

The Burger Court Opinion Writing Database

Cohen v. California

403 U.S. 15 (1971)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University





CHAMBERS OF
THE CHIEF JUSTICE

Supreme Court of the United States
Washington, D. C. 20543

May 25, 1971

To: Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

No. 299 - Cohen v. California

From: The Chief Justice

Circulated: MAY 25 1971

Recirculated: _____

MEMORANDUM TO THE CONFERENCE:

I will probably add the following, which is the most restrained utterance I can manage.

Regards,



MR. CHIEF JUSTICE BURGER, dissenting.

I, too, join in a word of protest that this Court's limited resources of time should be devoted to such a case as this. It is a measure of a lack of a sense of priorities and with all deference I submit that Mr. Justice Harlan's "first blush" was the correct reaction. It is nothing short of absurd nonsense that juvenile delinquents and their emotionally unstable outbursts should command the attention of this Court.

The appeal should be dismissed for failure to present a substantial federal question.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 3, 1971

Re: No. 299 - Cohen v. California

Dear Harry:

Please join me in your dissent. I have
decided to withdraw mine.

Regards,

WB

Mr. Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HUGO L. BLACK

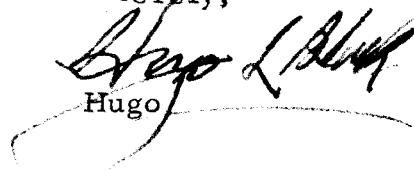
June 3, 1971

Dear Harry,

Re: No. 299- Cohen v. California

The amendment you have made to your
dissent in this case suits me precisely. You
hit the jugular and then stop! Please have it
printed and mark me as agreeing with you.

Sincerely,


Hugo

Mr. Justice Blackmun

April 27, 1971

Dear John:

In No. 299 - Cohen v.
California, please join me in
your opinion.

W. O. D.

Mr. Justice Harlan

(W)
A... 11/7

Ja

To: The Chief Justice
 Mr. Justice Black
 Mr. Justice Douglas✓
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Harlan, J.

Circulated **APR 26 1971**

No. 299.—OCTOBER TERM, 1970

Recirculated:

Paul Robert Cohen,
 Appellant. } On Appeal From the Court of
 v. } Appeal of California, Second Ap-
 State of California. } pellate District.

[May —, 1971]

MR. JUSTICE HARLAN delivered the opinion of the Court.

This case may seem at first blush too inconsequential to find its way into our books, but the issue it presents is of no small constitutional significance.

Appellant Paul Robert Cohen was convicted in the Los Angeles Municipal Court of violating that part of California Penal Code § 415 which prohibits “maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person, . . . by . . . offensive conduct . . .”¹ He was given 30 days’ imprisonment. The

¹ The statute provides in full:

“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 for 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.”

141

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas✓
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

Stylistic changes only
pp. 3, 4, 5

4th DRAFT

From: Harlan, J.

SUPREME COURT OF THE UNITED STATES

No. 299.—OCTOBER TERM, 1970 Recirculated

MAY 11 1971

Paul Robert Cohen,
Appellant, } On Appeal From the Court of
v. } Appeal of California, Second Ap-
State of California. } pellate District.

[May —, 1971]

MR. JUSTICE HARLAN delivered the opinion of the Court.

This case may seem at first blush too inconsequential to find its way into our books, but the issue it presents is of no small constitutional significance.

Appellant Paul Robert Cohen was convicted in the Los Angeles Municipal Court of violating that part of California Penal Code § 415 which prohibits “maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person, . . . by . . . offensive conduct . . .”¹ He was given 30 days’ imprisonment. The

¹ The statute provides in full:

“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 for 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.”

6,7,10

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

5th DRAFT

From: Harlan, J.

SUPREME COURT OF THE UNITED STATES

Circulated:

Recirculate

MAY 24 1971

No. 299.—OCTOBER TERM, 1970

Paul Robert Cohen,
Appellant,
v.
State of California.) } On Appeal From the Court of
Appeal of California, Second Ap-
pellate District.

[June —, 1971]

MR. JUSTICE HARLAN delivered the opinion of the Court.

This case may seem at first blush too inconsequential to find its way into our books, but the issue it presents is of no small constitutional significance.

Appellant Paul Robert Cohen was convicted in the Los Angeles Municipal Court of violating that part of California Penal Code § 415 which prohibits “maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person, . . . by . . . offensive conduct . . .”¹ He was given 30 days’ imprisonment. The

¹ The statute provides in full:

“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 for 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.”

SP
MSA
R. Harlan, J.
To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

6th DRAFT

From: Harlan, J.

SUPREME COURT OF THE UNITED STATES

No. 299.—OCTOBER TERM, 1970

Recirculated

JUN 11 1971

Paul Robert Cohen,
Appellant, } On Appeal From the Court of
v. } Appeal of California, Second Ap-
State of California. } pellate District.

[June —, 1971]

MR. JUSTICE HARLAN delivered the opinion of the Court.

This case may seem at first blush too inconsequential to find its way into our books, but the issue it presents is of no small constitutional significance.

Appellant Paul Robert Cohen was convicted in the Los Angeles Municipal Court of violating that part of California Penal Code § 415 which prohibits "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person, . . . by . . . offensive conduct . . .".¹ He was given 30 days' imprisonment. The

¹ The statute provides in full:

"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 for 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."

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 27, 1971

RE: No. 299 - Cohen v. California

Dear John:

I agree.

Sincerely,

Bill
W. J. B. Jr.

Mr. Justice Harlan

cc: The Conference

BB
44
First 2
Circulars
in This

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

April 27, 1971

No. 299 - Cohen v. California

Dear John,

I am glad to join your opinion for
the Court in this case.

