

CIVILIZING PUBLIC DISCOURSE: AN ESSAY ON PROFESSOR BICKEL, JUSTICE HARLAN, AND THE ENDURING SIGNIFICANCE OF *COHEN* V. *CALIFORNIA*

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On April 26, 1968, Paul Cohen was arrested for displaying the slogan "Fuck the Draft" on his jacket. Three years later, the United States Supreme Court reversed his conviction.¹ Justice Harlan's majority opinion attracted little attention at the time.² Perhaps, as Justice Harlan himself noted, the case seemed "at first blush too inconsequential to find its way into our books."³ Yet *Cohen v. California* did not escape notice entirely, for it struck the discerning eye of Professor Harry Kalven "as a helpful, and remarkably gallant, contribution to first amendment theory."⁴

Today, *Cohen v. California* is widely recognized as an important first amendment case.⁵ It is commonly considered the leading statement on the validity of prohibitions designed to protect people from involuntary exposure to offensive speech.⁶ *Cohen* is generally thought to resolve this "captive audience" issue by placing the burden upon the

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THE FOLLOWING CITATIONS WILL BE USED IN THIS ARTICLE:

Appendix, *Cohen v. California*, 403 U.S. 15 (1971) (this appendix does not appear in the case reporters, but may be found on microfiche at MICROCARD EDITIONS, INC., U.S. SUPREME COURT RECORDS, BRIEFS (1970 OP), No. 299 (1971) [hereinafter cited as Appendix];

A. BICKEL, *THE MORALITY OF CONSENT* 1975 [hereinafter cited as *MORALITY OF CONSENT*];

Arkes, *Civility and the Restriction of Speech: Rediscovering the Defamation of Groups*, 1974 SUP. CT. REV. 281 [hereinafter cited as Arkes].

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

2. For example, it was not featured in the *Harvard Law Review's* survey of the term's most important cases. See *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 38 (1971).

3. 403 U.S. at 15.

4. Kalven, *Foreward: Even When a Nation is at War*, 85 HARV. L. REV. 3, 10 (1971). See also Guenther, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell*, 24 STAN. L. REV. 1001, 1006-08 (1972).

5. See, e.g., J. NOWAK, R. ROTUNDA, & J. YOUNG, *HANDBOOK ON CONSTITUTIONAL LAW* 792-93 (1978); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 578, 618-19, 666 (1978).

6. See generally L. TRIBE, *supra* note 5, at 677 & ml. 11 & 13; Black, *He Cannot Choose But Hear: The Plight of the Captive Auditor*, 53 COLUM. L. REV. 960 (1953); Haiman, *Speech v. Privacy: Is There a Right Not to be Spoken To?*, 67 NW. U.L. REV. 153 (1972).

offended person to look away, at least when he is outside his own home. Only when avoidance is impossible may the state intervene.⁷ If this reading of *Cohen* is correct, then the decision is highly relevant to cases like *FCC v. Pacifica Foundation*,⁸ which involved a ban on "indecent" broadcasting to protect people who might unwittingly turn on their radios and be shocked by the language.⁹ After all, it is argued, turning off the radio would be no more of a burden than looking away from an offensive jacket.¹⁰

One of the primary purposes of this Essay is to refute the notion that *Cohen* resolved the captive audience problem. I will argue, to the contrary, that the structure of Harlan's opinion shows that *Cohen* is largely irrelevant to this issue. Instead, Harlan's real concern was whether the state had the power to maintain a tolerable climate of thought by purifying public discourse. For Harlan, the question was not frivolous. He had previously been willing to grant the states broad authority in regulating obscenity, in order to protect the moral fabric of society from the effects of "degrading" speech.¹¹ Yet in *Cohen*, he ultimately concluded that to extend the state's role as moral guardian to areas beyond obscenity was incompatible with first amendment values.

So understood, Justice Harlan's opinion in *Cohen* contrasts strikingly with the views of another great conservative thinker, Professor Alexander Bickel. In his last book, *The Morality of Consent*, Bickel argued that certain kinds of speech—pornography,¹² "filthy and violent

7. See *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210-11 (1975); *Spence v. Washington*, 418 U.S. 405, 412 (1974); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 320-21 (1974) (Brennan, J., dissenting); *Tollett v. United States*, 485 F.2d 1087, 1092 (8th Cir. 1973); *Cinecoin Theaters Midwest States, Inc. v. City of Fort Wayne*, 473 F.2d 1297, 1302-03, (7th Cir. 1973); *Arkes* 313-14, 317 n.98; Haiman, *supra* note 6, at 171-72; 18 LOY. L. REV. 403, 409 (1972); cf. Rutzick, *Offensive Language and the Evolution of First Amendment Protection*, 9 HARV. C.R.-C.L.L. REV. 1, 22 (1974) (in *Cohen*, the "Court failed to mention the 'sensibilities' interest, instead referring to 'public morality,' a broader and less definable category"). See also the sources cited in note 10 *infra*.

8. 438 U.S. 726 (1978).

9. *Id.* at 731-32, 748-50.

10. For arguments that *Pacifica* is controlled by *Cohen*, see *FCC v. Pacifica Foundation*, 438 U.S. 726, 764-66 (1978) (Brennan, J., dissenting); *Pacifica Foundation v. FCC*, 556 F.2d 9, 17 (D.C. Cir. 1977), *rev'd*, 438 U.S. 726 (1978); L. TRIBE, *supra* note 5, at 66 n.51 (Supp. 1979); Krattenmaker & Powe, *Televised Violence: First Amendment Principles and Social Science Theory*, 64 VA. L. REV. 1123, 1229-30 (1978); Note, *Pacifica Foundation v. FCC: "Filthy Words," the First Amendment and the Broadcast Media*, 78 COLUM. L. REV. 164, 170-71 (1978); Comment, "Indecent" Language: A New Class of Prohibitible Speech? *FCC v. Pacifica Foundation*, 13 U. RICH. L. REV. 297, 305-07 (1979); Note, *Filthy Words, the FCC, and the First Amendment: Regulating Broadcast Obscenity*, 61 VA. L. REV. 579, 619 (1975); 12 AKRON L. REV. 284, 287 (1978); 40 OHIO ST. L.J. 155, 177 (1979); 53 TUL. L. REV. 273, 281 (1978).

11. See, e.g., *Memoirs v. Massachusetts*, 383 U.S. 413, 456-58 (1966) (Harlan, J., dissenting); *Roth v. United States*, 354 U.S. 476, 500-03 (1957) (Harlan, J., concurring and dissenting).

12. MORALITY OF CONSENT 73-74.

rhetoric,"¹³ and "a kind of cursing, assaultive speech that amounts to almost physical aggression"¹⁴—erode fundamental social values, thereby creating a climate in which actions otherwise unthinkable become realistic possibilities. He viewed these kinds of speech as a form of pollution of our common moral environment.¹⁵ While aware of the risks, he believed that government should take cautious steps toward dealing with assaultive speech.¹⁶

Bickel's theory is somewhat removed from current first amendment doctrine, although perhaps less so than when he first wrote.¹⁷ Yet the concerns he voiced are troubling and deserve attention, not only because existing doctrine is subject to change, but also because as citizens, if not as lawyers, we cannot limit our vision strictly to legal doctrine.

This Essay is intended as an exploration of these contrasting views on control of offensive speech. It begins with a close examination of Justice Harlan's opinion in *Cohen*,¹⁸ demonstrating that Harlan was concerned with government power to upgrade public discourse, rather than with offense to the immediate audience. As a result, *Cohen*, although not wholly irrelevant, has little to say for cases such as *Pacifica*. The second part of this Essay discusses two recent, related cases that highlight the conflict between Justice Harlan and Professor Bickel and

13. *Id.* 73.

