May 11, 1988

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Honorable David H. Cain
Texas House of Representatives
P. O. Box 2910
Austin, Texas 78769

Opinion No. JM-900

Re: Whether the use of "abusive, indecent, profane or vulgar" language in a public place constitutes an immediate breach of the peace (RQ-1378)

Dear Representative Cain:

Section 42.01 of the Penal Code provides in part that

(a) A person commits an offense if he intentionally or knowingly:

(1) uses abusive, indecent, profane, or vulgar language in a public place, and the language by its very utterance tends to incite an immediate breach of the peace[.]

Penal Code §42.01(a)(1).

You ask the following questions:

(1) Does uttering abusive, indecent, profane, or vulgar language in a public place constitute an immediate 'breach of the peace'?

(2) How is 'breach of the peace' defined in relation to Article 42.01(a)(1)?

In order for this provision to withstand scrutiny under the broad guarantees for freedom of expression and due process of law in the United States Constitution, the utterances prohibited can only include "fighting words." Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). See Gooding v. Wilson,

Whether particular words are "fighting words" is a matter of fact. Chapline v. supra, at 573.

The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. . . . Derisive and annoying words can be taken as coming within the purview of the statute . . . only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace.


Speech punishable under the Penal Code provision does not include language merely harsh and insulting, see Gooding, supra at 525, and it should not include speech, actual or symbolic, that is only "inappropriate," "naughty," "disgusting," "repulsive," "tactless," "gross," or "appalling." Annot., 2 A.L.R.4th 1331. Conviction under a statute specifying a "breach of the peace" as an element of the offense must be based on jury instructions including an admonition that proof of "actual or threatened violence is essential." Woods v. State, 213 S.W.2d 685, 687 (Tex. Crim. App. 1948). In other words, anything short of the use of "fighting words" does not constitute a breach of the statute. See Jimmerson v. State, 561 S.W.2d 5 (Tex. Crim. App. 1978). Speech is protected against punishment unless "shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." Terminello v. Chicago, 337 U.S. 1, 4 (1949).

1. This statute does not concern speech legally obscene under the standards provided by the United States Supreme Court in Miller v. California, 418 U.S. 915 (1973). See Spears v. State, 337 So.2d 977 (Fla. 1976).
Finally, because the application of the statute may turn largely on the factual setting of the speech at issue, the test is whether, in a particular instance, an average person would be inured to respond by fighting. An average person is not someone who is overly sensitive or overly inured to the speech in question. Cohen, supra and Houston v. Hill, 482 U.S. ___, 96 L.Ed.2d 398 (1987), quoting from a concurring opinion of Justice Powell in Lewis v. New Orleans, 415 U.S. 130, 135 (1974).

SUMMARY

Article 42.01(a)(1) of the Penal Code applies only to speech which as a matter of fact constitutes "fighting words." As a matter of law, the statute does not reach speech that merely causes public inconvenience, annoyance, or unrest. "Fighting words" are words which would likely cause an average addressee to fight. An "average addressee" is not someone either overly sensitive or overly inured to the speech in question.

Very truly yours,

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