Old Habits Die Hard

Rethinking Disorderly Conduct and "Breach of the Peace"

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Texas law enforcement has come a long way in training, wellness resources, best practices, and overall professionalism. The profession has worked hard to balance tradition with progress. Legislative training mandates have created challenges for many agencies, but those mandates are often necessary to keep policing moving in the right direction.

In many cases, mandates follow a tragedy that exposes either a lack of training or long-standing misconceptions that were accepted as fact for years. Experienced law enforcement leaders may be well-versed in constitutional policing and current best practices, but it can be difficult to monitor every lesson taught in the classroom or every conversation between a field training officer and a recruit inside a patrol vehicle.

I attended the police academy in 2003. I still remember listening to an instructor explain the elements of Disorderly Conduct under Texas Penal Code § 42.01(a)(1). We were correctly taught that obscene language alone is not illegal unless it "tends to incite an immediate breach of the peace." However, the instructor went on to explain that because "breach of the peace" was not clearly defined, officers should simply ask the complainant: "Were you offended?"

After graduating from the academy and entering field training, I continued hearing the same explanation from training officers. At the time, the department where I worked was short-staffed, and some of the field training officers were relatively inexperienced themselves. Before long, I became a field training officer as well, "babies teaching babies," as they say. I would like to believe I contributed more good than harm during that period, but asking young officers with limited experience to train others creates obvious challenges. Looking back, I am certain I unintentionally helped pass along some of my own misconceptions.

Today, many agencies continue to face similar issues. In departments across Texas, patrol divisions are often staffed by very young officers who must make rapid decisions under difficult circumstances. Patrol officers are conditioned to think quickly, solve complex problems, and move on to the next call. Common sense and decisiveness are essential qualities in patrol work. However, when legal issues become complex, oversimplification can create significant liability.

After retiring from law enforcement in late 2024, I joined the TML Risk Pool as a Law Enforcement Outreach Consultant. Part of my role involves identifying areas of liability exposure and providing agencies with training and consulting resources to help mitigate risk. During training sessions, I began asking officers what question they typically ask when responding to complaints involving obscene language. So far, the overwhelming majority of classes have acknowledged that the "Were you offended?" question is still a commonly taught and accepted practice.

The problem is that Texas Penal Code § 42.01(a)(1) and (2) do not include the word "offended." Under Texas law, obscene language becomes criminal only when the language, "by its very

utterance, tends to incite an immediate breach of the peace." Tex. Penal Code § 42.01(a)(1). While subsection (a)(4) does reference "offensive" conduct, it addresses a separate category of behavior and must still be interpreted through applicable case law.

Part of the confusion likely stems from the lack of a single, universally accepted definition of "breach of the peace." Another issue may be the profession's tendency to rely too heavily on isolated portions of case law without examining the broader factual context behind a court's ruling. While case law is essential to law enforcement decision-making, relying on simplified interpretations can become problematic when officers are unfamiliar with the underlying facts that shaped the court's opinion.

Although "breach of the peace" may not be precisely defined in statute, courts have addressed the concept repeatedly over time. By examining multiple cases together, law enforcement officers can develop a more reliable framework for making constitutional decisions in the field.

Fighting Words and Constitutional Limits

An important question remains: Can people say whatever they want, whenever they want? The courts have consistently recognized limitations on speech. In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), the United States Supreme Court acknowledged that so-called 'fighting words' are not protected speech under the First Amendment. While this baseline exception remains recognized by modern courts, federal appellate courts tightly restrict its reach.

