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Gooding v. Wilson: Where from Here

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III. CONCLUSION

The importance of *Eisenstadt* lies in its decision that "whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike."[39] By declaring that an individual may not be discriminated against because of his marital status with respect to the distribution and use of contraceptives, *Eisenstadt* is not just another decision following *Griswold.* Instead, *Eisenstadt* transcends its significance as a precedent for future tests of anti-abortion and anti-contraception legislation and presents a possible basis for litigation challenging classifications based on marital status.

Stephen S. Mims

Gooding v. Wilson: Where From Here?

Johnny C. Wilson was convicted in Georgia state court[1] under a statute prohibiting the use of "opprobrious words or abusive language tending to cause a breach of the peace."[2] The conviction was affirmed by the Supreme Court of Georgia.[3] Wilson filed a writ of habeas corpus in federal district court, challenging the constitutionality of the Georgia statute. Both the district court[4] and the court of appeals[5] held that the statute was unconstitutionally vague and overbroad. The Supreme Court of the United States noted probable jurisdiction.[6] *Held, affirmed*: A state statute which, by its terms or judicial application, prohibits the use of language not within the class of "fighting words" is unconstitutionally overbroad, and it cannot withstand attack, even by one whose speech would appear to fall within the category of "fighting words." *Gooding v. Wilson*, 405 U.S. 518 (1972).

I. JUDICIAL DEVELOPMENT OF FREEDOM OF SPEECH LIMITATIONS

The Chaplinsky Standard. Cases arising out of the first amendment guarantee of freedom of speech have a relatively recent origin. Convictions under the 1917 Espionage Act[7] initially brought before the Supreme Court the question

[39] 405 U.S. at 453.

[1] Wilson's arrest arose out of an incident involving a group of draft and war protesters attempting to block the entrance of inductees into the Army Twelfth Corps Headquarters Building. Having unsuccessfully requested the protesters to move, police officers proceeded forcibly to clear the entrance of the building. During the ensuing scuffle, Wilson, one of those blocking the doorway, said to one officer: "White son of a bitch, I'll kill you." and "You son of a bitch, I'll choke you to death." To another officer, Wilson said: "You son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces."

[2] GA. CODE ANN. § 26-6303 (1957) (now GA. CODE ANN. § 26-2610 (1972)). The statute provided in relevant part: "Any person who shall, without provocation, use to or of another . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor."

[3] Wilson v. State, 223 Ga. 531, 156 S.E.2d 446 (1967).

[4] Wilson v. Gooding, 303 F. Supp. 952 (N.D. Ga. 1969).

[5] Wilson v. Gooding, 431 F.2d 855 (5th Cir. 1970).

[6] Gooding v. Wilson, 403 U.S. 930 (1971).

[7] Espionage Act of June 15, 1917, ch. 30, § 3, 40 Stat. 217, 219.

whether the constitutional right of expression was absolute or subject to limitation. The Court held that freedom of speech was subject to certain restrictions. In *Schenck v. United States* Mr. Justice Holmes, writing for the Court, stated that first amendment protection did not extend to those words which "create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[8]

The landmark opinion in this particular area of freedom of speech[9] is *Chaplinsky v. New Hampshire*.[10] Chaplinsky had been arrested under a New Hampshire statute[11] which, upon its face, appeared to encompass protected as well as unprotected speech.[12] The Court stated, however, that the true meaning of the statute could be determined only by looking at the decisions of the New Hampshire courts construing it. The purpose of the statute was, according to prior decisions, to preserve the public peace. No words were forbidden except those which had a "direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed."[13] Such an interpretation, the Court said, gave sufficient notice of the language which would fall within the purview of the statute. The Court stated the constitutional requirement to be that an accused "need not . . . have been a prophet to understand what the statute condemned."[14] The class of speech not protected by the first amendment was held to be "fighting words—those words which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[15] The rationale was that such words have so little social value that their benefit is "clearly out-weighed by the social interest in order and morality."[16] Included in the "fighting words" category were both "classical fighting words" and those words or phrases in popular use[17] which were recognized as equally likely to cause a breach of the peace.[18] This view continued in later decisions. It became well established that the protection extended to all speech unless it was likely that the speech would provoke the addressee to a violent breach of the peace in retaliation against the speaker.

The Interpretation of the Courts of Georgia. The Georgia courts have con-

[8] 249 U.S. 47, 52 (1919).