14. Bickel viewed *Cohen* as an example of such speech:

There is such a thing as verbal violence, a kind of cursing, assaultive speech that amounts to almost physical aggression, bullying that is no less punishing because it is simulated. Thus there is a difference, although in a 1971 decision the Supreme Court managed not to perceive it, between carrying a sign in public that says, Down with the Draft, and a sign that says—I bowdlerize—Fornicate the Draft; between a publication that vigorously criticizes the police and one that depicts them in a cartoon as raping the Statue of Liberty; between using all manner of epithets and employing a fashionable one which is quaintly abbreviated, "mother." This sort of speech constitutes an assault. More, and equally important, it may create a climate, an environment in which conduct and actions that were not possible before become possible.

Id. 72 (footnotes omitted).

15. *Id.* 74.

16. *Id.* 75-76.

17. Bickel's views on obscenity were quoted with approval in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 59 (1973). Interestingly enough, the *Adult Theatre* Court then cited, also with apparent approval, *Beauharnais v. Illinois*, 343 U.S. 250 (1952), as support for the view that "there is a 'right of the Nation and of the States to maintain a decent society . . .'" 413 U.S. at 59-60 (quoting Chief Justice Warren's dissent in *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964)). In *Beauharnais*, the Court held that speech defaming a racial group could be made criminal. 343 U.S. at 261. *Beauharnais* also provided one of Bickel's examples of speech that society should be able to control. MORALITY OF CONSENT 70. See text accompanying notes 100-11 *infra* for further discussion of the *Beauharnais* problem.

18. Quite apart from its relevance to my topic, this investigation is of interest for the light it sheds on Harlan's extraordinary judicial technique. Only on close reading is Harlan's great craftsmanship apparent.

examines both men's views in greater depth. Finally, after considering the arguments for tolerating some forms of speech despite their offensiveness, this Essay suggests that offensiveness itself unwittingly serves a useful role in our society.

I. AN ANALYSIS OF THE *COHEN* OPINION

The genesis of *Cohen v. California* was an antiwar meeting attended by nineteen-year-old Paul Cohen. Someone else at the meeting inscribed a peace symbol and the phrases "Stop War" and "Fuck the Draft" on his jacket. Although he was not the inscriber, Cohen admittedly was aware of these insignia.¹⁹ On April 26, 1968, he went to the Los Angeles County courthouse to testify in a case that apparently had no relation to the draft or the Vietnam War.²⁰ When Cohen entered the courtroom, he took off his jacket and stood with it folded over his arm. In the meantime, a vigilant policeman had observed the jacket²¹ and had sent the judge a note suggesting that Cohen be held in contempt of court.²² Evidently, the policeman's theory was either that wearing the jacket in the hall was an act of contempt, or that having it folded over one's arm in the presence of a judge was contumacious behavior. In any event, the judge wisely declined the policeman's invitation to forge new paths in the law of contempt.²³ Thus deprived of judicial reinforcement, the officer waited until Cohen left the courtroom and then arrested him for disturbing the peace.

California's disturbing the peace statute did not easily yield a charge against Cohen. It did prohibit the use of "vulgar, profane, or indecent language within the presence or hearing of women or children"²⁴—so far, so good—but unfortunately this part of the statute ap-

19. Appendix 19.

20. Transcript of Oral Argument, *Cohen v. California*, 403 U.S. 15 (1971), reprinted in 70 P. KURLAND & G. CASPER, LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES; CONSTITUTIONAL LAW 828, 830, 845 (1975).

21. It seems vigilance was required. According to Cohen's ACLU counsel, Professor Melville Nimmer of the UCLA Law School, the jacket was covered with writing and the words "Fuck the Draft" did not really stand out. Telephone interview with Professor Melville Nimmer, ULCA Law School (Aug. 10, 1979).

22. 403 U.S. at 19 n.3.

23. In *Eaton v. City of Tulsa*, 415 U.S. 697 (1974), the petitioner used the word "chicken-shit" in answering a question on cross-examination, and was cited for contempt. The Supreme Court held that "[t]his single isolated usage of street vernacular, not directed at the judge or any officer of the court, cannot constitutionally support the conviction of criminal contempt." *Id.* at 698. The Court further stated that to support a contempt charge, the language must constitute an imminent threat to the administration of justice. *Id.* California contempt law appears to be in harmony with these views. See CAL. CIV. PROC. CODE § 1209 (West Supp. 1979); 14 CAL. JUR. Contempt § 11 (1974).

24. The statute, section 415 of the California Penal Code, provided:

plied solely to language used in a "loud and boisterous manner."²⁵ The only other potentially applicable provision was the general prohibition against "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct."²⁶ The trial judge found this language a sufficient basis for conviction and imposed a sentence of thirty days in jail.²⁷ This harsh sentence, for what was at most a juvenile prank,²⁸ is hard to understand except as the consequence of either a puritanical attitude toward Cohen's language or, worse, strong hostility to Cohen's political views.

Cohen appealed the conviction to the Appellate Department of the Superior Court, which reversed in a brief memorandum order, stating simply that "conduct that is merely offensive is insufficient" to support a conviction under the statute.²⁹ In response to the state's petition for rehearing, the Appellate Department issued a much lengthier opinion.³⁰ Again relying on a statutory ground, the court concluded that conduct must be not only "offensive," but also "tumultuous,"³¹ and that Cohen's conduct did not qualify as tumultuous.³²

The state then appealed the case to the California Court of Appeal, which held that the statute *did* cover Cohen's conduct.³³ The appellate court construed the statute to apply when a person's willful conduct foreseeably provokes others to engage in violence or breach

Every person who maliciously and willfully disturbs the peace or quiet of any neighborhood or person, by loud or unusual noise, or by tumultuous or offensive conduct, or threatening, traducing, quarreling, challenging to fight, or fighting, or who, on the public streets of any unincorporated town, or upon the public highways in such unincorporated town, run any horse race, either for a wager or amusement, or fire any gun or pistol in such unincorporated town, or use any vulgar, profane, or indecent language within the presence or hearing of women or children, in a loud and boisterous manner, is guilty of a misdemeanor, and upon conviction by any Court of competent jurisdiction shall be punished by fine not exceeding two hundred dollars, or by imprisonment in the County Jail for not more than ninety days, or by both fine and imprisonment, or either, at the discretion of the Court.

CAL. PENAL CODE § 415 (West 1970).

25. *Id.*

26. *Id.*

27. 403 U.S. at 16.

28. Even the *Cohen* dissenters called the conduct merely an "absurd and immature antic." *Id.* at 27 (Blackmun, J., dissenting).

29. Appendix 10-11.

30. *Id.* 13.

31. *Id.* 14.

32. *Id.* 13-17. The state contended that because the statute was written in the disjunctive, conduct that was merely "offensive" was enough to convict. The court disagreed, noting that each of the specific acts listed under section 415 that constituted contempt contained elements of noise, disturbance, or conflict. The court inferred that the statute did not encompass peaceable conduct even if it was offensive. The court therefore concluded that to come under the statute conduct must have elements of noise, disturbance, or conflict, and that section 415 required the conduct to be both "offensive" and "tumultuous." *Id.* 16.

