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## Those Are Fighting Words, Aren't They? On Adding Injury to Insult

Mark P. Strasser

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THOSE ARE FIGHTING WORDS,  
AREN'T THEY? ON ADDING  
INJURY TO INSULT

*Mark P. Strasser*<sup>†</sup>

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<sup>†</sup> Trustees Professor of Law, Capital University Law School, Columbus, Ohio.

## INTRODUCTION

Fighting words doctrine is controversial<sup>1</sup> both with respect to its breadth<sup>2</sup> and even to whether it is still a live doctrine.<sup>3</sup> While the United States Supreme Court has occasionally cited the doctrine with approval in dictum,<sup>4</sup> the Court has not relied on it in any case since *Chaplinsky*

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1. Robert M. O'Neil, *Hate Speech, Fighting Words, and Beyond—Why American Law Is Unique*, 76 ALB. L. REV. 467, 472 (2013) (“Seventy years later, *Chaplinsky* remains a persistent source of constitutional confusion.”); Burton Caine, *The Trouble with “Fighting Words”: Chaplinsky v. New Hampshire Is a Threat to First Amendment Values and Should Be Overruled*, 88 MARQ. L. REV. 441, 443–44 (2004) (describing the Court’s fighting words exception as “a category so ill-conceived that not once in the ensuing sixty-two years has the United States Supreme Court upheld a conviction based on it”).
  2. G. Edward White, *Falsity and the First Amendment*, 72 SMU L. REV. 513, 521 (2019) (discussing “a tendency to narrow the scope of certain unprotected speech categories, such as . . . ‘fighting’ words”); Kevin P. Donoughe, *Can Dead Soldiers Revive a “Dead” Doctrine? An Argument for the Revitalization of “Fighting Words” to Protect Grieving Families Post-Snyder v. Phelps*, 63 CLEV. ST. L. REV. 743, 750 (2015) (“The Court began to steadily narrow the grounds on which ‘fighting words’ are held to apply . . . .”); Norman T. Deutsch, *Professor Nimmer Meets Professor Schauer (and Others): An Analysis of “Definitional Balancing” as a Methodology for Determining the “Visible Boundaries of the First Amendment,”* 39 AKRON L. REV. 483, 502 (2006) (alteration in original) (“[S]ince *Chaplinsky*, the Court has actually expanded the scope of protection afforded to such speech, by ‘narrow[ing]’ the definitional line between fighting words that are excluded from the First Amendment and speech that remains included.”).
  3. See Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 510 (1990) (suggesting that “*Chaplinsky*’s fighting words doctrine is no longer good law”); Note, *The Demise of the Chaplinsky Fighting Words Doctrine: An Argument for Its Interment*, 106 HARV. L. REV. 1129 (1993) (“The jurisprudential history of the *Chaplinsky* doctrine has led some commentators to conclude that the Court has sub rosa overruled the entire fighting words doctrine . . . .”); Melody L. Hurdle, R.A.V. v. City of St. Paul: *The Continuing Confusion of the Fighting Words Doctrine*, 47 VAND. L. REV. 1143, 1156 (1994) (“[C]ourts and scholars repeatedly have disagreed about the application and viability of the concept [of fighting words].”); cf. Clay Calvert, *Fighting Words in the Era of Texts, IMs and E-Mails: Can a Disparaged Doctrine Be Resuscitated to Punish Cyber-Bullies?*, 21 DEPAUL J. ART, TECH. & INTELL. PROP. L. 1, 1–2 (2010) (footnote omitted) (discussing “the much-maligned class of speech known as fighting words”).
  4. See O’Neil, *supra* note 1, at 472 (“[T]he case has been persistently cited with sufficient deference to imply that uttering ‘fighting words’ remains a recognized exception to First Amendment freedoms.”); Linda Friedlieb, *The Epitome of an Insult: A Constitutional Approach to Designated Fighting Words*, 72 U. CHI. L. REV. 385, 402 (2005) (“[T]he Court has repeatedly affirmed the doctrine’s continued vitality.”)

*v. New Hampshire* in which the doctrine was announced.<sup>5</sup> That said, the Court has never overruled *Chaplinsky*,<sup>6</sup> and state courts continue to rely on the doctrine to uphold convictions.<sup>7</sup>

Part II of this article discusses the ever-changing fighting words jurisprudence. Regrettably, the Court has offered conflicting accounts of what the doctrine involves and which speech limitations are constitutionally permissible.<sup>8</sup> Part III discusses how some of the states have applied the fighting words doctrine. As might be expected, the United States Supreme Court's mixed messaging has resulted in different state approaches to which expressions constitute fighting words and are thus subject to regulation.<sup>9</sup> The article concludes that the Court's confused and confusing analysis has not only resulted in certain expressions being (federally) constitutionally protected in some states but not in others, but has also constrained the ability of states to effectuate public policy. The Court's commitment to free expression and to applying the law with integrity is undermined by its failure to clearly articulate a consistent approach to fighting words, and articulating such an approach will help prevent harms that will otherwise continue unabated and will help counteract the perception that the Court's commitment to free expression wavers depending upon the issues or individuals before it.

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5. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942); see also Friedlieb, *supra* note 4, at 389 (noting that “the Supreme Court has never affirmed another fighting words conviction”).
  6. Thomas M. Place, *Offensive Speech and the Pennsylvania Disorderly Conduct Statute*, 12 TEMP. POL. & C.R.L. REV. 47, 59 (2002); Katherine Grace Howard, *You Have the Right to Free Speech: Retaliatory Arrests and the Pretext of Probable Cause*, 51 GA. L. REV. 607, 630 (2017) (quoting *Chaplinsky*, 315 U.S. at 572) (“[T]he category of fighting words, defined in *Chaplinsky v. New Hampshire* as ‘those which by their very utterance inflict injury or tend to incite an immediate breach of the peace,’ has not been overruled . . . .”); Beth C. Boswell-Odum, *The Fighting Words Doctrine and Racial Speech on Campus*, 33 S. TEX. L. REV. 261, 283 (1992) (“*Chaplinsky* has not been overruled . . . .”).
  7. See *Evans v. State*, 525 S.E.2d 780, 782 (Ga. Ct. App. 1999); *State v. Read*, 680 A.2d 944, 953 (Vt. 1996); *State v. Szymkiewicz*, 678 A.2d 473, 478–79 (Conn. 1996); *State v. Nelson*, No. 13-CR-13-107, 2014 WL 7237043, at \*4 (Minn. Ct. App. Dec. 22, 2014); *Watkins v. State*, 377 S.W.3d 286, 291 (Ark. Ct. App. 2010).
  8. Compare *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (reversing the plaintiff's conviction because of the overly broad nature of the statute providing the basis of his conviction), with *Feiner v. New York*, 340 U.S. 315, 318 n.1, 321 (1951) (upholding the plaintiff's conviction despite the broad language of the statute providing the basis of his conviction.).
  9. See *Evans*, 525 S.E.2d at 782; *Read*, 680 A.2d at 953; *Szymkiewicz*, 678 A.2d at 478–79; *Nelson*, 2014 WL 7237043 at \*4; *Watkins*, 377 S.W.3d at 291.

## I. THE EVER-CHANGING FIGHTING WORDS DOCTRINE

In the very case in which the fighting words doctrine was recognized, *Chaplinsky v. New Hampshire*,<sup>10</sup> the Court offered mixed signals about when the doctrine could be invoked to uphold convictions. In subsequent cases, the Court has continued to offer contradictory indications about what kinds of fighting words limitations pass constitutional muster, ultimately leaving the impression that members of the Court either cannot agree about or do not understand what the fighting words doctrine is or when it can be applied.

