In the

# Supreme Court of the United States

MALLIE LEWIS,

Appellant,

vs

CITY OF NEW ORLEANS,

Appelle.

No. 72-6156

Washington, D. C.
December 10, 1973

Pages 1 thru 33





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| v. | : | No. 72-6156 |
| CITY OF NEW ORLEANS, Appellee. | : | |

Washington, D. C.
Monday, December 10, 1973

The above-entitled matter came on for argument at 1:47 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, 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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

JOHN WILSON REED, ESQ., 2735 Tulane Avenue, New Orleans, Louisiana 70119; for the Appellant.

SERVANDO C. GARCIA, III, ESQ., Assistant City Attorney, New Orleans, Louisiana; for the Appellee.

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# C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 72-6156, Lewis v. New Orleans.

Mr. Reed, you can assume that we know the facts of your case and can get right into it, if you will.

ORAL ARGUMENT OF JOHN WILSON REED, ESQ.,

ON BEHALF OF APPELLANT

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

I believe this Court is familiar with this case. It is the second time here. We would like to emphasize very briefly a few of the facts though. The situation typifies the sort of situation that probably repeats itself every day in the urbanized parts of our society.

The defendant, Mallie Lewis, was upset about some particular police conduct directed towards her son Joseph. She failed to get satisfactory answers from the police. Upon the advice of the police, she followed the police patrol car carrying her son to the central lockup in New Orleans. Another police patrol car, seeing that he was being followed, eventually pulled over the appellant, apparently to find out why she was followed him, when appellant got out of the car, her tested again, her treatment by the police and the failureto explain to her what was being done with her son, and at that point, according to the police testimony, said, "You god dam m.f.

police -- I am going to Giarrusso about this." I think the part "I am going to Giarrusso about this" should not be ignored. Giarrusso is the Superintendent of Police in New Orleans, a high public official, and the comment by Mallie Lewis reflects an intention to complain. It is an expression of some First Amendment interest.

The ultimate issue in the case is what are the limits of protest, an expression of anger by a citizen who feels aggrieved by police conduct. The statute under which Mallie Lewis was convicted provides that it shall be unlawful and a breach of the peace for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty.

When this case was last before the Court, that ordinance had never been the subject of any sort of construction. It had been upheld all the way along the line on its face. It had never in fact received any reasonable consideration.

In light of this Court's vacating the original judgment and the remand to the Supreme Court of Louisiana, it has once against affirmed the appellant's conviction, this time with an opinion.

The position of the appellant that the opinion below, the Louisiana Supreme Court, is not a narrowing construction of the ordinance, that it does not resolve the constitutional

problems, and that it leaves punishable language which is merely opprobrious, language that this Court held in Gooding v. Wilson cannot be published. I think the point that most clearly emphasizes this is the provision in the statute that the langauge need not only be spoken towards the police but may be spoken merely with reference to the police. This issue was raised right from the very beginning, the problem with reference to the police, the problem of statements made out of the hearing of the particular police officer spoken about.

It is an apparently obvious defect in an ordinance that might otherwise be made applicable to fighting words. But nowhere, nowhere does the opinion of the Louisiana Supreme Court below address that issue. And yet it was very clearly before the court, the dissent picked it up at great length below, but the majority ignored it. And I submit that what the majority did below was to justify that ordinance on its face, which cannot be done under this Court's holding in Gooding.

Now, admittedly, the court below does refer to fighting words on a couple of occasions in its opinions, but it never articulates what the fighting words standard means, whether it is the dictum of Chaplinsky, that fighting words are those which are likely to provoke violence, or the mere utterance of which inflicts injury, or the holding of Chaplinsky and the holding of Gooding that the only language punishable is that which is likely to provoke a violent response.

I think what the Louisiana Supreme Court did below is similar to what the California courts had done with the ordinance involved in Cohen v. California, and in that case the late Mr. Justice Harlan noted in a footnote that although the Supreme Court of California had limited the scope of the ordinance to utterances likely to result in violence, it had more or less made a per se holding that all obscene language or epithets of the type uttered by Cohen were in all cases likely to provoke violence, and that is basically the way the Louisiana Supreme Court below has avoided this Court's holding in Gooding, by simply deciding, okay, all opprobrious and obscene language is fighting words and that is the end of it. I think that circumvents this Court's holding completely.