33. *People v. Cohen*, 1 Cal. App. 3d 94, 99, 81 Cal. Rptr. 503, 506 (1969).

the peace.³⁴ In the court's view, Cohen was guilty under this test: he had "carefully chose[n] the forum for his views where his conduct would have an effective shock value."³⁵ Accordingly, the appellate court concluded, he should have known that others might assault him or forcibly remove his jacket to protect women and children from exposure to his "lewd and vulgar language."³⁶

Cohen's attempt to obtain review in the California Supreme Court was unsuccessful.³⁷ He did have the satisfaction, however, of receiving dissenting votes from Chief Justice Traynor and Justices Peters and Tobriner.³⁸ The stage was set for his appeal to the United States Supreme Court.

On June 22, 1970, the Court agreed to hear the case, postponing consideration of whether it had jurisdiction.³⁹ The parties presented oral argument in February of 1971, and the Court announced its decision on June 7, 1971.⁴⁰ Splitting five to four, the Court reversed the conviction, with Justice Harlan writing for the majority and Justice Black joining the dissent.⁴¹

34. *Id.* at 99, 81 Cal. Rptr. at 506. There is an odd element of circularity in this definition: disturbing the peace includes provoking others to disturb the peace. Apparently, a person could disturb the peace by engaging in peaceful conduct that provoked others to engage in peaceful conduct that provoked still others to commit violence. In theory, the head of the selective service system could be found guilty of disturbing the peace because he willfully and foreseeably provoked Cohen into disturbing the peace. The extraordinary scope of this definition may make it susceptible to vagueness and overbreadth attacks.

The California Supreme Court later had occasion to interpret section 415 in *In re Bushman*, 1 Cal. 3d 767, 463 P.2d 727, 83 Cal. Rptr. 375 (1970). In dissent in *Cohen*, Justice Blackman asserted that the case should have been remanded to the California Court of Appeal for reconsideration in light of *Bushman*. 403 U.S. at 28 (Blackmun, J., dissenting). However, the *Bushman* opinion uses language similar to that used by the Court of Appeal in *People v. Cohen*, and even cites the lower court case approvingly. *In re Bushman*, 1 Cal. 3d at 773, 463 P.2d at 730, 83 Cal. Rptr. at 378 (conduct "likely to" incite others to violence may be "offensive conduct" and thus a disturbance of the peace). See 403 U.S. at 17 n.2. Furthermore, there is the possibility that even on remand the California Court of Appeal would have reached the same decision, merely delaying the ultimate disposition of the case.

35. 1 Cal. App. 3d at 99, 81 Cal. Rptr. at 506. See also *id.* at 103, 81 Cal. Rptr. at 509 (gravamen of offense was defendant's "selection of the public corridors of the county courthouse as the place to parade before women and children").

36. *Id.* at 103, 81 Cal. Rptr. at 509.

37. 1 Cal. App. 3d 104, 81 Cal. Rptr. 510 (1969).

38. *Id.*

39. 399 U.S. 904 (1970). The jurisdictional issue turned out to be trivial. See *Cohen v. California*, 403 U.S. at 17-18.

40. 403 U.S. 15 (1971).

41. Thus, the majority opinion was written by the Court's foremost advocate of balancing in first amendment cases, while the dissent was joined by the foremost advocate of "absolute" protection for speech. See generally Kalven, *Upon Rereading Mr. Justice Black on the First Amendment*, 14 U.C.L.A. L. REV. 428, 447-53 (1967). It is tempting to excuse Black's vote on the basis of age and illness, since he died shortly thereafter. If these factors excuse Black's vote, they make

Had he not been troubled by the case, Justice Harlan could have disposed of it with little elaboration. The record contained no indication of a violent reaction, actual or threatened, to Cohen's conduct, as required by the lower court's construction⁴² of the statute.⁴³ Hence, the California court had necessarily relied on the questionable presumption that offensive speech is *likely* to cause a violent reaction. Justice Harlan took only a single paragraph to expose the unconstitutionality of this presumption. Surely, he argued, there cannot be a great many people who would resort to violence at the sight of a four-letter word, and the possible existence of a few persons this easily provoked to violence is not a sufficient justification for a restriction on speech. If it were, anyone who voiced an unpopular viewpoint would face arrest. With this line of reasoning, Justice Harlan dismissed the rationale of the lower court as "plainly untenable."⁴⁴

Justice Harlan was not always averse to disposing of cases on the narrowest of grounds.⁴⁵ He could have done so in *Cohen*, based solely on the failure of the statute (as construed to cover only conduct likely to cause a violent reaction) to reach Cohen's conduct without the aid of an unconstitutional presumption.⁴⁶ An opinion resting entirely on this

Harlan's opinion all the more "remarkably gallant," in Harry Kalven's phrase, since Harlan was also mortally ill. See generally H. BLACK, *MY FATHER: A REMEMBRANCE* 247-66 (1975).

42. See text accompanying notes 34-36 *supra*.

43. Indeed, counsel for the state conceded that there was nothing in the record to show that anyone had even been offended, let alone provoked to violence. See note 65 *infra*.

44. 403 U.S. at 23. Justice Harlan's formulation of this argument is, however, considerably more eloquent:

The rationale of the California court is plainly untenable. At most it reflects an "undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression." *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 508 (1969). We have been shown no evidence that substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities with execrations like that uttered by Cohen. There may be some persons about with such lawless and violent proclivities, but that is an insufficient base upon which to erect, consistently with constitutional values, a governmental power to force persons who wish to ventilate their dissident views into avoiding particular forms of expression. The argument amounts to little more than the self-defeating proposition that to avoid physical censorship of one who has not sought to provoke such a response by a hypothetical coterie of the violent and lawless, the States may more appropriately effectuate that censorship themselves.

Id.

45. See, e.g., *Street v. New York*, 394 U.S. 576 (1969). In *Street*, the issue presented was whether flag burning is protected by the first amendment. *Id.* at 595 (Warren, C.J., dissenting). Justice Harlan managed to avoid this issue by unearthing an indication in the record that Street's conviction might have been based in part on his utterances at the time. Based on this speculation, Harlan reversed the conviction without reaching the fundamental issue. In fairness to Justice Harlan, it should be added that his discussion of whether those utterances were protected was insightful and a useful addition to first amendment jurisprudence. See Gunther, *supra* note 4, at 1008-11.

46. In a footnote, Justice Harlan admitted that there was "some force" to the argument that no broader issue was properly before the Court. 403 U.S. at 23 n.5. He argued that it was "not

narrow ground, however, would not have been intellectually satisfying. The lower court's rationale was too patently meritless to be taken seriously. It can only be understood as a transparent attempt to provide doctrinal support for the traditional taboo on public utterance of certain words. The crux of the case was the legal status of deep-seated societal antipathy for certain four-letter words.⁴⁷ Harlan's evident desire to deal with this problem caused him to take a more circuitous approach in resolving the matter.