### A. *The Doctrine Announced*

In *Chaplinsky v. New Hampshire*, the Court upheld a conviction for disturbing the peace.<sup>11</sup> Chaplinsky had been distributing literature denouncing religion as a racket.<sup>12</sup> Citizens complained to the City Marshal, Bowering,<sup>13</sup> who replied that Chaplinsky was merely exercising his rights<sup>14</sup> but who also warned Chaplinsky that the crowd was growing restless.<sup>15</sup> Some hours later, the crowd “got out of hand and treated Chaplinsky with some violence.”<sup>16</sup> A traffic officer escorted Chaplinsky to the station, likely to protect him.<sup>17</sup> The United States Supreme Court expressly noted that the traffic officer “did not inform [Chaplinsky] that

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10. 315 U.S. 568, 571–72 (1942).

11. *See id.* at 574 (“[T]he challenged statute, on its face and as applied, does not contravene the Fourteenth Amendment.”).

12. *See id.* at 570.

13. *Id.*

14. *Id.* (“Bowering told them that Chaplinsky was lawfully engaged . . .”).

15. *Id.*

16. *State v. Chaplinsky*, 18 A.2d 754, 758 (N.H. 1941).

17. *See id.* at 758 (noting that the officer’s action was “apparently more for [Chaplinsky’s] protection than for arrest, since his arrest was definitely fixed only after he uttered the words charged”); Hurdle, *supra* note 3, at 1147 (“A police officer led Chaplinsky toward the city police station to protect him from nearby listeners who reacted violently to the derogatory comments.”); Michael J. Mannheimer, *The Fighting Words Doctrine*, 93 COLUM. L. REV. 1527, 1534 (1993) (“[A] police officer escorted Chaplinsky toward the police station, apparently for his own protection.”).

he was under arrest or that he was going to be arrested,”<sup>18</sup> at least implying that there was no basis for an arrest at that point.<sup>19</sup>

Along the way, Chaplinsky and the officer ran into Bowering to whom Chaplinsky allegedly said, “You are a God damned racketeer” and “a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists.”<sup>20</sup> Chaplinsky claimed that his comments were made after Bowering had called Chaplinsky a damned bastard.<sup>21</sup> Chaplinsky was charged with and convicted of making comments that would likely bring about an immediate breach of the peace.<sup>22</sup>

When reviewing his conviction, the New Hampshire Supreme Court understood that Chaplinsky was probably angry because he had been assaulted by the crowd and because he believed that the police had failed to protect him.<sup>23</sup> But, the New Hampshire court reasoned, even if it were true that Chaplinsky had been provoked, that would not excuse his having called Bowering names.<sup>24</sup>

The purpose of the statute at issue was “to preserve the public peace, no words being ‘forbidden except such as have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed.’”<sup>25</sup> When explaining the standard to determine whether particular expressions would count as fighting words, the New Hampshire Court explained that the “test is what men of common

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18. *Chaplinsky*, 315 U.S. at 570. See also Daniel A. Farber, *The Categorical Approach to Protecting Speech in American Constitutional Law*, 84 IND. L.J. 917, 920 (2009) (“When a disturbance occurred, the traffic officer on duty at the intersection hustled the speaker off to the police station, but without ever telling him formally that he was under arrest.”).
  19. *But see* David Goldberger, *Sources of Judicial Reluctance to Use Psychic Harm as a Basis for Suppressing Racist, Sexist and Ethnically Offensive Speech*, 56 BROOK. L. REV. 1165, 1174 (1991) (“The defendant . . . had just been arrested for publicly making derogatory religious statements.”).
  20. *Chaplinsky*, 315 U.S. at 569.
  21. *Chaplinsky*, 18 A.2d at 759 (“The defendant admittedly called the Marshal a damned racketeer and Fascist, in exchange, as the defendant says, for the Marshal’s calling him a damned bastard.”).
  22. See *Chaplinsky*, 315 U.S. at 569; see also *Chaplinsky*, 18 A.2d at 758 (“Its plain tendency was to further breach of order, and it was itself a breach of the peace.”).
  23. See *Chaplinsky*, 18 A.2d at 758; see also Caine, *supra* note 1, at 448 (suggesting that Chaplinsky was “[p]rovoked and angered by Marshal Bowering’s words, by the refusal of the police to protect his constitutional right to speak, as well as by the blows he had received from the crowd”).
  24. *Chaplinsky*, 18 A.2d at 759 (“Chaplinsky could no more defend unlawful speech on the ground of provocation than could one of the street-crowd have defended a charge of calling Chaplinsky names on the ground that the name-caller had been incensed by Chaplinsky’s teachings.”).
  25. *Chaplinsky*, 315 U.S. at 573 (quoting *Chaplinsky*, 18 A.2d at 758).

intelligence would understand would be words likely to cause an average addressee to fight.”<sup>26</sup> There was no indication that the individual at whom the epithets were directed (Bowering) was even tempted to engage in fisticuffs,<sup>27</sup> but that did not matter—the New Hampshire Supreme Court reasoned that while there may be a time “when the words ‘damned Fascist’ will cease to be generally regarded as ‘fighting words’ when applied face-to-face to an average American, this is not the time.”<sup>28</sup> The United States Supreme Court cited the New Hampshire court’s interpretation with approval.<sup>29</sup> Because the statute at issue was limited to punishing individuals who had uttered fighting words,<sup>30</sup> the Court held that the application of the statute to Chaplinsky’s comments did not violate First Amendment guarantees.<sup>31</sup>

That Bowering was unlikely to engage in fisticuffs after being called a fascist<sup>32</sup> did not immunize Chaplinsky’s conviction under the statute, given that the average person (at the time<sup>33</sup>) might well have responded with violence when called such a name.<sup>34</sup> This position helps cast light on the proper interpretation of *Cantwell v. Connecticut*,<sup>35</sup> decided two years earlier, which involved someone expressing offensive opinions about religious groups.<sup>36</sup>

In a neighborhood known to have a high concentration of Catholics,<sup>37</sup> Jesse Cantwell stopped two individuals and asked them if

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26. *Chaplinsky*, 18 A.2d at 762.
  27. *Caine*, *supra* note 1, at 454 (“Nor was there any evidence that City Marshal Bowering was provoked to violence or that any mythical reasonable man would have been so provoked.”).
  28. *Chaplinsky*, 18 A.2d at 762.
  29. *See* *Chaplinsky*, 315 U.S. at 573.
  30. *See* *Chaplinsky*, 18 A.2d at 758 (“[N]o words were forbidden except such as have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed.”).
  31. *Chaplinsky*, 315 U.S. at 574 (“Nor can we say that the application of the statute to the facts disclosed by the record substantially or unreasonably impinges upon the privilege of free speech.”).
  32. *See* *supra* note 27 and accompanying text.
  33. *Chaplinsky*, 18 A.2d at 762.
  34. *Chaplinsky*, 315 U.S. at 574 (“Argument is unnecessary to demonstrate that the appellations ‘damned racketeer’ and ‘damned Fascist’ are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace.”).
  35. 310 U.S. 296 (1940).
  36. *Id.* at 302–03.
  37. *Id.* at 301 (“Cassius Street is in a thickly populated neighborhood, where about ninety per cent of the residents are Roman Catholics.”).

he could play a phonograph record for them.<sup>38</sup> When they consented, he played a record highly critical of the Roman Catholic Church.<sup>39</sup> The two men, who were Catholic,<sup>40</sup> were “incensed” and “were tempted to strike Cantwell unless he went away.”<sup>41</sup> Cantwell went away when told to do so.<sup>42</sup>

The Court noted that there “was no evidence that [Cantwell] was personally offensive or entered into any argument with those he interviewed.”<sup>43</sup> Further, there was no showing either that Cantwell’s “deportment was noisy, truculent, overbearing or offensive” or that “he intended to insult or affront the hearers by playing the record.”<sup>44</sup> Yet, the Court was not thereby implying that the record contents were innocuous—on the contrary, the record “naturally would offend not only persons of that persuasion [(Roman Catholics)], but all others who respect the honestly held religious faith of their fellows.”<sup>45</sup>

If indeed the comments were that offensive, their utterance might well have resulted in violence. Further, the Court was quite clear that “[w]hen clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the state to prevent or punish is obvious.”<sup>46</sup> Nonetheless, the Court reversed Cantwell’s conviction.<sup>47</sup>

Commentators offer different theories as to why that conviction did not pass constitutional muster.<sup>48</sup> One interpretation of *Cantwell* is that the relevant standard regarding a clear and present danger of violence had not been met because the violence had not been imminent but would only have occurred if Cantwell had refused to leave.<sup>49</sup> But if that

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38. *See id.* at 302–03.