[9] A distinction must be drawn between the area being dealt with in *Gooding v. Wilson* and the areas considered in certain other cases. The type of speech involved here, personal verbal assaults, can be clearly distinguished from "rostrum speech," slander, inciting to riot, and sedition, each of which has been the subject of cases involving the first amendment.

[10] 315 U.S. 568 (1942). Chaplinsky was arrested for creating a disturbance. While being taken to the police station, he called the arresting officer a "damned racketeer" and a "damned fascist."

[11] *Cf.* N.H. REV. STAT. ANN. § 570:2 (1955), the present statute.

[12] The statute provided, in relevant part: "No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation." 315 U.S. at 569.

[13] State v. McConnell, 70 N.H. 294, 47 A. 267 (1900). *See also* State v. Brown, 68 N.H. 200, 38 A. 731 (1895).

[14] 315 U.S. at 574 n.8.

[15] *Id.* at 572.

[16] *Id.*

[17] As the standards of permissiveness and the colloquialisms of a given period change and are gradually replaced by those of another, the language within the scope of "fighting words" also changes. *See, e.g.*, Winters v. New York, 333 U.S. 507 (1948).

[18] 315 U.S. at 573.

sidered the scope of section 23-6303 on five occasions. In three cases[19] Georgia courts held that whether given language is "opprobrious and abusive" was always a question of fact, not of law.[20] The first Georgia interpretation of the language "tending to cause a breach of the peace" came in *Elmore v. State*,[21] decided in 1914. The court held that the statute could be applicable to language even if no violent reaction were possible or likely.[22] After development of the *Chaplinsky* test, however, the Georgia courts revised their interpretation in an attempt to bring the standard into line with the constitutional requirements. In *Samuels v. State*, decided after *Chaplinsky*, "breach of the peace" was defined as:

> [A] disturbance of the public tranquility by any act or conduct inciting to violence or tending to provoke or excite others to break the peace; a disturbance of public order by an act of violence, or by any act likely to produce violence, . . . [or] acts such as tend to excite violent resentment or to provoke or excite others to break the peace. *Actual or threatened violence is an essential element of a breach of the peace.*[23]

II. APPLICATION OF THE STANDARD IN GOODING V. WILSON

The wording of the Georgia statute under attack in *Gooding v. Wilson* was very similar to that of the New Hampshire statute dealt with in *Chaplinsky*.[24] Wilson's contention that the statute infringed upon constitutionally protected speech was examined in a manner similar to that used in *Chaplinsky*.[25] The majority of the Court emphasized that the "constitutional guarantees of freedom of speech forbid the States from punishing the use of words or language not within narrowly limited classes of speech."[26]

In ascertaining whether the statute was constitutionally offensive, the Court began with the premise that it must look only to the statute itself and the state decisions construing it. The Court stated that it would not construe state legislation.[27] Therefore, the Court was forced to look exclusively to the construction of the statute made by the Georgia courts.[28] Looking to the applicable

[19] Lyons v. State, 94 Ga. App. 570, 95 S.E.2d 478 (1956); Jackson v. State, 14 Ga. App. 19, 80 S.E. 20 (1913); Fish v. State, 124 Ga. 416, 52 S.E. 737 (1905).

[20] 52 S.E. at 737.

[21] 15 Ga. App. 461, 83 S.E. 799 (1914).

[22] 83 S.E. at 800.

[23] 103 Ga. App. 66, 118 S.E.2d 231, 232 (1961). The Supreme Court majority ignored this limiting construction in *Samuels* and referred to a broader definition of "breach of the peace" given earlier in the *Samuels* opinion. 405 U.S. at 527.

[24] *Compare* the Georgia statute, *supra* note 2, *with* the New Hampshire statute, *supra* note 12.

[25] The Court said "[The statute] 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 and offensive, that is protected by the first and fourteenth amendments." 405 U.S. at 520.

[26] *Id.* at 521-22.

[27] 405 U.S. at 520, citing United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971).

[28] Chief Justice Burger dissented very strongly from this view. "It is not merely odd, it is nothing less than remarkable that a 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 v. New Hampshire*." 405 U.S. at 528-29 (Burger, C.J., dissenting).

Georgia decisions,[29] the majority of the Court held that the Georgia statute had not been sufficiently limited so as to conform to the *Chaplinsky* standard. "The statute leaves wide open the standard of responsibility, so that it is easily susceptible to improper application."[30] The Court concluded that in order to constitute the necessary notice to potential offenders, the statute in question must have been judicially limited to apply only to "fighting words" as defined by *Chaplinsky*. In ascertaining whether the statute had been so limited, the only source was Georgia decisions, which, in the judgment of the Court, had not sufficiently limited the statute to make it compatible with the first and fourteenth amendments.[31]

In analyzing the reasoning of the majority of the Court, each of these stages must be considered independently since each was the base upon which the next was built. The first point was essentially a restatement of the argument that a vague or overbroad statute is fatally defective because it fails to give adequate notice as to what language is prohibited. As enunciated in an earlier opinion, "no one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."[32] The inherent evil in such a

[29] *See* notes 19-23 *supra*, and accompanying text.

