"[T]he statute must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression."

GOODING v. WILSON

405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972).

Johnny C. Wilson, while involved in a protest against the war in Vietnam, had made such remarks to a police office as: "White son of a bitch, I'll kill you," and "You son of a bitch, I'll choke you to death." He was convicted under § 266303 of the Georgia Code, which made it a crime "without provocation, [to] use to or of another, and in his presence ... opprobrious words or abusive language, tending to cause a breach of the peace ...." The state supreme court sustained the conviction and Wilson brought habeas corpus proceedings in a federal district court. The district judge held the statute unconstitutionally vague, the court of appeals affirmed, and Georgia appealed to the Supreme Court.

Mr. Justice **BRENNAN** delivered the opinion of the Court ....

Section 266303 punishes only spoken words. It can therefore withstand appellee's attack upon its facial constitutionality only if, as authoritatively construed by the Georgia courts, it is not susceptible of application to speech, although vulgar or offensive, that is protected by the First and Fourteenth Amendments, Cohen v. California (1971); Terminiello v. Chicago (1949). Only the Georgia courts can supply the requisite construction, since of course "we lack jurisdiction authoritatively to construe state legislation." United States v. Thirty-seven Photographs (1971). It matters not that the words appellee used might have been constitutionally prohibited under a narrowly and precisely drawn statute. At least when statutes regulate or proscribe speech and when no readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution," Dombrowski v. Pfister (1965), the transcendent value to all society of constitutionally protected expression is deemed to justify allowing "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity," id.; see also Baggett v. Bullit (1964); Coates v. Cincinnati (1971) (White, J., dissenting); United States v. Raines (1960); NAACP v. Button (1963). This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression ....

The constitutional guarantees of freedom of speech forbid the States to punish the use of words or language not within "narrowly limited classes of speech." Chaplinsky v. New Hampshire (1942). Even as to such a class, however, because "the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn," Speiser v. Randall (1958), "[i]n every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom," Cantwell v. Connecticut (1940). In other words, the statute must be carefully drawn or be

authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression. "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." NAACP v. Button.

Appellant does not challenge these principles but contends that the Georgia statute is narrowly drawn to apply only to a constitutionally unprotected class of words– "fighting" words– "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky*.

[The Court then distinguished *Chaplinsky* on grounds that the New Hampshire supreme court had narrowly interpreted the statute applied there to punish only "fighting words."]

... Our decisions since *Chaplinsky* have continued to recognize state power constitutionally to punish "fighting" words under carefully drawn statutes not also susceptible of application to protected expression, *Cohen*; Bachellar v. Maryland (1970); see Street v. New York (1969). We reaffirm that proposition today.

Appellant argues that the Georgia appellate courts have by construction limited the proscription of § 26303 to "fighting" words, as the New Hampshire Supreme Court limited the New Hampshire statute. Neither the District Court nor the Court of Appeals so read the Georgia decisions. On the contrary, the District Court expressly stated, "Thus, in the decisions brought to this Court's attention, no meaningful attempt has been made to limit or properly define these terms." The District Judge and one member of the unanimous Court of Appeals panel were Georgia practitioners before they ascended the bench. Their views of Georgia law necessarily are persuasive with us. We have, however made our own examination of the Georgia cases, both those cited and others discovered in research. That examination brings us to the conclusion, in agreement with the courts below ....

[The Court then detailed earlier interpretations of the statute by Georgia's courts.]

We conclude that "[t]he separation of legitimate from illegitimate speech calls for more sensitive tools than [Georgia] has supplied." *Speiser*. The most recent decision of the Georgia Supreme Court, in rejecting appellee's attack on the constitutionality of § 266303, stated that the statute "conveys a definite meaning as to the conduct forbidden, measured by common understanding and practice." Because earlier appellate decisions applied § 266303 to utterances where there was no likelihood that the person addressed would make an immediate violent response, it is clear that the standard allowing juries to determine guilt "measured by common understanding and practice" does not limit the application of § 266303 to "fighting" words defined by *Chaplinsky*. Rather, that broad standard effectively "licenses the jury to create its own standard in each case." Herndon v. Lowry (1937). Accordingly, we agree with the conclusion of the District Court, "[t]he fault of the statute is that it leaves wide open the standard of responsibility, so that it is easily susceptible to improper application." ...

Affirmed.

Mr. Justice **POWELL** and Mr. Justice **REHNQUIST** took no part in the consideration or

decision of this case.

Mr. Chief Justice **BURGER,** dissenting.

I fully join in Mr. Justice Blackmun's dissent against the bizarre result reached by the Court. It is not merely odd, it is nothing less than remarkable that the court can find a state statute void on its face, not because of its language– which is the traditional test– but because of the way courts of that State have applied the statute in a few isolated cases, decided as long ago as 1905 and generally long before this Court's decision in *Chaplinsky*. Even if all of those cases had been decided yesterday, they do nothing to demonstrate that the narrow language of the Georgia statute has any significant potential for sweeping application to suppress or deter important protected speech ....

Mr. Justice **BLACKMUN,** with whom The Chief Justice [**BURGER**] joins, dissenting.