39. *Id.* at 303 (explaining that Cantwell “played the record ‘Enemies,’ which attacked the religion and church of the two men, who were Catholics.”).

40. *Id.* (noting that the “two men . . . were Catholics”).

41. *Id.*

42. *Id.* (“On being told to be on his way he left their presence.”).

43. *Id.*

44. *Id.* at 308–09.

45. *Id.* at 309.

46. *Id.* at 308.

47. *Id.* at 311.

48. *See infra* notes 51–68 and accompanying text.

49. Andrew M. Zeitlin, Comment, *A Test of Faith: Accommodating Religious Employees’ “Work-Related Misconduct” in the United States and Canada*, 15 COMPAR. LAB. L.J. 250, 254 (1994) (“Had there been evidence that the Cantwells’ solicitation presented a clear and present danger of riot or disorder, the Court likely would have upheld Connecticut’s power to punish the offense.”); Sheila M. Cahill, Note, *The Public Forum: Minimum Access*,



is why *Cantwell*'s speech was protected, then the relevant constitutional protection does not seem very robust. Suppose that the two passersby had not told *Cantwell* to leave but instead had simply struck him.<sup>50</sup> In that event, the very speech on the record would seem to have been the cause of imminent violence. If that speech would then have been unprotected, then the constitutional protection afforded to *Cantwell*'s speech would not only have depended upon its content but also on who happened to hear it.<sup>51</sup>

Constitutional protections do not seem very strong if they depend upon the luck of the draw, e.g., who happens to be in the audience when particular comments are made.<sup>52</sup> That said, *Cantwell* is not a particularly good case to explore the connection between constitutional protections and chance. *Cantwell* had gone into a neighborhood known for having a high concentration of Catholics,<sup>53</sup> so it was not merely a matter of chance that the persons listening to the record were Catholic.<sup>54</sup> Arguably, playing a record making highly offensive

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*Equal Access, and the First Amendment*, 28 STAN. L. REV. 117, 120 n.20 (1975) (“[A]ctual violence apparently was never imminent.”).

50. Cf. Brett G. Johnson, *The Heckler's Veto: Using First Amendment Theory and Jurisprudence to Understand Current Audience Reactions Against Controversial Speech*, 21 COMM. L. & POL'Y 175, 182 (2016) (“*Cantwell* leaves the door open for future convictions of speakers who incite a hostile audience to a violent reaction.”).
51. *But see* Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, “Situation-Altering Utterances,” and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1292 (2005) (alteration in original) (quoting *Cantwell*, 310 U.S. at 308–09) (suggesting that the *Cantwell* “Court set aside the conviction because the speech constituted breach of the peace only because of ‘the effect of [the speaker’s] communication upon his hearers’”).
52. Cf. Dana Berliner, *Looking Back Ten Years After Kelo*, 125 YALE L.J.F. 82, 90 (2015) (“Highly varied and uneven protections might be interesting as a matter of social policy experimentation, but they are no way to deal with the protection of constitutional rights.”) (footnote omitted); Dan T. Coenen, *Freedom of Speech and the Criminal Law*, 97 B.U. L. REV. 1533, 1555 (2017) (“The problem with this doctrinal approach is hard to miss: in effect, it permits the state to punish a speaker because of the unlawfully belligerent—indeed, the riotously belligerent—actions of unsympathetic listeners.”).
53. *Cantwell v. Connecticut*, 310 U.S. 296, 301 (1939); *see supra* text accompanying note 40.
54. *See* Marie A. Failinger, *Five Modern Notions in Search of an Author: The Ideology of the Intimate Society in Constitutional Speech Law*, 30 U. TOL. L. REV. 251, 274 (1999) (quoting *Cantwell*, 310 U.S. at 301–03) (“Jesse Cantwell and his Jehovah’s Witness comrades were ‘invading’ some of the most sensitive public space moderns can imagine, going from house to house in a ‘thickly populated,’ heavily Catholic neighborhood in New Haven, offering books or playing records which attacked Catholics scurrilously as

comments about Catholicism would be even more likely to pose a clear and present danger of engendering violence if those hearing the comments were themselves (likely) Catholic<sup>55</sup> than would making such comments in front of an audience composed of individuals likely of a different faith.<sup>56</sup> In any event, it is somewhat difficult to believe that Cantwell's speech did not create a clear and present danger of violence<sup>57</sup> but that Chaplinsky's did, given that there was no suggestion that Bowering was even tempted to strike Chaplinsky.<sup>58</sup>

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- 'enemies,' thus highly offending several hearers."); *see also* David S. Allen, *Spatial Frameworks and the Management of Dissent: From Parks to Free Speech Zones*, 16 COMM. L. & POL'Y 383, 404 (2011) ("Cantwell and his sons focused on a neighborhood where about 90% of the residents were Roman Catholics . . .").
55. *See* William C. Nevin, "Fighting Slurs": *Contemporary Fighting Words and the Question of Criminally Punishable Racial Epithets*, 14 FIRST AMEND. L. REV. 127, 133 (2015) (discussing "Cantwell's preaching . . . [and] its natural tendency to offend Catholics"); Stewart Jay, *The Creation of the First Amendment Right to Free Expression: From the Eighteenth Century to the Mid-Twentieth Century*, 34 WM. MITCHELL L. REV. 773, 883 (2008) ("But hadn't Cantwell created an 'immediate threat' to public order, saved only by his swift retreat?"); R. George Wright, *The Heckler's Veto Today*, 68 CASE W. RES. L. REV. 159, 162 (2017) (quoting *Cantwell*, 310 U.S. at 309) ("Cantwell's two initially consensual listeners to his anti-religious and anti-Catholic speech 'were in fact highly offended.' In this instance, offense at least momentarily threatened to transition into physical violence against the speaker.").
56. *But see Cantwell*, 310 U.S. at 309 ("[I]t then singles out the Roman Catholic Church for strictures couched in terms which naturally would offend not only persons of that persuasion, but all others who respect the honestly held religious faith of their fellows.").
57. Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 1011 (2011) ("[T]he Court held that Cantwell could not be convicted unless a clear and present danger existed of violence or other social harm and that the fact that Cantwell's speech offended others was not a constitutionally permissible ground for punishment."); Jay, *supra* note 55, at 889 (discussing the "tight limits on what speech would be found to present a clear and present danger of inciting violence or other criminal conduct").
58. Arnold H. Loewy, *Distinguishing Speech from Conduct*, 45 MERCER L. REV. 621, 628 (1994) ("There is no reason to think that Marshal Bowering was about to assault Chaplinsky."); *see also* Jonathan A. Weiss, *A Road Not Taken*, 26 SETON HALL LEGIS. J. 415, 449 (2002) ("[T]he police officer should not be considered a danger to be provoked into violence by the man's speech."). Some commentators do not seem to appreciate this point. *See, e.g.,* Calvin R. Massey, *Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression*, 40 UCLA L. REV. 103, 160 (1992) ("If Jesse Cantwell had, instead, insulted his auditors personally in a fashion likely to produce immediate violence, as did Walter Chaplinsky, the Constitution's free expression guarantee (at least circa 1940) would pose no problem to legal sanction.").