I think an ordinance like this, because of the manner in which it is enforced, and the courts in which it is enforced, presents a good case for the application of the over-breadth doctrine. The ordinance has been on the books in Louisiana and enforced in New Orleans for seventy-seven years, but until this past couple of years has not been the subject of any appellate decisions whatsoever. It is not the sort of ordinance that is going to be effectively narrowed on a case-by-case basis. The whole ordinance is over-broad, it mustbe thrown out, and standards set for how to write a good ordinance, how the legislative authorities in New Orleans can address themselves to the problems.

There is implicit in the opinion of the Supreme Court below that an ordinance such as this can be justified as opposed to the ordinance involved in Gooding because of the limitation of the ordinance to language spoken at the police. I think the interests involved tend to cut the other way and, if anything, the fact that this ordinance is limited to language spoken of the police suggests that the standards should be even tighter and more rigorous, and that this Court should assure that the fighting words standard is not abused in this context.

I think it is necessary to go back to the facts again, because I don't think it is clear at all that what Mallie Lewis uttered were in fact fighting words. It was an expression of anger, as someone might pound their fist in anger or pull their hair in anger, or simply if they were a person of great self-control say "I am angry." The comment was directed at both police generally, not just the police officer there, tied in with a statement that "I am aggrieved, I am going to complain."

I don't think Police Officer Berner could legitimately feel that the language addressed to him by Mallie Lewis was intended to provoke him. There is nothing in the record to suggest that Officer Berner was provoked.

Q Are you suggesting that in the heated exchange of that kind people undertake to disect and analyze these things as we are doing it here now properly here?

MR. REED: It is not completely clear to me that it

was a heated exchange and, secondly, I would say in the context of the citizen to a police officer, "I do expect that sort of consideration." A police officer, as the Court I know is familiar with the comments in the model penal code, is accustomed to language of this sort. The citizen is not. And a police officer deals day to day with situations in which people feel hostile towards them. Both the innocent and the guilty being arrested or being accosted or investigated by the police are going to feel aggrieved. The innocent want to know why it is happening to them, and the guilty realize that the game is up. And the people with whom the police are dealing with in most circumstances feel some anger towards the police.

Q Do you think that makes it tolerable and acceptable then?

MR. REED: I think if it is a compulsive expression of anger, yes. I think if it is fair for the police officer not to consider it as a provocation, I think the answer is yes. I would like to discintuish certain kinds of words. Let's say a defendant or a citizen says, "You god damm m.f. police, take off your gun and I'll show you who's boss" -- well, that is a challenge to the police officer right there, it is a challenge to his authority, it is a dare, I dare you to do something.

The words uttered by Mallie Lewis here aren't that kind of language. Your Honor, Mr. Chief Justice, in Cohen you noted that the words uttered by the defendant there were somewhat

childish. They were. They were premeditated and that was the way that he wanted to express himself. He had time to think it out in advance. Mallie Lewis was acting in a stressable situation. She was expressing anger the only way it appeared to her to express anger, not --

Q Well, was Chaplinsky a situation fraught with tension? Wasn't that an expression in anger?

MR. REED: Yes.

Q Was that an excuse there?

MR. REED: Well, I would like to consider Chaplinsky, it is right along that line. We do not dispute the law of the legal rule that was announced in Chaplinsky, that fighting words are not protected speech. The question is what are fighting words. I think the application of that standard to the utterances expressed in Chaplinsky is no longer free from doubt. This Court said there that argument is unnecessary, the "god damm racketeer" are fighting words. I think argument today might very well be necessary on that point.

In Gooding, this Court said "god damn you, why don't you get out of the road," while clearly expressing disgrace, were not fighting words. Well, I --

Q Wasn't that tied to a construction given I think by the Georgia court at an earlier date?