[30] 405 U.S. at 520; *see* Ashton v. Kentucky, 384 U.S. 195, 200 (1966).

[31] Although the Court did not directly reach the question of whether Wilson had standing, it did state: "[T]he words [Wilson] used might have been constitutionally prohibited under a narrowly and precisely drawn statute." 405 U.S. at 520. The district court had stated: "[We can] not see any policy reasons for upholding the right of a person to use the type of language expressed by [Wilson]. It strains the concept of freedom of speech out of proportion when it is argued that such language is and should be protected." 303 F. Supp. at 955. This statement by the district court could hardly have expressed more clearly the feeling that the specific language used by Wilson was constitutionally unprotected. It is a well established principle of constitutional adjudication that one may not invoke the constitutional rights of another in his own defense. *See, e.g.*, United States v. Raines, 362 U.S. 17 (1960); Tileston v. Ullman, 318 U.S. 44 (1943); Frothingham v. Mellon, 262 U.S. 447 (1923). In his dissent to the *Gooding* decision, the Chief Justice took the position that "under normal principles of constitutional adjudication, [Wilson] would not be permitted to attack his own conviction on the ground that the statute in question might in some hypothetical situation be unconstitutionally applied to the conduct of some party not before the Court." 405 U.S. at 530. One of the earliest statements of this rule of standing came in Smiley v. Kansas, 196 U.S. 447 (1905). In response to Smiley's argument that the state statute under which he had been convicted was unconstitutionally overbroad, the Supreme Court stated:

> It may be conceded, for the purposes of this case, that the language of the 1st section is broad enough to include acts beyond the police power of the state, and the punishment of which would unduly infringe upon the freedom of contract. At any rate we shall not attempt to enter into any consideration of that question. The supreme court of the state held that the acts charged and proved against the defendant were clearly within the terms of the statute, as well as within the police power of the state; and that the statute could be sustained as a prohibition of those acts irrespective of the question of whether its language was broad enough to include acts and conduct which the legislature could not rightfully restrain.

196 U.S. at 454-55. Considering subsequent decisions, such as Winters v. New York, 333 U.S. 507 (1948), and Smith v. Cahoon, 283 U.S. 553 (1931), the Court appears to have abandoned the standing requirement espoused in *Smiley*, in favor of allowing a defendant to attack an overbroad statute solely "on its face" with no showing of standing. In reality, *Winters* and *Smith* do not do away with the requirement of standing altogether. They allow a statute to be challenged as vague or overbroad only by one as to whose conduct it is defective. Assuming, therefore, that Wilson's speech was as unprotected as the district court indicated, he would not appear to have the requisite standing to question the constitutionality of the statute.

[32] Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

statute was that one should not be required to speculate as to the applicability of a given statute to the conduct in question.[33] To have a vague or overbroad statute on the books would have a "chilling" effect on the exercise of constitutionally guaranteed rights.

The entire notion of the notice requirement is, of course, based on the fiction that a person reads the statutes of his state as a guide in using or refraining from using certain language. A number of problems are immediately apparent in such a rationale for nullifying a statute. If it is assumed that the average person would check the wording of a statute, it is even more tenuous to assume that he has also read the decisions of the courts of his state. It would appear, however, that to one who had read the Georgia decision in *Samuels v. State*[34] it would be clear that the proscription of the statute extended to words tending to cause a violent reaction, but no further. This information would obviate the need for speculation as to how far the statutory prohibition extended, and how the statute would be applied in any given situation. Assuming that the statute, as construed, is not sufficient notice of what constitutes prohibited conduct, some authors have observed that it would be only reasonable to require that the person asserting such insufficiency as a defense to his own conduct make some showing that he actually consulted the statute with a view toward compliance.[35]