The *Chaplinsky* Court discussed a few kinds of speech that do not trigger First Amendment protections, including “the insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”<sup>59</sup> According to the New Hampshire law that *Chaplinsky* allegedly violated, fighting words were those that “have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed.”<sup>60</sup> Yet if Bowering was the individual to whom the words were addressed and there was no indication that Bowering was even tempted to assault *Chaplinsky*, then one would have thought that the fighting words doctrine would not have been triggered.

A closer examination of the doctrine articulated by the New Hampshire Supreme Court and endorsed by the United States Supreme Court reveals that the doctrine at issue was not focused on the addressee’s actual or probable reactions.<sup>61</sup> Instead, the test as to whether words had the prohibited tendency involved “what men of common intelligence would understand would be words likely to cause an average addressee to fight.”<sup>62</sup> Fighting words included “‘classical fighting words’, words in current use less ‘classical’ but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats.”<sup>63</sup>

Interpreted in light of *Chaplinsky*, *Cantwell* was not emphasizing the fact that *Cantwell* had not in fact incited someone to strike him. Instead, the Court in *Cantwell* was emphasizing that the statute under which *Cantwell* was prosecuted was not narrowly tailored to prohibit only fighting words.<sup>64</sup> The *Cantwell* Court explained:

Although the contents of the record not unnaturally aroused animosity, we think that, *in the absence of a statute narrowly*

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59. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1941).

60. *Id.* at 573 (citing *State v. Brown*, 38 A. 731, 732 (N.H. 1895)).

61. *See State v. Chaplinsky*, 18 A.2d 754, 762 (“The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. We have never applied the statute otherwise. The English language has a number of words and expressions which by general consent are ‘fighting words’ when said without a disarming smile.”); *Chaplinsky*, 315 U.S. at 573.

62. *Chaplinsky*, 315 U.S. at 573. A separate issue is whether the standard of what would cause the common addressee to fight takes into account gender-related differences. *See, e.g.*, Bunkosal Chhun, Note, *Catcalls: Protected Speech or Fighting Words?*, 33 T. JEFFERSON L. REV. 273, 274 (2011) (“[M]ost women do not respond violently to verbal abuse, leaving verbal conduct, like catcalls, excluded by the doctrine.”).

63. *Chaplinsky*, 315 U.S. at 573 (quoting *Chaplinsky*, 18 A.2d at 762).

64. *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1939).

*drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State, the petitioner's communication, considered in the light of the constitutional guarantees, raised no such clear and present menace to public peace and order as to render him liable to conviction of the common law offense in question.*<sup>65</sup>

Thus, even though Cantwell's speech was offensive and might indeed have aroused animosity and caused violence, that was not enough for him to be convicted of causing a breach of the peace, given that the statute was not limited to proscribing those kinds of utterances having a clear and present danger of provoking violence. While the state is of course permitted to act to prevent riots and public disturbances,<sup>66</sup> the means used to do so must be appropriately tailored so as not to preclude protected speech.<sup>67</sup>

*Chaplinsky* itself provides additional support for the interpretation that an important element of these cases involves the statutes under which the individuals were prosecuted, rather than merely the particular contents of the respective communications.<sup>68</sup> Chaplinsky had been addressing the crowd and had been warned that the crowd was getting restless,<sup>69</sup> i.e., that his continuing to speak might in fact result in unrest. Nonetheless, he continued to speak and was eventually attacked by the crowd.<sup>70</sup> He was later brought towards the station by a police officer,<sup>71</sup> although the Court expressly noted that Chaplinsky was *not* told that he was under arrest.<sup>72</sup> Yet, Chaplinsky had addressed the crowd in a way that he had already been warned might well result in violence, and the Court nonetheless suggested that the crowd's reaction was *not* what provided the basis for the arrest.<sup>73</sup> If that is so, then one's having made

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65. *Id.* (emphasis added).

66. *Id.* at 308.

67. *Id.* at 311.

68. See Nevin, *supra* note 55, at 133 (discussing the role played by the breadth of the respective statutes in *Cantwell* and *Chaplinsky*); see also Frolik v. State, 392 So. 2d 846, 847 (Ala. 1981) (discussing *Chaplinsky* and *Cantwell* and then noting that "the statute must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression" (quoting Gooding v. Wilson, 405 U.S. 518, 522 (1972))).

69. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 570 (1942).

70. *State v. Chaplinsky*, 18 A.2d 754, 758 (N.H. 1941).

71. See *id.*

72. *Chaplinsky*, 315 U.S. at 570.

73. See William Shepard McAninch, *A Catalyst for the Evolution of Constitutional Law: Jehovah's Witnesses in the Supreme Court*, 55 U. CIN. L. REV. 997, 1033 (1987) ("It was not until he was being led to the police

comments that would probably or even actually result in violence might not suffice to establish that one had uttered fighting words.<sup>74</sup>

Suppose that Cantwell had been struck by those listening to the record. Even so, Cantwell's conviction would likely have been reversed, given the content of his speech and the breadth of the statute under which he was prosecuted.<sup>75</sup> But if that is so, then the *Cantwell* Court's having noted that no violence had in fact taken place<sup>76</sup> was not meant to suggest implicitly that if there had been violence the breach of peace conviction would have been upheld.<sup>77</sup> On the contrary, the conviction still would not have been upheld, because there still would have been "no assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, no personal abuse"<sup>78</sup> by Cantwell. Further, there still would have been a "situation analogous to a conviction under a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application."<sup>79</sup>

If the *Cantwell* Court was not suggesting that the lack of violence was what provided the basis for striking down Cantwell's conviction, then some explanation must be offered as to why the Court bothered to mention that there had been no violence. The Court was likely illustrating its point that "in practically all [of the breach of peace

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station (whether for protection or arrest is unclear) that Chaplinsky spoke the offending words to the city marshal.").

74. In other contexts, the Court has rejected that the prevention of violence will justify any speech prohibition. *See* *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287, 296 (1941) ("Nor may a state enjoin peaceful picketing merely because it may provoke violence in others." (citing *Near v. Minnesota*, 283 U.S. 697, 721–22 (1931) and *Cantwell v. Connecticut*, 310 U.S. 296 (1940))).
75. *See* *Ashton v. Kentucky*, 384 U.S. 195, 200 (1966) (noting that "[c]onvictions for 'breach of the peace' where the offense was imprecisely defined were . . . reversed").
76. *See* *Cantwell v. Connecticut*, 310 U.S. 296, 309 (1939).
77. *But see* *Massey*, *supra* note 58, at 157 ("The Supreme Court reversed Cantwell's conviction of inciting a breach of the peace because, in part, there was not a sufficient causal connection between his speech and the threatened harm.").
78. *Cantwell*, 310 U.S. at 310; *see also* Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2201 (2015) (explaining that the *Cantwell* Court's "analysis would have been different had the defendant engaged with his unwilling interlocutors in a less polite fashion").
79. *Cantwell*, 310 U.S. at 308; *see also* Nevin, *supra* note 55, at 133 (footnote omitted) (quoting *Cantwell*, 310 U.S. at 310) ("Cantwell's preaching, despite its natural tendency to offend Catholics and all those who adhere to organized religion, failed to meet this standard of 'profane, indecent, or abusive remarks . . .'").

cases], the provocative language which was held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks directed to the person of the hearer.”<sup>80</sup> According to this interpretation, the Court was not providing the criterion for a disturbing-the-peace conviction. Instead, the Court was merely noting that these cases rarely, if ever, involve violence if no personal insults are made.

*Terminiello v. Chicago*<sup>81</sup> involved a disorderly conduct conviction<sup>82</sup> arising out of a speech in Chicago causing a violent reaction in a crowd.<sup>83</sup> When striking down the conviction, the Court focused on the construction of the statute rather than on whether Terminiello’s words would likely result in a breach of the peace.<sup>84</sup> Indeed, one might infer from the Court’s description of Terminiello’s speech that the breach of the peace was readily foreseeable—“[p]etitioner in his speech condemned the conduct of the crowd outside and *vigorously, if not viciously*, criticized various political and racial groups whose activities he denounced as inimical to the nation’s welfare.”<sup>85</sup> It would be unsurprising for such language to result in unrest, although there was some question whether his speech in fact caused the disturbance.<sup>86</sup>

The statute under which Terminiello had been convicted was not merely designed to prevent riots or disorder. Instead, “the statutory

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80. *Cantwell*, 310 U.S. at 309.