Sincerely yours,

Q.S.

Mr. Justice Harlan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 2, 1971

Re: No. 299 - Cohen v. California

Dear Harry:

Please add at the foot of
your dissenting opinion the
following:

Mr. Justice White
concurs in paragraph three
of Mr. Justice Blackmun's
dissenting opinion.

Sincerely,

Byron
B.R.W.

Mr. Justice Blackmun

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 27, 1971

Re: No. 299 - Cohen v. California

Dear John:

Please join me.

Sincerely,


T.M.

Mr. Justice Harlan

cc: The Conference

Mr. Justice Black
Mr. Justice Douglas ✓
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall

1st DRAFT

SUPREME COURT OF THE UNITED STATES

From: Blackmun, J.

Circulated: 5/27/71

No. 299.—OCTOBER TERM, 1970

Recirculated: _____

Paul Robert Cohen,
Appellant, } On Appeal From the Court of
v. } Appeal of California, Second Ap-
State of California. } pellate District.

[June —, 1971]

MR. JUSTICE BLACKMUN.

I dissent, and I do so for three reasons:

1. Cohen's absurd and immature antic, in my view, was mainly conduct and little speech. See *Street v. New York*, 394 U. S. 576 (1969); *Cox v. Louisiana*, 379 U. S. 536, 555 (1963); *Giboney v. Empire Storage Co.*, 336 U. S. 490, 502 (1949). The California Court of Appeal appears so to have described it, 1 Cal. App. 3d, at 100, and I cannot characterize it otherwise. As a consequence, this Court's agonizing over First Amendment values seems misplaced and unnecessary.

2. The importance of the litigation escapes me. I do not understand the Court's eagerness to take a case such as this. After all, it cannot decide every case or right every imagined wrong. With the burdens under which this Court labors, Cohen's case should be dismissed for want of a substantial federal question. I suspect that more deserving litigants, whose cases have been refused, will not understand, and may resent, our taking this one.

3. I am not at all certain that the California Court of Appeal's construction of § 415 is now the authoritative California construction. The Court of Appeal filed its opinion on October 22, 1969. The Supreme Court of California declined review by a four-to-three vote on December 17. See 1 Cal. App. 3d, at 104. A month later, on January 27, 1970, the State Supreme Court in

(w1)

HP
pp. 1, 2

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Blackmun, J.

No. 299.—OCTOBER TERM, 1970

Circulated:

Recirculated: 6/2/71

Paul Robert Cohen,
Appellant,
v.
State of California.

On Appeal From the Court of
Appeal of California, Second Ap-
pellate District.

[June —, 1971]

MR. JUSTICE BLACKMUN.

I dissent, and I do so for three reasons:

1. Cohen's absurd and immature antic, in my view, was mainly conduct and little speech. See *Street v. New York*, 394 U. S. 576 (1969); *Cox v. Louisiana*, 379 U. S. 536, 555 (1963); *Giboney v. Empire Storage Co.*, 336 U. S. 490, 502 (1949). The California Court of Appeal appears so to have described it, 1 Cal. App. 3d, at 100, and I cannot characterize it otherwise. See also *Chaplinsky v. New Hampshire*, 315 U. S. 568 (1942), an opinion by Mr. Justice Murphy for a unanimous Court; the Justice was not one known for downgrading First Amendment values. As a consequence, this Court's agonizing over First Amendment values seems misplaced and unnecessary.

2. The importance of the litigation escapes me. I do not understand the Court's eagerness to take a case such as this. After all, we cannot decide every case or right every imagined wrong. With the burdens under which this Court labors, Cohen's case should be dismissed for want of a substantial federal question. I suspect that more deserving litigants, whose cases have been refused, will not understand, and may resent, our taking this one.

3. I am not at all certain that the California Court of Appeal's construction of § 415 is now the authoritative California construction. The Court of Appeal filed its

June 3, 1971

Re: No. 299 - Cohen v. California

Dear Hugo:

Herewith is a proposal for modification of my little dissent. I shall not send this down to the Printer until I have heard from you.

Sincerely,

HAB

Mr. Justice Black

391
pp. 1,2
To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall ✓

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Blackmun, J.

Circulated:

No. 299.—OCTOBER TERM, 1970

Recirculated: 6/4/71

Paul Robert Cohen,
Appellant,
v.
State of California. } On Appeal From the Court of
Appeal of California, Second Ap-
pellate District.

[June —, 1971] *two*

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUDGE and MR. JUSTICE BLACK join.

I dissent, and I do so for three reasons:

1. Cohen's absurd and immature antic, in my view, was mainly conduct and little speech. See *Street v. New York*, 394 U. S. 576 (1969); *Cox v. Louisiana*, 379 U. S. 536, 555 (1963); *Giboney v. Empire Storage Co.*, 336 U. S. 490, 502 (1949). The California Court of Appeal appears so to have described it, 1 Cal. App. 3d, at 100, and I cannot characterize it otherwise. Further, the case appears to me to be well within the sphere of *Chaplinsky v. New Hampshire*, 315 U. S. 568 (1942), where Mr. Justice Murphy, a known champion of First Amendment freedoms, wrote for a unanimous bench. As a consequence, this Court's agonizing over First Amendment values seems misplaced and unnecessary.

2. I am not at all certain that the California Court of Appeal's construction of § 415 is now the authoritative California construction. The Court of Appeal filed its opinion on October 22, 1969. The Supreme Court of California declined review by a four-to-three vote on December 17. See 1 Cal. App. 3d, at 104. A month later, on January 27, 1970, the State Supreme Court in another case construed § 415, evidently for the first time. *In re Bushman*, 1 Cal. 3d 767, 463 P. 2d 727. Chief Justice Traynor, who was among the dissenters to his

deletion