MR. REED: Right. But as I understand the Court's opinion, it was used as an example of the fact that the Georgia

courts had been applying the ordinance there to situations that did not involve fighting words, and that case was cited as an example in which a jury issue was raised by that utterance, and this Court was of the opinion that no jury issue was raised because those were, while words of opprobrium, were not clearly fighting words. And I would think the average person today might feel that he was less likely to provoke a violent response if he said to a trained police officer in a metropolitan environment, "You are a god damn racketeer," than if he said to a stranger down a country road, "God damn you, get out of the road." I personally would think I would be more likely to get a violent response from the stranger on the country road, so I think --

Q I think the racketeer is redundant in the city, in the metropolitan area.

[Laughter]

Q Mr. Reed, the Chaplinsky definition of fighting words and the one reaffirmed in Gooding was words that, by their very utterance, tend to incite an immediate breach of the peace. Now, I follow your argument that these words could not incite a police officer to immediate breach of the peace, but apart from the police officer, what is the meaning of what the Louisiana Supreme Court said in the sentence "We find" -- I am reading from page 56 of the appendix -- "We find that section 49-7 is not offensive to protected speech; it is narrowed to

'fighting words' uttered to specific persons at a specific time."

MR. REED: All I can say about that sentence, Your Honor, is that it is contradicted by other parts of the opinion. It is contradicted by saying wantonly cursing or revile or using of obscene or opprobrious words are not protected means of communication. The appendix at 56.

Q In other words, notwithstanding the quote from Chaplinsky, actually the ordinance is read to embrace more than just words that would provoke or incite an immediate breach of the peace?

MR. REED: I think it is very clear that that is --

Q Where is that in the opinion?

MR. REED: The prohibition is that section 49-7 are self-explanatory.

Q This is right following that sentence on the bottom of 56?

MR. REED: Right, 56 to 57. "The prescriptions are narrow and specific -- wantonly cursing, reviling, and using obscene or opprobrious language." This Court has held that the mere use of obscenity is not fighting words. The mere use of opprobrious language is not fighting words.

Now, the court below does look at Chaplinsky, but what is significant in the court's reading of Chaplinsky is nowhere does the Louisiana Supreme Court recognize that Chaplinsky's conviction was upheld because New Hampshire had

narrowed the ordinance. The Louisiana Supreme Court below refers to Chaplinsky's conviction, refers to the ordinance, and then says Chaplinsky's conviction was okay, and it is okay here. Never does the Louisiana Supreme Court start to think about the construction issue, and I think the opinion is a justification of the ordinance on its face.

Now, I suppose it would be possible to lift out of there a section of the opinion and say this is what the Supreme Court meant, and perhaps tell them what they meant. And I don't think it is clear, just reading the opinion as it stands now, that --

Q Well, tell me this: If in fact this ordinance were limited to words tending to incite an immediate breach of the peace and not a police officer but some private citizen was the one to whom words were addressed, would the words used here be fighting words?

MR. REED: The words used here, to citizen-to-citizen encounter, under a properly narrowed ordinance might very well be considered fighting words, not necessarily, but they might be. I think it would be a jury issue or judge issue in the case, as is the case in Louisiana. But I think it would raise a question.

Q Do you think there is a factor to be considered when, in balancing this idea that a policeman should be prepared to take more than an ordinary citizen, that is the concept

expressed basically in your case, isn't it?

MR. REED: Yes, sir.

Q But in that process, do you think you have to take into account that the policeman who is a man who certainly in New Orleans is wearing a pistol right on his belt, with probably no jacket over it a good deal of the time of the year, and that if they do get into a fight over it, if notwithstanding our passing of how innicent these words are, they do in fact get into a fight, that you are liable to have a rather serious if not a fatal fight because of the presence of firearms?

MR. REED: Well, the question is, as I understand fighting words, it is the person to whom the words are addressed that is going to be the first to act. Now, if after these words are uttered the police officer says something and the situation escalates, sooner or later --

Q No, what I am talking about is the usual routine that I thought was implicit, the police officer arrests him, and then this escalates into a physical resistance of arrest, a struggle, perhaps the possibility of this arrestee seizing the pistol or trying to seize it.