81. 337 U.S. 1 (1949).

82. *Id.* at 2.

83. *See id.* at 13 (Jackson, J., dissenting) (“But the local court that tried Terminiello was . . . dealing with a riot and with a speech that provoked a hostile mob and incited a friendly one, and threatened violence between the two.”); Eva DuBuisson, *Teaching from the Closet: Freedom of Expression and Out-Speech by Public School Teachers*, 85 N.C. L. REV. 301, 327 (2006) (“Terminiello gave a speech to a large audience in a public meeting hall; outside, an angry crowd of protesters condemned his speech and created a violent disturbance.”); Comment, *The Constitutionality of A Requirement to Give Notice Before Marching*, 118 U. PA. L. REV. 270, 274 (1969) (“In *Terminiello*, the appellant delivered a speech severely attacking various political and racial groups, thereby creating great unrest in the crowd assembled outside the auditorium in which he was speaking.”).

84. *Terminiello*, 337 U.S. at 5 (“[T]he gloss which Illinois placed on the ordinance gives it a meaning and application which are conclusive on us. We need not consider whether as construed it is defective in its entirety. As construed and applied it at least contains parts that are unconstitutional. The verdict was a general one; and we do not know on this record but what it may rest on the invalid clauses.”); *see also* *Lynch v. State*, 236 A.2d 45, 53 (Md. Ct. Spec. App. 1967) (emphasizing the role of statutory construction in *Terminiello*).

85. *Terminiello*, 337 U.S. at 3 (emphasis added).

86. *See id.* at 8 (Vinson, C.J., dissenting) (suggesting that those outside the hall where the address was given did not hear Terminiello’s words).

words ‘breach of the peace’ were defined . . . to include speech which ‘stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance . . . .’<sup>87</sup> But speech might invite dispute without resulting in violence or endangering the public. The Court reasoned that “a function of free speech under our system of government is to invite dispute.”<sup>88</sup> Because “[t]he ordinance . . . permitted conviction of petitioner if his speech stirred people to anger, invited public dispute, or brought about a condition of unrest,”<sup>89</sup> the “conviction [could] . . . not stand.”<sup>90</sup> The Court expressly declined to address whether the speech at issue constituted fighting words,<sup>91</sup> instead basing its reversal of the conviction on the breadth of the statute.<sup>92</sup>

One court concluded that *Terminiello* undercut the inclusion of the “inflicts injury” prong<sup>93</sup> of the characterization of fighting words as “those which by their very utterance *inflict injury* or incite an

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87. *Id.* at 4 (majority opinion).

88. *Id.*

89. *Id.* at 5.

90. *Id.*

91. *Id.* at 3 (“The argument here has been focused on the issue of whether the content of petitioner’s speech was composed of derisive, fighting words, which carried it outside the scope of the constitutional guarantees. . . . We do not reach that question, for there is a preliminary question that is dispositive of the case.” (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) and *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1939))).

92. *But see id.* at 7 (Vinson, C.J. dissenting) (“[T]he Illinois courts construed the ordinance as punishing only the use of ‘fighting words.’ Their opinions plainly show that they affirmed because they thought that the petitioner’s speech had been found by the jury to come within that category.”).

93. *State v. Drahota*, 788 N.W.2d 796, 802 (Neb. 2010) (“In fact, it was only 7 years after *Chaplinsky* that the Court began to retreat from the ‘inflict injury’ part of the definition. In *Terminiello v. Chicago*, the Court stated that a conviction could not rest on the grounds that the speech merely ‘stirred people to anger, invited public dispute, or brought about a condition of unrest.’ To fall within the First Amendment exception for fighting words, speech must be ‘shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.’” (quoting *Terminiello*, 337 U.S. at 5)). For a different interpretation, see *City of Bismarck v. Schoppert*, 469 N.W.2d 808, 811 (N.D. 1991), where the Supreme Court of North Dakota explained:

Whatever the *Chaplinsky* Court meant by the phrase “words which by their very utterance inflict injury,” *Terminiello* and *Gooding* stand for the proposition that the fact that words are vulgar or offensive is not sufficient to remove them from the protection of the first amendment and into the arena in which the state can make conduct criminal.

*City of Bismarck*, 469 N.W.2d at 811.

immediate breach of the peace.”<sup>94</sup> But there are a number of ways to interpret *Terminiello* that have nothing to do with the “inflicts injury” prong. For example, Terminiello had been addressing remarks to one audience about another group of people.<sup>95</sup> Insofar as the “profane, indecent, or abusive remarks [must be] *directed to the person of the hearer*,”<sup>96</sup> his address might have been thought not to count as fighting words because of the audience at whom it was addressed—that audience would neither have been incited to commit violence *nor would have been likely to have felt injured by Terminiello’s words*. Arguably, the Court did not see fit to discuss whether anyone in the audience would have felt injured because the Court did not believe injury a likely result in light of the audience’s composition, just as the Court likely did not believe that members of that audience would react violently. If one of the reasons that Terminiello’s speech did not constitute fighting words was that it was directed at an audience who might be sympathetic to his position,<sup>97</sup> then the *Terminiello* Court would not have been excising the “inflicts injury” component of fighting words, but instead would have been focusing on the audience element of the fighting words doctrine.

After *Terminiello*, one might have inferred that convictions for disorderly conduct or breach of the peace would not be upheld if based on overly broad statutes. *Feiner v. New York*,<sup>98</sup> a case decided two years after *Terminiello*, suggests that the Court is not always willing to vacate convictions under overbroad statutes.

Irving Feiner was convicted of disorderly conduct.<sup>99</sup> He had been addressing a crowd, which had become restless.<sup>100</sup> Some in the crowd supported his position while others did not, and the police were allegedly fearful that there might be a fight.<sup>101</sup> Feiner was twice asked

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94. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (emphasis added).

95. *Terminiello*, 337 U.S. at 3 (explaining that Terminiello was addressing an audience inside an auditorium about people who were protesting outside of the auditorium).

96. *Cantwell v. Connecticut*, 310 U.S. 296, 309 (1939) (emphasis added).

97. Those who were viciously attacked in the speech might not have heard his words. *See Terminiello*, 337 U.S. at 8 (Vinson, C.J., dissenting) (noting that “those outside the hall . . . did not hear the speech”).

98. 340 U.S. 315 (1951).

99. *Id.* at 316.

100. *Id.* at 317.

101. *Id.* (“Because of the feeling that existed in the crowd both for and against the speaker, the officers finally ‘stepped in to prevent it from resulting in a fight.’”).



to stop talking, but he refused.<sup>102</sup> He was then arrested for violating the following statute:

Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:

1. Uses offensive, disorderly, threatening, abusive or insulting language, conduct or behavior;
2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others;
3. Congregates with others on a public street and refuses to move on when ordered by the police.<sup>103</sup>

The Court upheld the conviction.<sup>104</sup>

*Feiner* is hard to square with the previous cases in part because of the statute's breadth and in part because of the Court's reasoning.<sup>105</sup> The statute prohibited speech that involved fighting words—abusive or insulting language—but also prohibited the kind of protected speech whose prohibition was in violation of constitutional guarantees. For example, criminalizing annoying<sup>106</sup> or offensive<sup>107</sup> language includes too much. A statute's criminalizing protected speech might result in a jury's finding an individual guilty of having committed a crime when the speech for which she was convicted was not the kind of speech that is

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102. *Id.* at 318.

103. *Id.* at 318 n.1 (quoting N.Y. PENAL LAW § 722 (current version at N.Y. PENAL LAW § 240.20 (McKinney 2020))).