The opinion begins with an analysis of "various matters which this record does *not* present."⁴⁸ Of these, two issues are especially significant for our purposes. The first relates to the locale of the speech. The California court had stressed Cohen's "selection of the public corridor of the courthouse as the place to parade"⁴⁹ with his slogan. This appears to be the point of Justice Blackmun's dissent, which dismissed Cohen's action as "mainly conduct and little speech."⁵⁰ This characterization makes little sense unless Blackmun thought Cohen was conducting a sort of protest march through the courthouse.⁵¹ Although Justice Harlan probably was sympathetic to this claim of special respect for courts and their environs,⁵² he nevertheless rejected it as a basis for upholding the conviction because the statute contained no suggestion of any special restriction on speech within the courthouse.⁵³ Because of this failure to provide fair notice, the Court held that the conviction could not be supported on the ground that the statute attempted to "preserve an appropriately decorous atmosphere in the courthouse."⁵⁴

. . . inappropriate" to consider whether some broader rationale might support a *per se* ban on the public use of certain words. *Id.* Nevertheless, he expressly refrained from deciding whether this broader issue was properly presented on the record in *Cohen*. *Id.*

47. Perhaps this is an appropriate place to note that Justice Harlan's opinion directly challenged this societal attitude not only by defending the use of these words, *id.* at 23-24, but also by using one of them in the statement of facts, *id.* at 16. A LEXIS search indicates that the *Cohen* opinion contains the first appearance of the word "fuck" or its derivatives in the United States Reports.

48. 403 U.S. at 18.

49. 1 Cal. App. 3d at 103, 81 Cal. Rptr. at 509.

50. 403 U.S. at 27 (Blackmun, J., dissenting).

51. Actually, this appears not to have been Cohen's purpose. He was in the courthouse to testify as a witness in an unrelated case, and wore the jacket because the weather was chilly. *See* Transcript of Oral Argument, *supra* note 20, *reprinted in* 70 P. KURLAND & G. CASPER, *supra* note 20, at 828, 835.

52. *See* Lewin, *Justice Harlan: The Full Measure of the Man*, 58 A.B.A.J. 579, 582 (1972); Lumbard, *John Harlan: In Public Service 1925-1971*, 85 HARV. L. REV. 372, 376 (1971); Wood, *John M. Harlan, As Seen by a Colleague in the Practice of Law*, 85 HARV. L. REV. 377, 380 (1971).

53. *See* note 24 *supra*. Indeed, unlike the defendants in many cases in which similar appeals to "fair notice" are made, Cohen actually might have been influenced had he received such notice. After all, he did remove the jacket when he entered the courtroom.

54. 403 U.S. at 19.

The Court's failure to rule on the abstract validity of strictures to assure courthouse decorum leaves open the possibility, however, that a narrowly drawn ban on four-letter words within the courthouse would have been acceptable.⁵⁵

The second issue specifically put aside by the Court is the "captive audience" argument, in particular, whether the government could legitimately act to prevent Cohen's offensive language from being thrust upon unwilling viewers. The discussion began with a general exploration of the captive audience problem.⁵⁶ Justice Harlan observed that the recognized power of government to prevent intrusion into the sanctuary of the home must be sharply limited elsewhere if it is not to become an instrument for majoritarian repression of dissidents. His proposed test was that "substantial privacy interests" must be invaded in an "essentially intolerable manner."⁵⁷ This test obviously leaves unspecified which privacy interests have substance and which invasions can be tolerated.⁵⁸ Justice Harlan found the privacy interest in *Cohen* far less substantial than the interest invaded by sound trucks blaring into homes,⁵⁹ since people confronted with Cohen's jacket could simply

55. Compare *Cox v. Louisiana*, 379 U.S. 559, 561-64 (1965) (Cox II) (upholding constitutionality of narrowly drawn statute forbidding picketing near courthouse, but reversing defendant's conviction because no violation of statute occurred) with *Cox v. Louisiana*, 379 U.S. 536, 544-52 (1965) (Cox I) (reversing defendant's conviction for breach of peace on same facts and invalidating statute as unconstitutionally vague). For this reason, it is misleading to assert that *Cohen* held that the act of wearing a jacket bearing the words "Fuck the Draft" in a courthouse corridor was constitutionally protected. But see L. TRIBE, *supra* note 5, at 578. Since *Cohen* leaves open the possibility that this act could have been punished under a properly drawn statute, the Court cannot properly be said to have held that the act was constitutionally protected.

56. 403 U.S. at 21.

57. *Id.*

58. See Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233, 263 (*Cohen* test "facially ambiguous"). This test is similar to the "reasonable expectation of privacy" test set forth in *Katz v. United States*, 389 U.S. 347 (1967). Katz had been convicted of transmitting wagering information by telephone in violation of federal law. At trial, the government was allowed to introduce evidence of Katz's portion of certain telephone conversations overheard by FBI agents who had attached electronic listening devices to the outside of a telephone booth Katz had used. The issue facing the Court was whether this eavesdropping was an unconstitutional search and seizure. The Court answered in the affirmative, noting that the fourth amendment "protects people, not places"; what one seeks to keep private, even in a telephone booth, may be constitutionally protected. *Id.* at 351-52. It is Harlan's concurrence, however, that has been frequently used in interpreting *Katz*. See, e.g., 1 W. LAFAVE, SEARCH AND SEIZURE 227 (1978). Harlan viewed the *Katz* test as having two prongs: requiring first that the person have "an actual (subjective) expectation of privacy and, second, that the expectation be one society is prepared to recognize as 'reasonable.'" 389 U.S. at 361 (Harlan, J., concurring). Harlan's concurrence may help define the limits of the *Cohen* test. By analogy from *Katz* to *Cohen*, perhaps one should examine (a) contemporary expectations regarding what speech people will hear in particular places or in the media, and (b) the extent to which courts should recognize these expectations as reasonable.

59. 403 U.S. at 21 (referring to *Kovacs v. Cooper*, 336 U.S. 77 (1948)).

look away. On the other hand, the interest in privacy while walking through the courthouse corridor was at least arguably more substantial than the interest in privacy while "strolling through Central Park."⁶⁰ Perhaps it is fair to infer that Harlan found the privacy claim in *Cohen* less than compelling, but it is also clear that he did not find it frivolous. His final decision was to avoid the issue:

Given the subtlety and complexity of the factors involved, if Cohen's "speech" was otherwise entitled to constitutional protection, we do not think the fact that some unwilling "listeners" in a public building may have been briefly exposed to it can serve to justify this breach of the peace conviction where, as here, there was no evidence that persons powerless to avoid appellant's conduct did in fact object to it, and where that portion of the statute upon which Cohen's conviction rests evinces no concern, either on its face or as construed by the California courts, with the special plight of the captive auditor, but, instead, indiscriminately sweeps within its prohibitions all "offensive conduct" that disturbs "any neighborhood or person."⁶¹

With these two issues placed to the side, Harlan found that the case presented a single remaining issue: whether the state could completely outlaw the word "fuck," either on the theory that its use is inherently likely to provoke violence, or on the theory that the states, "acting as guardians of public morality, may properly remove this offensive word from the public vocabulary."⁶² As has been shown,⁶³ Harlan rejected the violence theory as unsupportable, leaving only the second theory, which Harlan restated as an attempt to maintain "a suitable level of discourse within the body politic."⁶⁴ This theory represented state censorship in its purest form: it claimed state power to censor offensive words, even when there was no objection⁶⁵ and no risk of concrete harm. Not only would this censorship apply as fully to

60. 403 U.S. at 21-22.

61. *Id.* at 22. Because of Harlan's reference to the "subtlety and complexity of the factors involved," it is difficult to predict what his response to captive audience claims would have been in other situations, such as that in *Pacifica*.

62. *Id.* at 22-23.

63. See text accompanying notes 42-44 *supra*.

64. 403 U.S. at 23. It should be clear at this point that this theory is quite different from a captive audience rationale. Under the captive audience rationale, the state can arguably prevent Ann from using the word "fuck" in a speech to her willing audience, Betty and Charley, in order to protect the sensibilities of Dave, who is unwittingly walking by. Under the public morality theory, the state can take the same action to "protect" Betty and Charley from hearing language they are willing to hear, but which the state considers unsuitable. Because it directly interferes with the relationship between a speaker and a willing audience, regulation based on the public morality rationale is far more paternalistic and conflicts more directly with first amendment values. See generally Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U.L. REV. 372, 404-05 (1979).