MR. REED: Well, that possibility exists whenever any arrest is made, that the person will protest. In fact, if anything, it suggests why language like this, if the Court agrees that it is inherently harmless, that is all the more

reason why somebody shouldn't be arrested. And Your Honor's comment that you note what usually happens would be that the person would be arrested upon uttering something like this, I don't think that is entirely clear. I think there is inherent in an ordinance such as this the possibility for abuse by the police in its enforcement, similar to the sort of abuse that was possible under the vagrancy ordinance which was criticized in Papachristou.

If they police are call to a citizen-to-citizen encounter, the language used is reported to them, they will make some judgment whether they think this is escalated to the point where criminal sanctions are required, or they may simply accommodate the interests by saying, well, he gets a little loud but just stay away from him. In a police-citizen encounter, this gives the police officer tremendous amount of discretion to make arrest where no other ground for arrest exists.

This argument goes somewhat beyond the record, but you don't find armed robbers, murderers, burglars being charged with those serious felonies and reviling the police. You find it in the situation of someone like Mallie Lewis who did nothing else wrong, the situation of Yvonne Martin, and that record was before the Court, too, in a related case. No other crimes charged.

For example, let's take a situation where the police deal repeatedly once a month with a known criminal on the

street. One day they come down and they say, "Okay, up against the wall, we are going to stop you and frisk you," and the guy says, "You m.f.'s, why are you always bothering me, man, why don't you go bother somebody else? I haven't done anything wrong." The police frisk him and they find nothing, right then they have -- they are in a position where they can put this guy away, they can bother him, send him to the trouble of making bond, when they are really not offended by that language. They expect that language in that type situation. They may very well be using this language themselves on occasion, a lawyer might use it to his partner quietly in a court room when taken by surprise by a witness he has called. I don't think the police in that context would be offended by that language.

The existence of a statute like this gives the possibility for the abuse of that statute by the police. I think there is a more significant First Amendment interest in allowing citizens to criticize the police than there is in allowing citizens to criticize citizens. The libel decisions of this Court reflect that. In Time v. Pate, St. Amath v. Thompson, this Court has held the police to be public official unless -- entitled to somewhat less protection than a purely private citizen from possibly libelous statements by the press, by people running for political office. And I think all the decisions in the past show that public officials can be

criticized more harshly, and that there is an interest in permitting that sort of criticism.

To the extent that there might be a rationale for allowing a broader prescription of speech, when that speech is addressed to the police, that rationale is not addressed by the ordinance here. The question of interference is a very good -- would make a very good rationale, but interference is not the object of this statute. And Colten v Kentucky involved an interference. The statute was addressed to that sort of conduct. It didn't even involve any obscene of opprobrious language. This ordinance, an ordinance of this type might be upheld if it were addressed to interferences, but it is not.

Q But it is addressed to language used to the police?

MR. REED: Yes, but the limitations --

Q And at the very least the state court has decided that the police aren't any less insensitive than anybody else or any less sensitive or any more insensitive.

MR. REED: I don't think they have decided that. I don't think they really attacked the question.

Q Maybe they felt this conviction wasn't worth treating.

MR. REED: Maybe that's possible. They certainly aren't entitled to more protection unless it is on an interference type rationale. But the statute -- there is no

construction in the statute and the statute on its face is not directed at interference.

Q Let's assume that their opinion was construable as limiting the statute to those words that in normal circumstances would incite, would tend to incite immediate violence. Do you think these words addressed to an ordinary citizen would -- might very well be fighting words? Now, if the state court -- your argument is that the First Amendment would forbid a state legislature or a state court from saying that these words addressed to a policeman are fighting words?

MR. REED: I think the Constitution requires that the state court or the legislature enacting a law like this require a focus on all the attendant circumstances surrounding the evidence, and that they cannot adopt a per se rule that the utterance here is in all circumstances fighting words. It should be noted that the court below did not have the --

Q Well, my question was whether you are arguing that the First Amendment would prevent a legislature from saying we don't see any difference between the policeman and the ordinary citizen, we will take in all the circumstances but policemen are like citizens.