104. *Feiner*, 340 U.S. at 321 (“The findings of the state courts as to the existing situation and the imminence of greater disorder coupled with petitioner’s deliberate defiance of the police officers convince us that we should not reverse this conviction in the name of free speech.”).

105. James Weinstein, *Free Speech, Abortion Access, and the Problem of Judicial Viewpoint Discrimination*, 29 U.C. DAVIS L. REV. 471, 476 (1996) (noting “the lack of a precise constitutional rule announced by the [*Feiner*] Court”).

106. *Cf.* *City of Houston v. Hill*, 482 U.S. 451, 465 (1987) (“[W]e have repeatedly invalidated laws that provide the police with unfettered discretion to arrest individuals for words . . . that annoy or offend them.”).

107. *Cf.* *Cantwell v. Connecticut*, 310 U.S. 296, 309 (1939) (“The hearers were in fact highly offended.”); *see also* William Drabble, *Righteous Torts: Pleasant Glade Assembly of God v. Schubert and the Free Exercise Defense in Texas*, 62 BAYLOR L. REV. 267, 270 (2010) (noting that *Cantwell*’s communications were offensive).

permissibly criminalized.<sup>108</sup> One would have inferred after *Terminiello* that the overbreadth<sup>109</sup> of the statute at issue in *Feiner* would have resulted in the convictions being vacated.<sup>110</sup>

An additional point is that the crowd listening to *Feiner* may not in fact have been riled up—it seems equally plausible that the one individual who was upset could have been handled easily by the police.<sup>111</sup> While *Feiner* had uttered insults, there was no evidence that those insults were directed at anyone present.<sup>112</sup> Finally, if *Feiner* is justified because of a reasonable fear of a riot,<sup>113</sup> then *Terminiello* should

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108. *Terminiello v. Chicago*, 337 U.S. 1, 5 (1948) (“We need not consider whether as construed it is defective in its entirety. As construed and applied it at least contains parts that are unconstitutional. The verdict was a general one; and we do not know on this record but what it may rest on the invalid clauses.”).
109. *Cf. Cox v. Louisiana*, 379 U.S. 536, 551 (1965) (“There is an additional reason why this conviction cannot be sustained. The statute at issue in this case, as authoritatively interpreted by the Louisiana Supreme Court, is unconstitutionally vague in its overly broad scope.”).
110. *Cf. Aviva O. Wertheimer*, Note, *The First Amendment Distinction Between Conduct and Content: A Conceptual Framework for Understanding Fighting Words Jurisprudence*, 63 *FORDHAM L. REV.* 793, 804 (1994) (“Despite its recent holding in *Terminiello*, the Court upheld the conviction [in *Feiner*].”); Macklin W. Thornton, *Laying Siege to the Ivory Tower: Resource Allocation in Response to the Heckler’s Veto on University Campuses*, 55 *SAN DIEGO L. REV.* 673, 697 n.125 (2018) (noting “the change from *Terminiello* to *Feiner*”).
111. *See Feiner v. New York*, 340 U.S. 315, 327 (Black, J., dissenting) (“[O]ne person threatened to assault petitioner but the officers did nothing to discourage this when even a word might have sufficed.”). *But see* Note, *Blasphemy*, 70 *COLUM. L. REV.* 694, 729 (1970) (“Feiner was convicted of disorderly conduct only after disorder by his audience seemed imminent as a result of his speech . . .”).
112. *Feiner*, 340 U.S. at 330 (Douglas, J., dissenting) (noting that a few mayors and the President were insulted). In addition, *Feiner* insulted members of the American Legion. *See id.* It is not clear whether anyone from the American Legion was present, and in any event these comments would seem no more objectionable than those that *Cantwell* had directed against Catholicism to two individuals who were in fact Catholic. *See Cantwell*, 310 U.S. at 303; *see also* Wertheimer, *supra* note 110, at 804 (“[T]he defendant, *Feiner*, made derogatory remarks about President Truman, local politicians and the American Legion.”).
113. *See Edwards v. South Carolina*, 372 U.S. 229, 236 (1963) (citing *Feiner*, 340 U.S. at 317, 321) (suggesting that *Feiner* was inciting a riot); Brian J. Levy, Note, *Who Wants to Know—and Why?: The Supreme Court’s Secret Purposivist Test for Exemptions from Association Membership Disclosure Laws*, 87 *N.Y.U. L. REV.* 473, 503 (2012) (“The Supreme Court upheld the conviction. Emphasizing the danger of violence, the Court concluded that the arrest was constitutional because the police had the power to prevent a riot.”).

certainly have been decided differently, because there was an actual, easily foreseeable disturbance in the latter case.<sup>114</sup>

*B. Limiting Fighting Words to Exclude the Injury Prong?*

In a few fighting words cases, the Court has only considered whether the words at issue would result in violence rather than look in addition at whether the words would inflict injury. This has led some courts and commentators to conclude that the fighting words exception no longer includes the injury prong.<sup>115</sup>

*Street v. New York*<sup>116</sup> is sometimes cited as a case limiting the construction of fighting words doctrine.<sup>117</sup> Sidney Street was convicted of destroying or casting contempt upon a United States flag by word or deed.<sup>118</sup> On the day that Street heard that James Meredith had been

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114. See DuBuisson, *supra* note 83, at 327 (“Terminiello gave a speech to a large audience in a public meeting hall; outside, an angry crowd of protesters condemned his speech and created a violent disturbance.”).

115. See, e.g., Collin v. Smith, 578 F.2d 1197, 1206 (7th Cir. 1978) (rejecting that fighting words doctrine includes an “inflicts injury” prong); State v. Drahota, 788 N.W.2d 796, 806 (Neb. 2010) (“[T]he State cannot criminalize speech under the fighting words exception solely because it inflicts emotional injury . . . .”); see also Ronald Turner, *Hate Speech and the First Amendment: The Supreme Court’s R.A.V. Decision*, 61 TENN. L. REV. 197, 208 (1993) (“[C]ommentators have concluded that the inflict[s] injury prong of *Chaplinsky* is no longer good law.”); Ashley Barton, *Oh Snap!: Whether Snapchat Images Qualify As “Fighting Words” Under Chaplinsky v. New Hampshire and How to Address Americans’ Evolving Means of Communication*, 52 WAKE FOREST L. REV. 1287, 1305 (2017) (“The Court perhaps let the inflict[s]-injury prong fall to the wayside.”); Gregory Preves, *The Death Knell for Hate-Crime Laws? The Supreme Court Protects Unpopular Speech in R.A.V. v. City of St. Paul*, 24 LOY. U. CHI. L.J. 309, 315 (1993) (“[T]he personal injury prong of *Chaplinsky*, which never enjoyed strong support by the Court, is now essentially dead.”); Clay Calvert, *Cohen v. California Turns 40: F--- the Midlife Crisis*, COMM’NS LAW., March 2011, at 5 (“In brief, fighting words today must be conveyed in direct, one-on-one fashion and be likely to provoke an immediate, violent response in the context in which they are uttered.”); Brady Coleman, *Shame, Rage and Freedom of Speech: Should the United States Adopt European “Mobbing” Laws?*, 35 GA. J. INT’L & COMPAR. L. 53, 82 (2006) (second alteration in original) (“[M]ost observers believe the first prong of the *Chaplinsky* test—excluding from First Amendment protection language which by its ‘very utterance inflict[s] injury’—has not survived the test of time.”).

116. 394 U.S. 576 (1969).

117. Donoughe, *supra* note 2, at 750 (“The Court began to steadily narrow the grounds on which ‘fighting words’ are held to apply, beginning in 1969 with *Street v. New York*.”).