65. The importance of the fact that no one objected was brought into focus during oral argument:

Lenny Bruce speaking to a willing nightclub audience⁶⁶ as it would to Cohen, but presumably it would apply to literary works as well. Despite his willingness to grant the states similar power over erotic literature,⁶⁷ Harlan was reluctant to expand the established exceptions to the usual rule against content censorship. He concluded, for reasons that will be discussed in connection with Professor Bickel's views,⁶⁸ that

THE COURT: 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?

MR. SAUER: There's nothing in the record, Mr. Justice Marshall. We just said "the effect on the average person." As I go back and read *Chaplinsky*, there's no showing that Major Browerlein, when the man yelled at him "You damn fascist," or "You damn racketeer," was offended by the statement. There's no showing that Major Browerlein was going to react against it.

THE COURT: Well, who in the building was interested in the draft? Does the record show?

MR. SAUER: There's no showing. Even appellant admits the man was there because just citizens who would be present—

THE COURT: Well, my great difficulty as to what's the difference between the man whispering something in the corner to somebody, and wearing a jacket that so far as this record shows only one person saw it?

MR. SAUER: No, I believe three people saw it. There was a S[e]rgeant Spawn. There was someone named Alexander, and there was one other person, I believe, who saw it.

THE COURT: Well, was it offensive to them?

THE COURT: Mr. Sauer, may I read from the Settled Statement on appeal? "S[e]rgeant Shauler and Officer Alexander corroborated S[e]rgeant Spawn'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?

MR. SAUER: Correct, Mr. Justice Blackmun, yes. I said the record shows that there were other individuals present, as well as three specifically named individuals. There were women and children present in the corridor.

Transcript of Oral Argument, *supra* note 20, reprinted in 70 P. KURLAND & G. CASPER at 844-45. This colloquy brings out three interesting points. First, the record does not show that anyone was offended. Second, as far as the record shows, the only people who noticed the jacket were three police officers. Third, at oral argument, at least one Justice was of the view that there was no captive audience problem because the issue would have been the same if Cohen had been "whispering something in the corner to somebody." If the state is to regulate the use of offensive language in a whispered conversation, the state must have a reason other than a desire to prevent offense to bystanders. Instead, the reason must be a desire to improve the morals of the participants, or something similar.

66. See generally *People v. Bruce*, 31 Ill. 2d 459, 202 N.E.2d 497 (1964).

67. See cases cited in note 11 *supra*. In *Cohen*, Justice Harlan treated the obscenity cases as involving a special but limited state power:

[T]his case cannot be said to fall within those relatively few categories of instances where prior decisions have established the power of government to deal more comprehensively with certain forms of individual expression simply upon a showing that such a form was employed. This is not, for example, an obscenity case. Whatever 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. *Roth v. United States*, 354 U.S. 476 (1957). It cannot plausibly be maintained that this vulgar allusion to the Selective Service System would conjure up such psychic stimulation in anyone likely to be confronted with Cohen's crudely defaced jacket.

403 U.S. at 19-20. Later in the opinion, Justice Harlan stressed that "most situations where the State has a justifiable interest in regulating speech will fall within one or more of the various established exceptions . . ." *Id.* at 24.

68. See text accompanying note 109 *infra*.

government control over the public vocabulary was intolerable.⁶⁹

It should be clear by now that Harlan's first amendment methodology did not revolve around the simple issue of constitutional protection⁷⁰ for particular conduct. Rather, Harlan first carefully determined what justifications for regulation were properly before the Court and then attempted to determine the sufficiency of those particular justifications. The result of this analysis has been misleading when carelessly used as precedent in later cases. For example, in *FCC v. Pacifica Foundation*,⁷¹ the issue was whether a radio station was entitled to play a record containing a number of four-letter words. At first sight, *Cohen* appears to be powerful precedent on this issue. On closer analysis, however, *Cohen* proves to have little relevance. The Federal Communications Commission's justifications for regulating speech in *Pacifica* turned on the context of the midafternoon broadcast, whereas Justice Harlan found that none of the possible context-related justifications were properly presented in *Cohen*. Instead, the issue he did find to be properly presented—and therefore the only issue he decided—was whether the state, acting as a paternalistic guardian of public morality, could ban the use of certain words in *all* contexts. Because *Pacifica* dealt with context and *Cohen* dealt only with content, *Cohen* contributes little to the issue presented in *Pacifica*.⁷²

69. From the point of view of judicial craftsmanship, this opinion is most admirable for the precision with which Harlan isolated the essential issue in the case. His elimination of other possible issues was based not only on a sure grasp of the relevant legal tools, *see generally* Gunther, *supra* note 4, at 1007 (Harlan's "dissection of state justifications" called "exemplary"), but also on a sound instinct about the crux of the case. Recall that while the record revealed no objections from bystanders in the hall, *see* note 65 *supra*, the police pursued Cohen into a courtroom, and even though he had removed the jacket they attempted to have him held in contempt of court. It is hard to perceive this behavior as anything other than the officious intermeddling of self-appointed guardians of public morality. Moreover, Cohen's counsel says that, as far as he knows, the police did not ask Cohen to remove the jacket. Telephone interview with Professor Melville Nimmer, UCLA Law School (Aug. 10, 1979). This reinforces the view that the police were less interested in protecting bystanders than in punishing immoral speech.

70. Despite the reversal of Cohen's conviction, it still could not be said with any assurance that his conduct was constitutionally immune from prohibition. *See* note 55 *supra*.

71. 438 U.S. 726 (1978).

72. The Court in *Pacifica* could not avoid the captive audience issue because *Pacifica* involved an objecting bystander. 438 U.S. at 747 n.25. Thus, commentators who find the absence of objection in *Cohen* an irrelevant difference between the two cases are incorrect. *See, e.g.*, Krattenmaker & Powe, *supra* note 10, at 1230 n.639. The point is not that a single objection is enough to create a strong captive audience claim; rather, the point is that it is difficult to find a captive audience claim at all unless someone objects.

A case decided a year after *Cohen* reinforces the view that the *Cohen* Court did not reach the merits of the context-related justifications for regulating speech. In *Rabe v. Washington*, 405 U.S. 313 (1972), the Court relied on *Cohen* in holding that an obscenity conviction could not be upheld on the theory that a film was obscene when shown at a drive-in theatre but not when shown indoors. The state had asserted that it had a special interest in "prohibiting outdoor displays of

Although *Cohen* does not resolve all the questions relating to offensive speech, it does answer one basic question: whether the goal of maintaining a minimum quality of public discourse justifies restrictions on offensive speech. Before accepting too readily Justice Harlan's negative answer to this question, however, it is well to consider opposing arguments.

II. THE DEBATE ON CIVILITY AND RESTRICTIONS ON SPEECH

In the abstract, the balance between the values of free speech and public civility is struck all too easily: free speech must prevail. When confronted with speech that truly offends us, however, we begin to feel the need for a less facile analysis. Cohen's speech is probably not sufficiently offensive to challenge our abstract views on civility and free speech. His underlying message was well within the political mainstream. In retrospect, that message today probably arouses the sympathy even of many people whose political views differed at the time. Moreover, Cohen's language has become considerably more acceptable in what used to be called "polite society."