In *Terminiello v. Chicago*, 337 U.S. 1 (1949), the United States Supreme Court stated that speech "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." That language makes it clear that speech does not lose constitutional protection merely because it causes offense. Similarly, the Court of Criminal Appeals of Texas observed in one case: "'Serious offense' occurred, but there was no breach of peace nor does the record reflect that the situation was potentially explosive. One cannot equate 'serious offense' with incitement to breach the peace." *Johnson v. State*, 755 S.W.2d 92, 95, 97 (Tex. Crim. App. 1988), *aff'd, Johnson*, 491 U.S. 397 (1989). The United States Supreme Court affirmed that opinion, 491 U.S. 397 (1989), cautioning that we may not presume that "an audience that takes serious offense at particular expression is necessarily likely to disturb the peace." Precedent from the Supreme Court has "not permitted the government to assume that every expression of a provocative idea will incite a riot." Instead, the Court requires "careful consideration of the actual circumstances surrounding such expression, asking whether the expression is 'directed to inciting or producing imminent lawless action and is likely to incite or produce such action.'" In short, was it "an invitation to exchange fisticuffs"?

So how do we determine what a fighting word is? "Fighting words" are "personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." *Cohen v. California*, 403 U.S. 15 (1971). "Actual or threatened violence is an essential element of a breach of the peace." *Woods v. State*, 213 S.W.2d 685 (Tex. Crim. App. 1948). The test is whether the words, "when addressed to the ordinary

citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." *Cohen*, 403 U.S. at 20; s*ee also Virginia v. Black*, 538 U.S. 343 (2003).

An important consideration during an investigation is that a fundamental purpose of the Constitution is to protect the people from government overreach. Because political speech is often divisive and emotionally charged, strong criticism of law enforcement or other government officials may provoke outrage; however, law enforcement officers must proceed with caution to avoid infringing upon constitutionally protected expression. As the United States Supreme Court stated in *City of Houston v. Hill*, "The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." 482 U.S. 451 (1987). Of course, these aren't the only cases to consider, but they are a great place to start.

Texas Cases Worth Revisiting

There are Texas specific cases that provide additional guidance but are rarely discussed in law enforcement training.

In *Estes v. State*, 660 S.W.2d 873 (Tex. App.—Fort Worth 1983, pet. ref'd), Phillip Farris, the principal of Grand Prairie High School, was conducting a graduation ceremony before a large audience. As student Michael Estes received his diploma, he extended his middle finger within inches of the principal's face. Estes was charged and ultimately convicted of Disorderly Conduct. The conviction was upheld on appeal. Principal Farris testified that he experienced shock and anger and resisted what he described as an "animal instinct to retaliate,". The Texas Court of Appeals affirmed the conviction. Although violence did not actually take place, the reasonable potential for violence was present.

By contrast, the facts in *Coggin v. State*, 123 S.W.3d 82 (Tex. App.—Austin 2003, pet. ref'd), produced a different outcome. In that case, Robert Coggin was driving on U.S. Highway 183 near Lockhart, Texas. He was operating a white car with a mounted spotlight and handcuffs hanging from the rearview mirror and came upon another car traveling more slowly. Coggin tailgated the vehicle, flashed his headlights, and motioned for the driver to move over so he could pass. The other driver, believing Coggin may have been a police officer in an unmarked police car, changed lanes. As Coggin passed, he displayed his middle finger toward the driver and passenger who called 911. Coggin was later stopped and cited for Disorderly Conduct by gesture.

Although he was initially convicted, the appellate court overturned the conviction. The court distinguished the case from *Estes*, noting several critical differences: the incident did not occur in a crowded public setting, the parties did not know each other, there was no face-to-face confrontation, the gesture was not made in close physical proximity, and the encounter lasted only seconds. Cases like *Coggin* demonstrate why merely causing offense does not automatically constitute a "breach of the peace."

Moving Forward

So where do we go from here? Most officers and trainers are doing exactly what they were taught by experienced people they trusted. That is part of the culture that has traditionally helped pass knowledge through the profession. At the same time, evolving case law and modern constitutional policing standards create opportunities to periodically reassess how certain concepts are explained in both the classroom and the field. Continued formal training and dialogue among supervisors, trainers, and officers can help ensure that long-standing practices remain aligned with current legal standards while supporting sound decision-making in the field.