118. *Street*, 394 U.S. at 578.

shot,<sup>119</sup> Street went outside with a United States flag and burned it. When asked whether he had burned the flag, he said, “Yes; that is my flag; I burned it. If they let that happen to Meredith we don’t need an American flag.”<sup>120</sup>

Street was convicted under a statute which criminalized both the burning of the flag and using words to cast contempt upon a United States flag.<sup>121</sup> He argued that the statute was unconstitutional both because it prohibited his saying certain words<sup>122</sup> and because it prohibited his engaging in certain expressive conduct.<sup>123</sup> The Court saw no need to address the latter claim,<sup>124</sup> because it held that the statute’s criminalizing the use of certain words about the American flag was unconstitutional.<sup>125</sup> Because Street’s conviction might well have been based at least in part upon that unconstitutional provision,<sup>126</sup> the conviction could not stand.<sup>127</sup>

In reversing the conviction based on an unconstitutional speech limitation, the Court addressed whether the prohibition targeted words that fell into one of the recognized exceptions, e.g., fighting words. The Court reasoned, “Nor could such a conviction be justified on . . . the possible tendency of appellant’s words to provoke violent retaliation,”<sup>128</sup> although the Court conceded that it “it is conceivable that some listeners might have been moved to retaliate upon hearing appellant’s

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119. *Id.* (“Appellant testified that during the afternoon of June 6, 1966, he was listening to the radio in his Brooklyn apartment. He heard a news report that civil rights leader James Meredith had been shot by a sniper in Mississippi.”).

120. *Id.* at 579.

121. *Id.* at 577–78 (citing N.Y. PENAL LAW § 1425, subd. 16 (1909)).

122. *Id.* at 580.

123. *Id.* at 580–81 (“[H]e asserts that New York may not constitutionally punish one who publicly destroys or damages an American flag as a means of protest, because such an act constitutes expression protected by the Fourteenth Amendment.”).

124. *Id.* at 581.

125. *Id.* (“[W]e hold that § 1425, subd. 16, par. d, was unconstitutionally applied in appellant’s case because it permitted him to be punished merely for speaking defiant or contemptuous words about the American flag.”).

126. *Id.* at 590 (“In the face of an information explicitly setting forth appellant’s words as an element of his alleged crime, and of appellant’s subsequent conviction under a statute making it an offense to speak words of that sort, we find this record insufficient to eliminate the possibility either that appellant’s words were the sole basis of his conviction or that appellant was convicted for both his words and his deed.”).

127. *Id.* at 594 (“[W]e reverse the judgment of the New York Court of Appeals.”).

128. *Id.* at 592.

disrespectful words.”<sup>129</sup> Nonetheless, the Court rejected that “appellant’s remarks were so inherently inflammatory as to come within that small class of ‘fighting words’ which are ‘likely to provoke the average person to retaliation, and thereby cause a breach of the peace.’”<sup>130</sup> Here, the Court implied that even if violence had resulted, that would not have sufficed to establish that Street’s communication fell into the fighting words exception, because the average person would not have reacted violently to his words.<sup>131</sup>

The construction of the fighting words exception in *Street* does not include anything about the likelihood that the words would cause *injury* to the person at whom they were directed.<sup>132</sup> Yet, the Court’s having failed to include the injury component of fighting words when providing an analysis in *Street* may not have been because it was trying to change the analysis *sub rosa*<sup>133</sup> but, instead, because the Court did not believe that these words would be viewed as personally insulting and hence did not believe that the words would plausibly be thought to cause anyone injury.

The *Street* Court stated that the words employed simply did not constitute fighting words.<sup>134</sup> But the Court seemed to step back from that judgment, explaining that even if his speech qualified as fighting words,<sup>135</sup> the statute under which he had been convicted was overbroad.<sup>136</sup>

The *Street* Court addressed a related issue, namely, whether Street’s language could be regulated based on its offensiveness. The Court explained, “It is firmly settled that under our Constitution the

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129. *Id.*

130. *Id.* (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942)); see also Beverly Weinberg, *Treating the Symptom Instead of the Cause: Regulating Student Speech at the University of Connecticut*, 23 CONN. L. REV. 743, 778 (1991) (“[I]n *Street v. New York*,[,] . . . [t]he Court held that the words used by the defendant were not so inherently inflammatory as to fall within that small class of fighting words.”).

131. *Street*, 394 U.S. at 592.

132. See *supra* note 115 and accompanying text.

133. See Note, *supra* note 3, at 1129 (“The jurisprudential history of the *Chaplinsky* doctrine has led some commentators to conclude that the Court has *sub rosa* overruled the entire fighting words doctrine, or at least the ‘inflict injury’ prong.”).

134. See *supra* notes 125–127 and accompanying text; see also Hurdle, *supra* note 3, at 1150 (“Street’s statement did not constitute fighting words because it was not directed to incite a violent response by any individual.”).

135. *Street*, 394 U.S. at 592.

136. *Id.* (“[Section] 1425, subd. 16, par. d, is not narrowly drawn to punish only words of that character, and there is no indication that it was so interpreted by the state courts.”).

public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.”<sup>137</sup> Here, it was unclear whether the Court was treating offensiveness as if it might be part of the fighting words exception<sup>138</sup> or, instead, was listing several possible bases upon which the words might be thought excepted from First Amendment guarantees and then was discussing why each would not work.<sup>139</sup>

Sometimes, when the Court suggests that words do not lose constitutional protection merely because they are offensive, the Court seems to be distinguishing between an individual’s feeling hurt and her feeling offended.<sup>140</sup> Insofar as they are different kinds of reactions, the Court’s suggesting that convictions cannot be based on having caused offense<sup>141</sup> would not also entail that convictions cannot be based on having hurt someone. In addition, the Court has implicitly distinguished between the causes for one’s taking offense—one might be

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137. *Id.*

138. *But see* Victoria L. Handler, *Legislating Social Tolerance: Hate Crimes and the First Amendment*, 13 HAMLIN J. PUB. L. & POL’Y 137, 148 (1992) (“In effect, the [*Street*] Court had refined the ‘fighting words’ doctrine in terms of the ‘inflicts injury’ prong to read that the mere effect of offending or shocking a speaker does not constitute preventable injury.”).

139. The *Street* Court considered and rejected that the words could be criminalized because they constituted incitement, fighting words, shocking or offensive words, or words manifesting a lack of respect for the flag. *See Street*, 394 U.S. at 591–92.

140. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 414 (1992) (White, J., concurring) (“The mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected.” (citing *United States v. Eichman*, 496 U.S. 310, 319 (1990))); Amnon Reichman, *The Passionate Expression of Hate: Constitutional Protections, Emotional Harm and Comparative Law*, 31 FORDHAM INT’L L.J. 76, 123 (2007) (separately listing hurt feelings and offended sensibilities in an analysis of the Israeli Court’s free-expression cases). Some comments might cause both hurt and offense. *See* Christopher J. Roederer, *Free Speech on the Law School Campus: Is it the Hammer or the Wrecking Ball That Speaks?*, 15 U. ST. THOMAS L.J. 26, 27 (2018) (discussing individuals “who are offended and hurt by insensitive language”).

141. *See Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989))).

offended by an idea<sup>142</sup> or by a personal insult,<sup>143</sup> and the First Amendment distinguishes between the two kinds of offense.<sup>144</sup>

Sometimes, members of the Court do not distinguish between hurt feelings and offended sensibilities for purposes of the fighting words doctrine.<sup>145</sup> But when the Court is not distinguishing between these, the kind of offense that is included within fighting words is the kind due to personal insult rather than an unpopular idea.<sup>146</sup>

Suppose that the feelings of offense are due to a personal insult rather than a disagreeable idea.<sup>147</sup> Even so, *merely* because someone has been offended, however slightly, would not establish that the fighting words exception had been triggered.<sup>148</sup> Presumably, when the Court talks about the kind of offense that might qualify an expression as falling with the fighting words category, the Court is including a degree component—only words causing extreme offense or injury would qualify.<sup>149</sup>

Two years after *Street* was issued, the Court decided another case in which the Court has been interpreted to be limiting the fighting words exception. Paul Robert Cohen was convicted of disturbing the

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142. See Peter E. Quint, *The Comparative Law of Flag Desecration: The United States and the Federal Republic of Germany*, 15 HASTINGS INT'L & COMP. L. REV. 613, 614 (1992) (“In 1984 Gregory Lee Johnson, a political protester, publicly burned an American flag near the Republican National Convention to express his disapproval of the renomination of President Reagan.”).

