering something in the corner to somebody and wearing a jacket that so far this record shows

only one person saw?

A No; I believe three people saw it. There was a Sergeant Swan; there was -- somebody named Alexander and one other person, I believe, saw it.

Q Did they say it was offensive to them?

Q In a signed statement on appeal, Sergeant Shore(?) and Officer Alexander corroborated Sergeant Swan's testimony as to Defendant's presence in the corridor; his wearing of the jacket; his entering the courtroom and as to the presence in the corridor of women and children. Isn't that the answer?

A Correct, Mr. Justice Blackmun; yes. I said the record showed that there were other individuals present, as well as three specifically named individuals. There were women and children present --

Q Well, did they --

Q Was he there for the absolute purpose of testifying at a trial? Was he under subpoena?

A I believe he was to be a defense witness in another case, as I understand --

Q Does the record show that he was in the courthouse pursuant to subpoena?

A The record doesn't show but I would stipulate that he was there as a defense witness in another case, which this has no bearing on.

Q But there is nothing in the erecord to show when he came in the building, how he came in and how long he was there or how many people saw him. The only thing in the record is that two people saw him and testified that there were women and children who might have seen him.

A Three people saw him and they testified that they had seen it and that there were women and children present in the corridor --

Q They were --

A At least three people specifically named, saw it.

Q They might not have seen it?

A No, the three specifically-named people did see it.

Q And did they say it was offensive to them?

A No; there is no evidence of hthat. I believe you have to, if you take offensive as defined in Chaplinsky, you have to apply it as what the average man would think and I would say these words would be offensive to the average man.

Q Well, suppose he had on his jacket: "I don't like the draft" --

A Then I don't believe he --

Q No; "I dislike the draft."

A Then I doubt if we would be here, Mr. Justice

Marshall.

Q So, it's the word; isn't it?

A Yes.

Q Isn't that all you have?

A A word; yes. I think collectively throughout the case it's referred to as three words.

Q I see what you mean.

A The terms offensive have been upheld by this Court in the past. In Feiner versus New York the defendant was charged among other things with using offensive language, conduct or behavior, acting in a manner so as to be offensive to others.

In Chaplinsky the man was charged with using offensive words. This word has stood the test of time in the past. In other cases, in Beauharnais and Ross, in discussing an area of obscene speech if these words are determined to be obscene speech, the Court, it was said, certainly no one would contend that obscene speech may be punished only upon a showing of circumstances of the clear and present danger.

In Roth and in Beauharnais it seems to indicate that if someone used obscene speech in public that would be a sufficient violation.

When the Court agreed to take the case the question of jurisdiction was postponed. One of the arguments the people made in their brief would be that this is merely the state

interpretation of its own statutes. That the trial court found the man guilty as charged with only the two words alleged in the complaint. The California Appellate Department of the Superior Court held the term "tumultuous or offensive." They said the only violation you could have would be tumultous and offensive and they reversed the case twice and they certified it to the Appellate Court of Appeal. They did it to settle an important question of statutory interpretation as: how is the phrase tumultuous or offensive to be read?

The California Court of Appeals read it based on the facts and the interpretation of the statute as to mean tumultuous or offensive from the facts and the interpretation of the statute as to mean tumultuous or offensive and that any one of those violations, in and of itself, would be sufficient.

Q I don't have so much trouble with "tumultuous or offensive," as I do with what the conduct is here.

A The conduct is wearing the jacket displaying the sign.

Q Just in plain words, that's all the conduct there is; isn't it?

A Yes; correct. If the man had yelled the word, Mr. Justice STewart, that part of the statute is not before us, but it says "if he yells in a loud and boisterous manner" --

Q Well, we're not talking about decibels here

at all; that would be quite a different case. This is displaying a message and that's the only conduct involved; isn't it?

A That's correct; displaying a sign that we would contend is not accepted for public display. The fact that it appears in best sellers, I don't believe is a sufficient reason to allow it to be displayed in public. There are people who may wish to read a best seller. That is their choice, but here individuals were a captive audience with the words foisted upon them. They could not avoid it, other than to close their eyes, but they had the right to be in the corridor also.

Q If the words had been: "Nuts to the draft," would this case have been here?

A No; I do not believe so.

Q So it's not the -- it narrows down to this one four-letter word; is that it?

A That is correct, a word that we contend and the Court of Appeals said, is not generally accepted for public display. I would say if a person were in front of the White House picketing the President, using this word in relation to the President, or picketing the Court with the word in relation to the Court it would still be offensive conduct, of words that are not accepted at this time.

Q Is everybody in Los Angeles walking down the street who might use that word subject to be arrested?

A If they were displaying the word we would consider that to be --

Q Have you got jails big enough?

A Well, in six-and-a-half years at the City Attorney's office, Mr. Justice Marshall, this is the only time I have seen a case of this type come up in which it has been publicly displayed. I'm not saying the word isn't used, but written in public is something else. People yelling it, we have had numberous convictions in which somebody has just yelled it, but this is the first case of this instance.