A much tougher test is posed by the facts of *Village of Skokie v. National Socialist Party*⁷³ and *Collin v. Smith*.⁷⁴ These cases arose from the same circumstances: an attempt by the American Nazi Party to conduct a march in the largely Jewish suburb of Skokie, Illinois. Several thousand survivors of the Third Reich, and many others whose relatives were murdered by the Nazis, live in Skokie. The American Nazis intended to march through town wearing Nazi uniforms and displaying the swastika on armbands and flags.⁷⁵ As the Seventh Circuit observed, we cannot

ignore the certainty that appellees [the Nazis] know full well that, in light of their views and the historical associations they would bring with them to Skokie, many people would find their demonstration extremely mentally and emotionally disturbing, or the suspicion that such a result may be relished by appellees.⁷⁶

Although there was reason to fear violence, local officials declined to stop the march on that basis. Instead, they commendably pledged to

sexually frank motion pictures." *Id.* at 316. The Court responded that the statute did not give notice that the place where a film was shown was relevant. Consequently, just as the need to maintain decorum near the courts could not be raised to uphold the *Cohen* conviction, neither could the desire to shield outdoor displays be used to support the conviction in *Rabe*. See *id.*

73. 69 Ill. 2d 605, 373 N.E.2d 21 (1978).

74. 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916 (1978).

75. For a full statement of the facts, see the *Village of Skokie* opinion, 69 Ill. 2d at 609-11, 373 N.E.2d at 21-23. Further background on the litigation can be found in Goldberger, *Skokie: The First Amendment Under Attack by its Friends*, 29 MERCER L. REV. 761 (1978).

76. *Collin v. Smith*, 578 F.2d at 1200.

make every effort to protect the Nazis if the march were held.⁷⁷ Moreover, there was no captive audience problem. Since the Nazi march was well publicized, anyone who would be offended could stay away.⁷⁸ The only remaining basis for cancelling the march or banning the display of swastikas was that the mere existence of such activity was an intolerable affront to our sense of civilized decency.

Both the Illinois Supreme Court and the United States Court of Appeals for the Seventh Circuit were convinced that an affront to our sense of decency did not justify prohibiting the Nazis' march or their display of swastikas. The Seventh Circuit conceded that the Nazis' beliefs are repugnant to our "core values" and to "much of what we cherish in civilization."⁷⁹ Nevertheless, under the first amendment, "there is no such thing as a false idea";⁸⁰ even the Nazis are entitled to compete in the marketplace of ideas. The Illinois Supreme Court, while admitting that the sight of swastikas is "abhorrent to the Jewish citizens of Skokie"⁸¹ and that the memories evoked are "offensive to the principles of a free nation,"⁸² concluded with some reluctance that "it is entirely clear that this factor does not justify enjoining defendants' speech."⁸³ Both courts, incidentally, cited *Cohen* extensively.⁸⁴

It is a tribute to both courts that they ruled as they did despite obvious misgivings about the effects of their decisions. The Skokie cases ought to provoke misgivings. We ought not lightly decide to subject survivors of concentration camps to the nightmare of storm troopers marching through the streets. As a society, must we tolerate speech that so grievously offends the most basic values of our civilization?

Several years before Skokie, Professor Alexander Bickel presented a forceful argument that we should not tolerate this kind of speech.⁸⁵ At some risk of oversimplification, his basic argument against tolerance may be summarized as follows: the necessary premise of the first amendment is that speech has important consequences. If we believed that "words don't matter, that they make nothing happen and are too

77. *Id.* at 1203 n.10.

78. In any case, the march was to be held at the city hall on a Sunday afternoon, when few people would normally be present. *Id.* at 1207.

79. *Id.* at 1200.

80. *Id.* at 1203 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974)).

81. *Village of Skokie v. National Socialist Party*, 69 Ill. 2d at 615, 373 N.E.2d at 24.

82. *Id.*

83. *Id.*

84. The *Collin* opinion cites *Cohen* six times. 578 F.2d at 1201, 1202 (twice), 1204, 1206, 1207 n.18. The *Village of Skokie* opinion quotes four paragraphs of the *Cohen* opinion at one point, 69 Ill. 2d at 613-15, 373 N.E.2d at 23-24, later quotes another paragraph, *id.* at 615-16, 373 N.E.2d at 24-25, and then cites *Cohen* again in its concluding paragraph, *id.* at 619, 373 N.E.2d at 26.

85. MORALITY OF CONSENT 70-71.

trivial to bother with,"⁸⁶ then little reason would exist to refrain from regulating speech that annoys the majority. Yet, if speech does matter, speech like that of the Nazis must have the capacity for enormous harm. Bickel then addressed and rejected the arguments made by Justices Brandeis and Holmes for tolerating potentially harmful speech. Brandeis, with his usual faith in human nature, argued that further discussion "affords ordinarily adequate protection against the dissemination of noxious doctrine"⁸⁷ In other words, bad ideas will not survive exposure to the marketplace of ideas. Holmes, with *his* usual toughmindedness, purported not to care: "If in the long run [these] beliefs . . . are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."⁸⁸ Bickel rejected Brandeis' optimism. In Bickel's view, to assume that further discussion will necessarily lead to the rejection of false ideas was to ignore the lesson of history that "[d]isastrously, unacceptably noxious doctrine can prevail."⁸⁹ Nor did Bickel accept Holmes' purported indifference to the final product of the marketplace. Bickel's belief in the marketplace of ideas was not so strong that he was willing to accept the idea of genocide if enough people came to believe in it after full discussion. In his view, ideas such as genocide are not entitled to a fair chance to gain majority support.⁹⁰ In short, Bickel was not willing to ignore the risk that truly horrible ideas may triumph in the marketplace.

Bickel saw another harm in tolerating unacceptable speech: he found in expressions such as "fuck the draft" a kind of verbal assault on the audience. He believed also that abusive language creates a moral climate in which antisocial conduct becomes more likely.⁹¹ As in the case of obscenity, he contended that "what is commonly read and seen and heard and done intrudes upon us all, wanted or not, for it constitutes our environment."⁹²

To imply that Bickel's appeal was a simple plea for repression,

86. *Id.* 71.

87. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

88. *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

89. MORALITY OF CONSENT 72. Professor Kurland apparently shares this view. See Goldberger, *supra* note 75, at 770 (quoting a speech by Kurland).

90. MORALITY OF CONSENT 72, 76-77. In a more recent article, Dean Wellington supported Bickel's view: "Most of us do believe that the book is closed on some issues. Genocide is an example." Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105, 1132 (1979).

91. MORALITY OF CONSENT 72-73. "Where nothing is unspeakable, nothing is undoable." *Id.*

92. *Id.* 74. For the Supreme Court's response to this argument in the obscenity area, see *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 59 (1973). See note 17 *supra*.

however, would be to misrepresent his views. As always, tension and ambiguity characterized his thoughts. He was keenly aware of the risks created by even the most limited grant of the power of censorship. As a consequence, he sought a workable accommodation rather than a clear resolution of conflicting values. Although his ultimate conclusions were not entirely clear, he seemed inclined toward the following position.⁹³ First, he believed that we need to "resist the assertion of absolute claims."⁹⁴ In particular, we should not acknowledge a positive right to engage in offensive speech, for to do so is to legitimize it.⁹⁵ Second, we should control the risks created by restrictive laws through devices like the vagueness and overbreadth doctrines.⁹⁶ Third, the very existence of restrictive laws, and "occasional but steady enforcement in aggravated cases," serve the important purpose of providing visible support for our basic social values.⁹⁷ In sum, Bickel believed that in regulating this area, the law "walks a tightrope, and runs high risks,"⁹⁸ but that the effort is worth it, "[f]or the stakes are high."⁹⁹

A thoughtful article by Professor Hadley Arkes develops a similar argument in the specific context of racial defamation.¹⁰⁰ Echoing arguments by Justice Frankfurter¹⁰¹ and David Riesman,¹⁰² Arkes contends

93. I am extrapolating in part from Bickel's conclusions on obscenity, which he viewed as presenting essentially the same issue. Perhaps some of the lack of clarity was due to the evolving nature of his analysis at the time of his death.