MR. REED: Yes, I think the First Amendment would prevent that because the First Amendment prevents the prescription of free speech unlessyou can point to an identifiable danger in that speech. And the legislature simply can't make

up identifiable dangers that do not exist.

Q What if a police court judge or police court jury, however the issue of fact was tried in the court of initial jurisdiction, had made a finding that he found in fact these were fighting words as defined in Chaplinsky and Gooding, would that at least remove one prong of your argument here?

MR. REED: If he decided that they were likely to provoke under the circumstances that they were likely to provoke the average police officer to violence, yes, if that were the finding, and I think that is what the finding has to be, not the average citizen but the average police officer. The ordinance limits itself to the police. I think it is appropriate that the standards should be those of the police, because I don't think -- I think that is required because the police are not as sensitive to language such as this as perhaps a sixty-year-old woman would be, or even the average citizen might be.

Q There is nothing implicit in the totality of this record that that is the determination the highest court of Louisiana has made?

MR. REED: No, I don't think so, Your Honor. The court below did not have the record before it, and therefore I don't think if they made a narrowing construction, it seems to me that they had to look at the record to see whether the appellant's speech fitted into that narrow construction, and it

is quite clear that at the time this case was originally remanded from this Court, there was an absolute necessity to construe that statute, to limit that statute in some way. On its face, it is remarkably similar and not nearly as grave as the statute involved in Gooding v. Wilson. So since they didn't have the record before them, I don't see how they could possibly have made any finding along that line. All they had before them was Mr. Justice Powell's comment in the concurrence of the remand order of June 1972.

Q Why didn't they have the record before them? We had it here.

MR. REED: The answer to that is that the application, an application for writ was made to Louisiana Supreme Court. It does not require that the record be sent up. If the application for writ is granted, the record is sent up. When the case came back down on remand, the Supreme Court of Louisiana did not read this as forcing them to grant writ on the case, order up the record from the Criminal District Court and consider the whole thing. That is the only possible explanation. The Yvonne Martin case that was also remanded was argued twice in the Louisiana Supreme Court, the first time without the record and then they did subsequently order up the record in that case.

Q The first time around here they said writ is refused the judgment is correct, or something like that?

MR. REED: That is correct. The judgment is correct was that of the Criminal District Court of Appeals which upheld the ordinance very clearly on its face.

Q They didn't ask that the record be brought up to them, but then when the case first came to us, we had the record.

MR. REED: Because I complied with the rule of this Court at that time, which was either had just been changed or was being changed, that required that the record be sent up. That is simply the reason why it was here and the reason you had it.

Q The record went back to the police court, the municipal court?

MR. REED: No, it did not go back to the Louisiana Supreme Court. Maybe it is still here, I don't know. It was my own copy, a copy that I had prepared I think that I sent up.

Q Mr. Reed, I want to be sure I understand you. I have the appendix here, the evidence that is reproduced in the appendix. You are saying this was not before the court on this remand?

MR. REED: The trial transcript was not before the court. Footnote 1 to the majority's opinion says, "While we do not have the record here before us, we note from Mr. Justice Powell's concurrence that here the appellant uttered the words "god damn m.f. police."

Q Well, I saw that but does that mean that even this portion of the record was not before the court, this portion being what you have in the appendix, which has some of the testimony of witnesses?

MR. REED: That was not before the court.

Q It was not?

MR. REED: No.

Q The only thing they had was what we sent down?

MR. REED: The only thing they had was my original application for writ back in 1970 or 1971, which I discussed the case, the legal issues, but there was no transcript attached to that application for writ.

Unless the Court has any further questions, I thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Reed.

Mr. Garcia?

