

# 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

From: The Chief Justice

Circulated: MAY 25 1971

Recirculated: \_\_\_\_\_

No. 299 - Cohen v. California

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.

320  
LJM  
R  
CHAMBERS OF  
THE CHIEF JUSTICE

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

June 3, 1971

Re: No. 299 - Cohen v. California

Dear Harry:

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

Regards,

WRB

Mr. Justice Blackmun

cc: The Conference

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

CHAMBERS OF  
JUSTICE HUGO L. BLACK

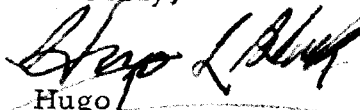
June 3, 1971

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)  
10/87

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 . . . ." <sup>1</sup> He was given 30 days' imprisonment. The

<sup>1</sup> 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."

END

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,	} On Appeal From the Court of
Appellant,	
v.	
State of California.	Appeal of California, Second Ap- 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 . . . ." <sup>1</sup> He was given 30 days' imprisonment. The

<sup>1</sup> 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."

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: \_\_\_\_\_

Recirculated MAY 24 1971

No. 299.—OCTOBER TERM, 1970

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 . . . ." <sup>1</sup> He was given 30 days' imprisonment. The

<sup>1</sup> 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



REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION

OFFICE OF THE CLERK OF THE SUPREME COURT

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

Filed: \_\_\_\_\_  
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 . . . ." <sup>1</sup> He was given 30 days' imprisonment. The

<sup>1</sup> 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."

BP  
✓  
R

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,

*Bail*

W. J. B. Jr.

Mr. Justice Harlan

cc: The Conference

First 2  
Circulations  
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,

P.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  
concurrs in paragraph three  
of Mr. Justice Blackmun's  
dissenting opinion.

Sincerely,

  
B.R.W.

Mr. Justice Blackmun

Copies to Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION

SECTION OF RECORDS

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

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION

SECTION OF ADVISORY

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

WD

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 *Chap- linsky 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

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION

OFFICE OF ADVANCEMENT

443  
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



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 ✓

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9/2  
pp. 1, 2  
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]

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE 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

two

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U. S. DEPARTMENT OF JUSTICE