94. MORALITY OF CONSENT 88.

95. *Id.* 73.

96. *Id.* 78-79. See also *id.* 87-88.

97. *Id.* 75.

98. *Id.*

99. *Id.* 75-76.

100. Arkes.

101. See *Beauharnais v. Illinois*, 343 U.S. 250 (1952). The present status of *Beauharnais* is unclear. The opinion has been harshly criticized, see, e.g., H. KALVEN, *THE NEGRO AND THE FIRST AMENDMENT* 1-64 (1965), and some lower courts doubt that it remains good law. See, e.g., *Collin v. Smith*, 578 F.2d 1197, 1205 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978); *Tollett v. United States*, 485 F.2d 1087, 1094 n.14 (8th Cir. 1973); *Anti-Defamation League of B'nai B'rith v. FCC*, 403 F.2d 169, 174 n.5 (D.C. Cir. 1968) (Wright, J., concurring), *cert. denied*, 394 U.S. 930 (1969). On the other hand, *Beauharnais* was cited with apparent approval in *Paris Adult Theatre*. See note 17 *supra*. The Supreme Court's denial of certiorari in *Collin v. Smith*, 439 U.S. 916 (1978), leaves the status of *Beauharnais* highly uncertain.

102. Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727 (1942). Riesman's conclusion was as follows:

In the more or less democratic lands, however, the threat of fascism and the chief dangers to freedom of discussion do not spring from the "state", but from "private" fascist groups in the community. These groups try to repress criticism of themselves, sometimes with the help of government, but more often and more subtly by "private" pressure and coercion. This pressure often takes the form of defamation against opposing weaker groups like "labor", which further weakens these groups in the eyes of the community as a whole—and even in their own eyes. Or the defamation aims to shift to relatively powerless scapegoats—Negroes, Jews, Mexicans—the attacks which might otherwise be made against the prevailing system. Usually, both strategies are combined. In this state

that defamation creates racial stereotypes that injure minority groups.¹⁰³ Like Bickel, he believes that some forms of speech constitute assaults as serious as physical assaults. One example he gives is an intimidating (but nonviolent) crowd surrounding the home of the first blacks to move into a white neighborhood.¹⁰⁴ In his view, governments are morally obligated to protect their citizens from such conduct. "No government that would call itself a decent government would fail to intervene in these cases"¹⁰⁵

Having considered the opposing views, we return to Justice Harlan. How well do his arguments stand up to Bickel and Arkes in the context of the Skokie cases? Harlan makes, in essence, two arguments for tolerance. The first is that banning offensive methods of expression is undesirable in itself. When symbols such as the swastika or four-letter words are banned, the speaker's ability to express his emotions and even his ideas is undesirably limited.¹⁰⁶ Further, banning such speech is inappropriate because the decision to regulate must be based on subjective judgment; "one man's vulgarity is another's lyric."¹⁰⁷ Second, even if offensive speech is not to be protected for its own sake, it must be protected as a necessary side effect of our basic decision to leave control of discourse in the hands of the people rather than the government.¹⁰⁸ In view of the difficulty of line drawing, we

of affairs, it is no longer tenable to continue a negative policy of protection *from* the state; such a policy, in concrete situations, plays directly into the hands of the groups whom supporters of democracy need most to fear.

Id. at 779-80. Professor Kalven referred to this as a "brilliant but erroneous prediction about the coming problem of a Fascist exploitation of the American Law of defamation." H. KALVEN, *supra* note 101, at 233 n.304. On the other hand, the drafters of the Model Penal Code believed that group libel can indeed be "an important instrument in the subversion of democracy." MODEL PENAL CODE § 250.7, Comment 2 (Tent. Draft No. 13, 1961). Note that the Chief Reporter of the Code was Herbert Wechsler.

103. Arkes 292.

104. *Id.* 309. For a similar expression of the verbal assault idea, see *Rosenfeld v. New Jersey*, 408 U.S. 901, 909 (1972) (Powell, J., dissenting).

105. Arkes 310. See also *id.* 311. It has been argued that Alexander Meiklejohn would have taken the same position in connection with the Skokie cases. Jones, *Alexander Meiklejohn on Skokie*, 35 GUILD PRAC. 84, 90-91 (1978). This view finds some support in Meiklejohn's comments on civility in public discourse:

And, if the interests of a self-governing society are to be served, vituperation which fixes attention on the defects of an opponent's character or intelligence and thereby distracts attention from the question of policy under discussion may be forbidden as a deadly enemy of peaceable assembly. Anyone who persists in it should be expelled from the meeting, and, if need be, the police should give help in getting it done.

Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 260.

106. *Cohen v. California*, 403 U.S. at 26.

107. *Id.* at 25.

108. To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the

cannot afford to open the door to censorship.

As applied to the Nazi march in Skokie, Harlan's first line of argument seems misplaced. While one man's vulgarity may be another man's lyricism, this kind of relativism is misguided when applied to the swastika. Rejecting the swastika is not on the same level of subjective taste as disliking garlic, if one has the slightest belief in the existence of moral standards. Perhaps banning the swastika limits expression of an idea. Bickel is surely right, however, that there is no affirmative societal interest in encouraging the uninhibited propagation of that idea. He is surely also right that genocide is not an issue on which we are prepared to abide by the results of a referendum. While the first amendment may give some protection to the expression of emotion, a person's desire to express vicious racial prejudices deserves no solicitude on our part. If this speech is to be protected, in short, the reason cannot be our concern that the Nazis might lose the opportunity to impart their message and convert new disciples.

Justice Harlan is on stronger ground in arguing that this speech, although worthless, must be tolerated because of the risks created by suppression. An attempt to purge public discourse of everything offensive and obnoxious undoubtedly would drastically impair the "robust and uninhibited" public debate we value.¹⁰⁹ There is also force in Harlan's argument that it is risky to make any exceptions on this point, lest there be no principled stopping place. Finally, he is, one hopes, justified in his faith that our society is strong enough to shrug off the side effects of allowing even the most debased messages their place in the market.

Perhaps Harlan's argument is all the justification for tolerance we should require. Yet somehow it does not fully satisfy. It is true that if we began to make exceptions for especially horrible speech we would have to draw the line somewhere. Still, much of the law consists of rough but workable line drawing. In this situation, the line could be drawn generously enough to allow speech with any conceivable merit. Justice Harlan may be right that the risk, albeit small, is just not worth taking, but this is a rather negative reason for protecting speech. It rejects the practicability, but not the desirability, of suppression. To permit speech we detest would be more palatable if we believed that doing so served some positive purpose, rather than simply the negative

process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense, not a sign of weakness but of strength.

Id. at 24-25.

109. See *Watts v. United States*, 394 U.S. 705, 708 (1969); *New York Times v. Sullivan*, 376 U.S. 254, 269-70 (1964); *Terminiello v. Chicago*, 337 U.S. 1, 4-5 (1949).

one of preventing the slightest leak in the first amendment dike.