The majority declared that the statute could stand only if the Georgia courts had limited it to conform with *Chaplinsky*, since the Court refused to construe state legislation.[36] However, as Chief Justice Burger stated in dissent, it would not necessarily follow that the Court could do nothing but declare the statute void and let the conduct of Wilson go unpunished.[37] To call the statute void on its face for overbreadth does not necessarily mean that it is completely void. For example, it could be held void only to the extent of the overbreadth. The Court could have clearly stated that for the state courts to expand the scope of the statute so as to include protected speech would be impermissible, in the expectation that the state courts would hold the statute to its stated limits in subsequent cases.[38] Such a decision would not constitute a definitive interpretation, but would give some notice to state courts, law enforcement officers, and, presumably, potential offenders, of the scope of the statute in question.[39]

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[33] Yet the Supreme Court has allowed such statutes the benefit of whatever interpretation the state courts may have added. In other words, the defendant is charged not only with knowledge of the wording of the statute and past interpretations, but the interpretation the court will place on the statute in the course of his prosecution, as well. Thus charging the defendant, at the time of the act, with knowledge of the scope of subsequent judicial interpretation is basically inconsistent with the notice requirement.

[34] 103 Ga. App. 66, 118 S.E.2d 231 (1961); *see* note 23 *supra*, and accompanying text.

[35] *See, e.g.*, Comment, *Legislation-Requirement of Definiteness in Statutory Standards*, 53 MICH. L. REV. 264, 270 (1954).

[36] 405 U.S. at 520.

[37] *Id.* at 533.

[38] *See, e.g.*, Comment, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 895 (1970): "Rarely will the terms of a state law or prior authoritative interpretation utterly foreclose the possibility of a limiting construction in line with the per se rule the Court wishes to announce."

[39] *See, e.g.*, Fox v. Washington, 236 U.S. 273, 277 (1915):

> So far as statutes may fairly be construed in such a way as to avoid doubtful constitutional questions they should be so construed. . . . It does not appear

The Court concluded that the Georgia courts had not limited the statute to conform with the *Chaplinsky* standard. The majority held that the scope of the statute, as interpreted, was beyond constitutional limitations. The Court relied heavily upon *Fish v. State*[40] and *Elmore v. State*,[41] both decided before *Chaplinsky*. The majority contended that *Fish* expanded the meaning of the statute beyond the constitutionally permissible bounds, and that *Elmore* defined the key language "breach of the peace" in such a way as to make the statute encompass language beyond the scope of "fighting words." The *Fish* decision, however, said nothing more than that the question of whether language comes under the statute was a question of fact for the jury.[42] While *Elmore* did define "breach of the peace" in a manner inconsistent with *Chaplinsky*, it was not the last word from the Georgia courts on the matter. The *Samuels* standard, applicable at the time of Wilson's arrest, made violence an essential element of a breach of the peace.[43] When compared with the language of the New Hampshire decisions considered by the *Chaplinsky* Court,[44] it is difficult to see how the Georgia courts could have used language which more closely adhered to the standard.

III. CONCLUSION

Gooding v. Wilson presented to the Court issues very similar to those considered in *Chaplinsky*. The cases, in fact, were virtually the same in every significant respect. Each case arose out of very similar fact situations. The respective state statutes under which Chaplinsky and Wilson were convicted were worded almost the same, and appear to have been interpreted by the state courts in such a way as to limit their application to the same bounds. As limited by these judicial interpretations, neither statute had significant potential, if any, for application outside the realm of "fighting words." Yet the Court decided the cases differently. Although paying lip service to *Chaplinsky* and the standards it established, the Court seems to have carried the *Chaplinsky* test to the extreme in *Gooding*. This very strict application of the standard indicates that a high standard of narrow construction is to be required when state statutes which purport to restrict the first amendment guar-

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> and is not likely that the statute will be construed to prevent publications merely because they tend to produce unfavorable opinions of a particular law in general . . . and we see no reason to believe that the statute will be stretched [to] that point. If the statute should be construed as going no farther than it is necessary to go in order to bring the defendant within it, there is no trouble with it.

[40] 124 Ga. 416, 52 S.E. 737 (1905).

[41] 15 Ga. App. 461, 83 S.E. 799 (1914); *see* text accompanying notes 21, 22 *supra*.

[42] The entire *Fish* opinion stated:

> On the trial of one indicted for using opprobrious words and abusive language, it is for the jury to determine whether under all the facts and circumstances the words used were of such character as to cause a breach of the peace, as well as to determine whether there was provocation sufficient to excuse their use. It is therefore error for the judge to instruct the jury as a matter of law that the words alleged in the indictment are opprobrious and abusive within the meaning of the statute, and that a given set of facts would not be a sufficient provocation for their use.

52 S.E. at 737.

[43] *See* note 23 *supra*, and accompanying text.

[44] *See* note 13 *supra*, and accompanying text.