ORAL ARGUMENT OF SERVANDO C. GARCIA, III, ESQ.,

ON BEHALF OF THE APPELLEE

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

Today I represent the City of New Orleans in the matter presently before this Honorable Court. I believe that the main question before this Court today simply stated is whether or not section 49-7 of the New Orleans Code is unconstitutionally vague and over-broad, in violation of the First

and Fourteenth Amendments. It is the contention of the City of New Orleans that the ordinance as written clearly delineates the contours of its prescription and obviously does not apply to speech that is protected by the First Amendment, but rather applies only to that speech which finds itself within the exceptions to the First Amendment.

As early as in 1940, in the case of --

Q Well, now, let's see, the exceptions, what do you mean, the exceptions, you mean only the exception for fighting words?

MR. GARCIA: The exception for fighting words and the exception for words as put forth in Chaplinsky.

Q That's for fighting words, that is tend to incite to an immediate breach of the peace?

MR. GARCIA: Mr. Justice Brennan, in Chaplinsky, it states, the way I read it -- excuse me, I am trying to get an exact cite on it.

Q You mean the lewd and obscene, the profane and the libelous?

MR. GARCIA: That's correct. Included in this category are the lewd and obscene, the profane, the liberlous and the insulting or fighting words.

Q And you say that is what Chaplinsky stands for?

MR. GARCIA: That is the interpretation that I give to Chaplinsky.

Q Gooding didn't give that interpretation, did it?

MR. GARCIA: In the Gooding case, I think --

Q Did it? I thought Gooding interpreted Chaplinsky as limiting in this context state power to make criminal the use of utterance which tends to incite to immediate breach of the peace. Didn't it?

MR. GARCIA: That is a correct wording, Your Honor.

Q Is that what this case is all about then? Don't you stand or fall on whether or not your court has narrowed this statute to such words?

MR. GARCIA: That is not the contention of the City of New Orleans.

Q I see. All right.

MR. GARCIA: As I stated in the case of Cantwell and Chaplinsky, the words that were uttered by the majority opinion of the Court, in that case, Chaplinsky, the Court concerns itself with appellations directed at a police officer, as such is the case before this Court today. In Chaplinsky, the defendant told a marshal, you are a damn racketeer and a damn fascist. In the case of bar, the words used by Mrs. Lewis, I think the Court will agree, are of a much harsher tone and import. The likelihood of the utterance failing to incite the average person to a breach of the peace is highly improbable in the Mallie Lewis case. There, going to your interpretation, as far as requiring a disturbance or inciting of the peace, we

feel that in the Mallie Lewis case the use of the words g.d.m.f. police certainly are adequate to incite a member of the New Orleans Police Department or to incite him to a disturbance of the peace. Although we feel that the appellant's contention is correct, that he should not permit himself to -- he should exercise as much restraint upon his emotions so that he does not permit himself to go to this extent to incite a breach of the peace, we don't feel that a police officer should be penalized simply because of his position as a police officer. We feel that he should be judged as an average man, as an average, reasonable man, just as anyone who is a layman and not a police officer should be judged.

Q Well, if that is true, why is it limited to police officers?

MR. GARCIA: I think there was a specific purpose in the minds of the City Council when they -- I can't tell you exactly what it is, but it is my interpretation that this particular ordinance applies to situations where police officers are cursed profanities by members of the population, is a specific narrow instance of when the reviling statute applies to police officers.

Q Can you curse the mayor without being punished?

MR. GARCIA: Can you do what?

Q Curse the mayor of New Orleans without being punished.

MR. GARCIA: That depends on the --

Q Well, is there any ordinance that protects him from being cursed?

MR. GARCIA: The use of obscene words, the prohibition against the use of obscene words.

Q That applies to everybody?

MR. GARCIA: Yes, sir.

Q Is there any other group but the police singled out for this special treatment in New Orleans?

MR. GARCIA: Not that I know of, no, sir.

Q As to the over-breadth, does it apply to detectives?

MR. GARCIA: Does over-breadth apply to detectives?

Q I say on the question of over-breadth, does this ordinance apply to detectives, a member of the city police?

MR. GARCIA: Yes, sir.

Q So the detective who walks down the street, if something calls him an m.f., that is it?

MR. GARCIA: That is correct, as long as he is a member of the New Orleans Police Department.