Part of Professor Arkes' argument for suppressing truly offensive speech inadvertently suggests a positive reason for permitting it. In the course of discussing the "group libel" case of *Beauharnais v. Illinois*,¹¹⁰ Professor Arkes contrasts the vicious racial slurs involved in that case with Dr. Jensen's heavily qualified, scholarly writing on racial inferiority, writing Arkes clearly would not attempt to ban.¹¹¹ Would it be desirable as a matter of policy to limit expression of belief in racial inferiority to respectable scholarly discussions, assuming of course that all other speech was left entirely unaffected? There is at the outset something reassuring and attractive about the notion of limiting discussion of such ideas to the pleasant, civilized atmosphere we associate with academia, while ridding ourselves of crude, vehement expressions of racism. Yet on closer examination there is also something seriously wrong with this idea. Limiting expression of racist views to the calm, heavily qualified statements of scholars would give a completely misleading view of racist thinking. The truth is that racism in our society is far more often characterized by the ugliest of emotions. If many of its expressions are ugly, that is because the attitudes behind those expressions are ugly. The most obnoxious expressions of racism confront us with the offensiveness of the speakers and their ideas. We obtain an important truth from these speakers, although it is not a truth they mean to convey.

In the Skokie cases, if we take away the swastika, we take away the most vivid reminder of just how offensive the Nazis are. We need to be reminded of the consequences of their kinds of "ideas." We also need to be reminded that the Nazis are not just another group of harmless cranks: their views have a deadly potential that we must not be allowed to forget. In short, as in the case of racist invective, to reduce the ugliness of the Nazis' speech would only conceal the real ugliness, the ugliness of their ideas. That truth is too important to suppress merely

110. 343 U.S. 250 (1950). *Beauharnais* is discussed in notes 17 & 101 *supra*.

111. Because of the pivotal importance of this passage, full quotation seems appropriate:

The comparison, however, is not fully satisfying. There are important differences that are not to be discounted in the way the material is treated in the hands of a scholar and the way it is used by a *Beauharnais*. Scholars may vary widely in their degree of scholarly care, but they are almost universally cautious about qualifying their remarks, and if for no better motive than to guard themselves against obvious criticism, they can usually be depended on to say something about the limits of generality in the analyses they are offering. With the material involved in *Beauharnais*, a scholar would be likely to have warned that the data he was reporting about blacks described the characteristics of an aggregate; that it was hazardous to draw inferences about individuals from the statistical profile of a population; and that there was of course some overlap among populations, so that there were classes of whites who had higher crime rates than blacks as a group, and many blacks who had never been implicated in a crime.

Arkes 300.

to maintain our mental equanimity.

What of *Cohen v. California*? For the militarist, perhaps *Cohen* stands on all fours with the Skokie cases. To allow Cohen to use offensive language reinforces the offensiveness of his views. It also reveals the link between those views and rebellion against other American norms. For the rest of us, Cohen's message was within the bounds of the legitimately thinkable, and his use of strong language accurately reflected his views. After all, few things are more offensive than an unjust war.¹¹²

In short, offensiveness is often an important part of the speaker's message. Use of offensive language reveals the existence of something offensive and ugly, whether in the situation described by the speaker or in the speaker's mind itself. In either event, the language reveals an important though unpleasant truth about the world. Suppressing this language violates a cardinal principle of a free society, that truths are better confronted than repressed. As long as we live in an ugly world, ugly speech must have its forum.¹¹³ We cannot expect to have, nor should we require, true civility in discourse until we achieve civility in society.

112. In *Cohen*, there may be an additional reason for permitting the speech. In a democracy, given the government's lack of any power to coerce respect from its citizens, see *Street v. New York*, 394 U.S. 576, 593 (1969), there may be a special privilege to use abusive, offensive language with respect to the government. See generally *Coulton v. Kentucky*, 407 U.S. 104, 122 (1972) (Douglas, J., dissenting). In this respect, offensive speech like that used in *Cohen* is like seditious libel, but is the converse of group libel. As Riesman has noted, in many ways, group libel is the reverse image of seditious libel. What would be seditious libel if directed against those in power is group libel when directed against powerless minorities. See Riesman, *supra* note 102, at 734-39, 779-80. See also H. KALVEN, *supra* note 101, at 1-64 (linking group libel and seditious libel).

113. This phrasing is chosen deliberately. Speech of this kind must have a forum in which it can be presented. It does not necessarily follow that every forum should be open to such speech, if there are reasons for exclusion such as captive audience problems. Thus, this analysis does not require that courts void context-related bans such as that in *Pacifica*.

There is a further reason why this analysis does not apply to *Pacifica*. In *Pacifica*, to the extent that the offensive speech was "about" anything, it was about the undesirability of the Federal Communications Commission ban of indecent speech. *Pacifica Foundation v. FCC*, 556 F.2d 9, 33 (D.C. Cir. 1977), *rev'd*, 438 U.S. 726 (1978). On the theory explained in the text, it might be argued that this speech served the useful function of confronting the audience with the potential offensiveness of the speaker's point of view concerning the right to use indecent language. But if we assume that the broadcast was protected, the audience cannot do anything about the issue anyway. If people are repelled by the Nazis, they can oppose their program. If people are repelled by the monologue in *Pacifica*, there is nothing for them to oppose but re-broadcasting the monologue itself. Because of this element of circularity, the analysis presented in the text is inapplicable to the situation presented in *Pacifica*. The necessary premise is that the offensiveness of the speech reveal something about some other issue, not simply about the speech itself as in *Pacifica*.

III. CONCLUSION

Justice Harlan narrowed the issues in *Cohen* to a single question: whether the state has the power to upgrade public discourse by banning offensive speech. He concluded that this power is lacking, a conclusion easy enough to accept in *Cohen*, but more difficult in cases like *Village of Skokie* and *Collin*, where the speech is more offensive and more clearly worthless. In this context, Professor Bickel's arguments become harder to refute. Yet there is much to be said for Harlan's counterargument that the benefits to be gained outweigh the risks created by even the most limited censorship.

The last portion of this Essay has attempted to bolster Harlan's argument with an additional rationale, that the most highly offensive forms of expression communicate an important truth about the offensiveness of the speaker's message. They have a place in the marketplace of ideas because they help the marketplace reject false, ugly ideas by revealing them for what they are. Acceptance of this rationale depends, of course, on a basic confidence in the ability of the people to understand and to act upon what they read and hear. It is this confidence in the American people that Justice Harlan so eloquently expressed in his *Cohen* opinion.

This Essay has stressed throughout the limits on the holding in *Cohen*. While *Cohen* says that offensive speech may not be banned outright, it says little about when such speech can be banned in particular contexts. It offers only limited guidance for determining to what extent government can protect people from involuntary exposure to offensive forms of expression. It does not even assure us that Paul Cohen was entitled to wear his jacket in the courthouse corridor. It does, however, establish one very important principle: the government is not entitled to assume the role of moral guardian and to set the standards of acceptable discourse.¹¹⁴ Establishment of that principle is an enduring contribution to our legal heritage.

114. Another way of stating the *Cohen* holding is that the government is not entitled to jail people as part of an educational program to improve their vocabularies. Even without the first amendment, the Court might find a way to void such perverse legislation. See generally *Carey v. Population Control Servs.*, 431 U.S. 678, 713-16 (1977) (Stevens, J., concurring in part and concurring in the judgment). See also *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975) (citing *Cohen* for the proposition that public intolerance of eccentric behavior cannot justify incarceration).