It seems strange, indeed, that in this day a man may say to a police officer, who is attempting to restore access to a public building, "White son of a bitch, I'll kill you" and "You son of a bitch, I'll choke you to death," and say to an accompanying officer, "You son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces," and yet constitutionally cannot be prosecuted and convicted under a state statute that makes it a misdemeanor to "use to or of another, and in his presence ... opprobrious words or abusive language, tending to cause a breach of the peace. ..." This, however, is precisely what the Court pronounces as the law today.

The Supreme Court of Georgia, when the conviction was appealed, unanimously held the other way. Surely any adult who can read– and I do not exclude this appellee-defendant from that category– should reasonably expect no other conclusion. The words of Georgia Code § 266303 are clear. They are also concise. They are not, in my view, overbroad or incapable of being understood. Except perhaps for the "big" word "opprobrious"– and no point is made of its bigness– any Georgia schoolboy would expect that this defendant's fighting and provocative words to the officers were covered by § 266303. Common sense permits no other conclusion. This is demonstrated by the fact that the appellee, and this Court, attack the statute, not as it applies to the appellee, but as it conceivably might apply to others who might utter other words.

The Court reaches its result by saying that the Georgia statute has been interpreted by the State's courts so as to be applicable in practice to otherwise constitutionally protected speech. It follows, says the Court, that the statute is overbroad and therefore is facially unconstitutional and to be struck down in its entirety ....

The Court would justify its conclusion by unearthing a 66-year-old decision, of the Supreme Court of Georgia, and two intermediate appellate court cases over 55 years old, broadly applying the statute in those less permissive days, and by additional reference to (a) a 1956 Georgia intermediate court decision, which, were it the first and only Georgia case, would surely not support today's decision, and (b) another intermediate appellate court decision, relating, not to § 266303, but to another statute.

This Court appears to have developed its overbreadth rationale in the years since these

early Georgia cases. The State's statute, therefore, is condemned because the State's courts have not had an opportunity to adjust to this Court's modern theories of overbreadth ....

I cannot join the Court in placing weight upon the fact that Judge Smith of the United States District Court had been a Georgia practitioner and that Judge Morgan of the Court of Appeals had also practiced in that State. After all, each of these Georgia federal judges is bound by this Court's self-imposed straitjacket of the overbreadth approach ....

For me, *Chaplinsky*, was good law when it was decided and deserves to remain as good law now. A unanimous Court, including among its members Chief Justice Stone and Justices Black, Reed, Douglas, and Murphy, obviously thought it was good law. But I feel that by decisions such as this one and, indeed, *Cohen*, the Court, despite its protestations to the contrary, is merely paying lip service to *Chaplinsky*. As the appellee states in a footnote to his brief, "Although there is no doubt that the state can punish 'fighting words' this appears to be about all that is left of the decision in *Chaplinsky*." If this is what the overbreadth doctrine means, and if this is what it produces, it urgently needs re-examination. The Court has painted itself into a corner from which it, and the States, can extricate themselves only with difficulty.

Editors' Notes

(1) As part of the restrictions of federalism, a long line of cases has held that national courts lack authority to interpret state statutes. They are to apply those statutes either according to their plain words or as interpreted by state judges. If the plain words are ambiguous and there is no state judicial interpretation of the statute, federal judges are supposed to apply the doctrine of "equitable abstention" and retain jurisdiction of the case while allowing the litigants to seek an authoritative interpretation from state tribunals. See, for example, Harrison v. NAACP (1959) and NAACP v. Button (1963; reprinted below, p. 723).

(2) The doctrine of "overbreadth" is a negative way of saying that a statute that affects communication of ideas must be narrowly phrased (or construed by the courts) so as to have a minimal effect on speech or writing as contrasted with deeds. In effect, "overbreadth" has become a judicial test for constitutionality. Judges, as C. Herman Pritchett has put it, look at the statute "on its face," not as it has been applied in a particular case. The Court has been willing to relax the usual rule of standing that one may assert only one's own rights. "The parties and the facts in the case become almost irrelevant. The statute itself is on trial." (Constitutional Civil Liberties [Englewood Cliffs, N.J.: Prentice-Hall, 1984], p. 32.) This process, Justice Black pointed out in Younger v. Harris (1971), is to some extent "fundamentally at odds with the function of federal courts in our constitutional plan. The power and duty of the judiciary to declare laws unconstitutional are in the final analysis derived from its responsibility for resolving concrete disputes brought before courts for decision ...." The Court's rationale for this relaxation is that freedom of communication is critically important and, because of the "chilling effect" of broadly sweeping statutes, litigants are unlikely to assert their First Amendment rights so that the statutes may be properly challenged. As one would expect from *Younger* and from the dissents in *Gooding*, the doctrine of overbreadth remains controversial among the justices as well as among commentators.

For discussion see Laurence H. Tribe, *American Constitutional Law* (Mineola, N.Y.: Foundation Press, 1978), pp. 710716; and Ernest H. Schopler, "Annotation: The Supreme Court's Views as to Overbreadth of Legislation in Connection with First Amendment Rights," 45 L.Ed.2d 725 (1976).

(3) **Query:** To what extent does the doctrine of overbreadth allow the Court to avoid difficult questions regarding the nature and reach of freedom of communication, and to what extent does it represent an effort to make concrete the implications of democratic theory for constitutional interpretation?

(4) For other cases relating to obscene language and the First Amendment, see Cohen v. California (1971; reprinted below, p. 564) and discussion in the Eds.' Notes to that ruling.