Q And if he and the mayor are walking side by side, he has been hurt but the mayor hasn't?

MR. GARCIA: If they were to direct the language to both individuals?

Q Yes.

MR. GARCIA: If they were to direct the language to both individuals, the language directed to the mayor could be prosecuted under a separate ordinance, not the reviling ordinances brought forth before this Court today.

Q Then I ask why it is special for the police?

MR. GARCIA: I think there is a need for it. It is a contention of the City of New Orleans that -- and it has been my experience as Assistant Attorney -- that this goes on quite often, that citizens apparently, for what reason I don't know, feel that it is permissible or they can get away with reviling New Orleans police officers, and I am sure officers of many other cities around the United States, this represents a distinct problem.

Q Well, while you are prosecuting -- how many of these cases do you have a week?

MR. GARCIA: Approximately 50 percent of our cases in municipal court concern themselves with reviling the police, where a police officer confronts --

Q Fifty percent?

MR. GARCIA: I am approximating, but I don't stand on the accuracy of that figure, but this is -- I think it would be close. This is in the average confrontation where a police officer stops a -- maybe not an upright citizen, but an individual who is suspected of committing a crime on the streest of New Orleans, the attitude of the citizenry of New Orleans has

changed to the effect that they apparently have been responding with these types of abusive words to the New Orleans policemen. It has been brought forth by many members of the New Orleans Police Department who I know personally.

Q If I understand, this statute has been on the books for seventy years?

MR. GARCIA: That is correct.

Q What about all this new business you are talking about? They needed it way seventy years ago.

MR. GARCIA: I misunderstand your question. What new business? This apparently, this ordinance initially was apparently written for that very purpose, but my comment is that it has become an exaggerated -- the instances have exaggerated.

Q The police can't arrest them for anything else, so they arrest them for this?

MR. GARCIA: I think if that argument were true, that the police could find more serious violations with which to arrest someone if they merely wanted to inconvenience them or rather to penalize them for no reason whatsoever.

Q Well, rather than to do that, they get them on this one?

MR. GARCIA: I am saying if that were their purpose. I don't believe that that is their purpose.

Q Well, if they have got 50 percent of them, that

is a pretty good percentage.

MR. GARCIA: I --

Q Mr. Garcia, I didn't understand you to say that 50 percent of all the cases in the police court in New Orleans, Louisiana are brought under this ordinance. I understood you to say rather, that in your observation, just estimating, that in about half the cases in that court, involve circumstances in which there was some reviling of the police.

MR. GARCIA: That's correct.

Q Isn't that it?

MR. GARCIA: In a lot of instances -- it is not solely the reviling of police violations that I am talking about, in a lot of instances they are charged with multiple violations of ordinances.

Q How many prosecutions under this ordinance would you guess again? Fifty?

MR. GARCIA: No, I wouldn't say -- well, a lot of times this particular ordinance is nol-prossed due to the prosecution of a more serious one. For instance, if an arrest is effected for two or three violations and one of them we feel we have a better case on, we will nol-pros this one. I am guessing that the majority of cases -- I would have to say that the overriding percentage of cases that come before the city court in New Orleans, given each ordinance a percentage, the reviling the police ordinance has a much greater percentage

than that of any other ordinance.

Q It does?

MR. GARCIA: Yes, sir.

Q So the answer is still the same?

MR. GARCIA: Yes, it does.

Q What's the volume?

MR. GARCIA: The volume of cases per day?

Q Yes.

MR. GARCIA: I would have to say anywhere from 30 to 35 per day for section B. We have four sections.

Q 15 to 20 of them are prosecutions under this ordinance?

MR. GARCIA: Of course, I am not -- I would have to say that approximately 15 to 20 percent of them, and at least up to 50 percent of them on some days. I am approximating the figures, but the majority of them, as opposed to other classifications of crimes, are reviling the police. And I don't know whether this Court is having difficulty determining what the reason is for this, but it has been my experience that in the average confrontation between citizens of New Orleans and the New Orleans Police Department, being a prosecutor for four years, has almost always resulted in the use of obscene language by citizens to the members of the New Orleans Police Department.