Q How much of a sentence did this youngster get?

A I believe he got 30 days in jail, Mr. Justice Harlan.

The argument has been made that we should have a democratic dialogue. I agree that conversation is important if the streets are to be used for public arguments. I don't believe this type of language has to be subjected upon an unwilling public. I think in the past wehave seen candidates for public office who have been subjected to offensive signs, language being yelled at them; things that at the moment are not accepted by all the public.

I don't believe this is the same as an individual in Edwards or some of the sit-in cases from the south: the fact that some white individuals may have objected to the fact

that these people were peacefully protesting, because there is no showing that they displayed such signs. Many of them sang freedom songs and engaged in conduct like that, but in this case the man has displayed a sign that the State of California has found to be offensive by its decisions. Apparently the decision was approved by the California Supreme Court in Bushman in relation to the question asked by Mr. Justice Blackmun.

It is interesting that the Bushman case originally came to this Court and was denied a writ of certiorari and then went to the California Supreme Court where they granted a writ of habeus corpus, and in doing what they did, apparently approving the decision of the lower court.

We believe that this is verbal communication that is not permitted. Again I would go back to the Chaplinsky case where it's no showing that Major Brownly who was yelled at, was going to react to these words in any way. The man yelled to him and this Court approved the words "offensive conduct" in relation to the lower court decision.

Q Mr. Sauer, let me see if I understand your comment about Bushman. You feel that the California Supreme Court in Bushman approved what was said in Cohen in characterization of the statute under consideration?

A Yes, Mr. Justice Blackmun. I believe that would be the only way: one in the fact that the California

Supreme Court denied a hearing in Cohen; and two by the fact they cited with approval what offensive conduct is.

Q Nothing inconsistent in the two opinions, in your judgment?

A No; going into offensive is something that is likely or would tend to cause others to violence or if the individual actually engaged in violent conduct on his own. I don't believe there is any discrepancy between the two court opinions. Because, the very same court, the same seven justices who ruled in Bushman unanimously were the same seven, by 4 to 3 who denied a hearing in Cohen. And by the fact that they --one of the dissenters in Cohen, Chief Justice Trainer, retired Chief Justice Trainer, wrote the opinion in Bushman, so I would have to assume that they are then approving of Cohen.

We would just repeat, as I cited in our brief, in going back to Chaplinsky: it has been well-urged, paraphrasing that, that words of this type are no essential part of any exposition of ideas and -- cite social value as to the -- a step to the truth, that any benefit that may be derived from them is clearly outweighed by the social interests in order and morality.

We believe the conviction of the California Court of Appeals is valid and that the judgment should stand.

Thank you, Mr. Justices.

MR. CHIEF JUSTICE BURGER: Thank you Mr. Sauer. Mr. Nimmer, your time is exhausted but in light of the fact that questions came after you had undertaken to submit, we will give you two minutes.

REBUTTAL ARGUMENT BY MELVILLE R. NIMMER

ON BEHALF OF APPELLANT

MR. NIMMER: Thank you very much, Your Honor.

I would like to make a few comments simply about, taking off on what Mr. Sauer said about the number of arrests that have occurred. Actually, to look at the amicus brief of the ACLU of Northern California in this case, there is the suggestion that there are numerous arrests all over the country all the time for this kind of offense, and particularly relating to minority groups, where no charge is made against the minority person other than he uttered something that was offensive. Now, sometimes it may be fighting words, but not necessarily. Sometimes, that is, it may be a preliminary to violence, but even if it's not, this kind of thing occurs.

And that gets to what the final point is that the final point made by the ACLU amicus brief of Northern California where they suggest that this Court may decide this case on very narrow grounds and of course we agree on the narrow grounds suggested by them, and I won't repeat them because of the lack of time.

But, may I close, Your Honors, with the suggestion

that if this case is decided for our side on narrow grounds what it will mean that it will continue to be the fact that hundreds of thousands of people all over the country are arrested because they simply have used a word that others find offensive in the profanity area where there is no likelihood of violence.

We suggest, Your Honors, that just as the basic underlying theory of the doctrine of overbreadth, in order to avoid a chilling effect you will decide the case, even though you could decide it more narrowly, in order to avoid the chilling effect on those not before the Court that it would be particularly appropriate for this Court in its decision, if it does decide that there should be a reversal, 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. It may be outside in given circumstances where it is a preliminary to violence or where there are other specific other grounds. But simply because it's offensive it should be made clear this is within the First Amendment.

And one other point, final point on the hostile audience doctrine. Again, to make clear to college students that there is a distinction between engaging in dissent in such a way that you don't like it and engaging in dissent as to put down the speaker. That, too, is outside the bounds of the First Amendment and this Court should make that clear.

Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Thank you Mr. Nimmer. Thank you Mr. Sauer.

The case is submitted.

(Whereupon, at 1:55 o'clock p.m. the argument in the above-entitled matter was concluded)