Q Are relationships that strained between the

police department --

MR. GARCIA: It is that bad between the New Orleans and the citizens on the street, yes, sir.

Q Is it possible that one reason why the City Council enacted a special ordinance for policemen and none for the mayor is that the policemen are out on the street exposed to this and the mayor is not --

MR. GARCIA: Absolutely.

Q -- and for the same reasons they let the police carry guns but the mayor probably does not?

MR. GARCIA: Absolutely. The police officers, of course, are on the street daily and are subject to this abuse daily, as I stated. The mayor of course probably rarely if ever comes into contact with this type of abuse and, if so, there is an ordinance that would protect the mayor. But I think that is the reason for this specific ordinance relative to the New Orleans police officers.

Q Now, the dissenting opinion pointed out in this case that, under the terms of the ordinance, this mother, Mrs. Lewis, could have been prosecuted -- "The mother is punishable under the ordinance" -- I am reading -- "for using disrespectful language in her own living room as well as in the street and not in the presence even of the police." In reading the court opinion, I can't find any disagreement with that construction of the ordinance.

MR. GARCIA: Well, although there may be no disagreement with that construction --

Q Have I missed something, first of all, in the court opinion?

MR. GARCIA: No, I don't believe you have. But what I am saying is that that may very well be true, that this type of imaginative situation could occur, but under the over-breadth doctrine, which was quoted in the index, they have certain guidelines which are to be used in scrutinizing the over-breadth of certain ordinances, and the first one of these is the degree of over-breadth, and it states in the Law Review article specifically a law ought not be struck down for over-breadth unless it lends itself to a substantial number of impermissible applications. In this instance, I certainly don't think that this would happen at all, and it certainly wouldn't happen in a substantial number of instances.

Q Where are these over-breadth guidelines? Is this something for the New Orleans Police Department or guidelines for --

MR. GARCIA: No, sir, it is the Harvard Law Review.

Q What pages?

MR. GARCIA: It is cited -- the document itself, we don't have a copy of, but it is cited in the appendix.

Q You are referring us to an article that you haven't even read yourself?

MR. GARCIA: Yes, sir, I've read it.

Q Oh, you've read it?

MR. GARCIA: I have a copy of it.

Q Oh, I don't need it. Do you have anything in the Yale Law Review, while you're at it?

Q How about this language that Justice Stewart was drawing to your attention, and I took it as the hyperbole that extravagant statements that sometimes come in dissenting opinions which the majority doesn't take the trouble to notice.

MR. GARCIA: Also in a recent case, which was decided by this Court, Mr. Justice Marshall stated in the majority opinion that condemned to the use of words, we can never expect mathematical certainty from our language, and I think this is --

Q Well, the point is that this case was here once before.

MR. GARCIA: That's correct.

Q And it was remanded to the Supreme Court of Louisiana to reconsider in light of Gooding, with an invitation to narrow it, to narrow it, the statute, to construe it in a narrow way. And as I read the court's opinion, it not only declined that invitation but left it just as open as the dissenting opinion said it is. And he uses another example of the fellow on the balcony looking down at the traffic policeman trying to regulate the traffic in the French Quarter and says, "Look at that stupid cop down there making an ass out of

himself," or whatever it is, and he's guilty of violating this ordinance, and particularly with the invitation before the highest court of your state to narrow this ordinance I would have thought they might have taken issue with the dissenter's characterization of the ordinance if they had not agreed with it.

MR. GARCIA: Well, I certainly -- the only thing I can say about the Louisiana Supreme Court's decision is what I have read myself, which is substantially the same thing that you have read, so I can't add to their reasoning in that decision. That ends my case.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Do you have anything further? You have one minute left, Mr. Reed.

MR. REED: Unless the Court has any questions, Your Honor, I have nothing.

MR. CHIEF JUSTICE BURGER: Thank you very much, gentlemen. The case is submitted.

[Whereupon, at 2:30 o'clock p.m., the case was submitted.]

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