143. See *Cantwell v. Connecticut*, 310 U.S. 296, 309–10 (1940) (“Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution . . .”).

144. Cf. *Johnson*, 491 U.S. at 409 (“No reasonable onlooker would have regarded Johnson’s generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange fisticuffs.”).

145. See *R.A.V.*, 505 U.S. at 414 (White, J., concurring).

146. See *Cantwell*, 310 U.S. at 309–10 (suggesting that insults and epithets are unprotected).

147. Cf. *Hill v. Colorado*, 530 U.S. 703, 746 (2000) (Scalia, J., dissenting) (“[S]uppression of uncongenial ideas is the worst offense against the First Amendment.”).

148. *R.A.V.*, 505 U.S. at 414 (White, J., concurring) (“The mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected.” (citing *United States v. Eichman*, 496 U.S. 310, 319 (1990))).

149. See *infra* note 256 and accompanying text (discussing whether the Court might be saying that the fighting words exception would only be triggered if the person felt so hurt that she would be tempted to lash out in some way).

peace<sup>150</sup> when he wore a jacket “bearing the words ‘Fuck the Draft’” in a courthouse.<sup>151</sup> The Court addressed whether wearing such a jacket could be construed as employing fighting words and thus fall outside of First Amendment protection.<sup>152</sup>

The *Cohen* Court defined fighting words as “those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.”<sup>153</sup> In this case, “the four-letter word displayed by Cohen . . . was clearly not ‘directed to the person of the hearer.’”<sup>154</sup> Thus, because “[n]o individual actually or likely to be present could reasonably have regarded the words on appellant’s jacket as a direct personal insult,”<sup>155</sup> the fighting words exception had not been met.

There are a variety of reasons that the words on Cohen’s jacket did not constitute fighting words. For example, the Court citing *Cantwell* emphasized that the fighting words have to be directed at the person who likely would have had the negative response. One commentator has taken this limitation to mean that for an expression to count as fighting words, the person in particular must be insulted rather than simply be a member of a targeted group.<sup>156</sup> Even if insults can count as fighting words when targeting a group of which a hearer<sup>157</sup> is a member,<sup>158</sup> Cohen’s expression was not an insult and was aimed at the public

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150. *Cohen v. California*, 403 U.S. 15, 16 (1971) (“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 . . . .’”).

151. *Id.* at 16.

152. *See id.* at 19–20.

153. *Id.* at 20.

154. *Id.* (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309 (1940)).

155. *Id.*

156. *See Massey*, *supra* note 58, at 160 (“It is the right to be free of *personal* abuse that is carved out by the exception to free speech created by *Cantwell* and *Chaplinsky*, not a right to be free of abuse that inheres in the status of the auditor as a member of a social group.”).

157. Here, there were no sounds. Instead, people saw the jacket. *Cohen*, 403 U.S. at 16–17. The *Cohen* Court did not imply that seeing versus hearing the words was the relevant differentiating feature. While the *Cohen* Court did suggest that “[t]hose in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes,” *id.* at 21, offended hearers might adopt an analogous remedy and cover their ears. *But see Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 773 (1994) (“[I]t is much easier for the clinic to pull its curtains than for a patient to stop up her ears . . . .”).

158. *Kunz v. New York*, 340 U.S. 290, 298–99 (1951) (Jackson, J., dissenting) (“There held to be ‘insulting or ‘fighting’ words’ were calling one a ‘God



at large rather than at a particular group. Ironically, when noting that no one was likely be personally insulted, the Court was also explaining why the “inflicts injury” prong would not have been met, i.e., why this particular expression did not constitute fighting words even if the “inflicts injury” prong is included with the exception.<sup>159</sup>

*Cohen* underscores some of the lessons of *Street*. Cohen’s “conviction quite clearly rest[ed] upon the asserted offensiveness of the words Cohen used to convey his message to the public.”<sup>160</sup> Indeed, the statute that he had allegedly violated precluded engaging in “offensive conduct.”<sup>161</sup> However, he had not engaged in conduct but speech,<sup>162</sup> which would mean that if his conviction were to stand it would be for having expressed offensive speech.<sup>163</sup>

Like the *Street* Court,<sup>164</sup> the *Cohen* Court examined several exceptions under the First Amendment to see if the expression at issue was immune from First Amendment scrutiny, but found that the expression on Cohen’s jacket did not fall into any of those categories.<sup>165</sup> For example, the Court noted that “[t]his [was] not . . . an obscenity case,”<sup>166</sup> because “[w]hatever else may be necessary to give rise to the States’ broader power to prohibit obscene expression, such expression must be, in some significant way, erotic.”<sup>167</sup> The *Cohen* Court described fighting words as “those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction,”<sup>168</sup> but rejected that this exception was triggered because no one would likely have felt

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damned racketeer’ and a ‘damned Fascist.’ Equally inciting and more clearly ‘fighting words,’ when thrown at Catholics and Jews who are rightfully on the streets of New York, are statements that ‘The Pope is the anti-Christ’ and the Jews are ‘Christ-killers.’ These terse epithets come down to our generation weighted with hatreds accumulated through centuries of bloodshed.” (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 569, 572, 574 (1942))).

159. *See Cohen*, 403 U.S. at 20.

160. *Id.* at 18 (emphasis omitted).

161. *Id.* at 16–17.

162. *Id.* at 18–19.

163. *Id.* at 19 (“Appellant’s conviction, then, rests squarely upon his exercise of the ‘freedom of speech’ . . .”).

164. *See supra* notes 116–139 and accompanying text.

165. *See Cohen*, 403 U.S. at 19–22.

166. *Id.* at 20.

167. *Id.* (citing *Roth v. United States*, 354 U.S. 476 (1957)).

168. *Id.* (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)).

personally insulted.<sup>169</sup> Cohen's jacket could not be interpreted as an attempt to incite. "Nor do we have here an instance of the exercise of the State's police power to prevent a speaker from intentionally provoking a given group to hostile reaction."<sup>170</sup> Basically, the Court considered a number of possible bases upon which to argue that the First Amendment was not implicated and rejected each of them.

When excluding the "inflicts injury" prong, the *Cohen* Court characterized fighting words as those "likely to provoke violent reaction,"<sup>171</sup> just as the *Street* Court had.<sup>172</sup> The *Cohen* Court might have been attempting to narrow what qualified as fighting words or instead might have been focusing on violent reactions because it could not take seriously that the words on Cohen's back would cause anyone injury.<sup>173</sup> If indeed the reason that the Court in *Street* and *Cohen* did not include the personal injury prong of the fighting words exception was that the Court did not believe that the prong was plausibly implicated in the cases, then the conclusion that the Court had implicitly modified the exception would be error.<sup>174</sup>

If courts and commentators were correct that the Court had excised the "inflicts injury" prong, one would not expect the Court to include that prong in future cases when discussing the fighting words exception.<sup>175</sup> Yet, in the year following *Cohen*, the Court again considered a fighting words case, although this one involved language directed at a particular individual during a contentious confrontation.<sup>176</sup> Johnny Wilson was convicted "on two counts of using opprobrious words and abusive language."<sup>177</sup> Wilson had said to a police officer, "'White son of a bitch, I'll kill you' and 'You son of a bitch, I'll choke you to death.'"<sup>178</sup>

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169. *See id.*

170. *Id.* (citing *Feiner v. New York*, 340 U.S. 315 (1951)).

171. *Id.* (citing *Chaplinsky*, 315 U.S. 568).

172. *See supra* note 130 and accompanying text.

173. *Cohen*, 403 U.S. at 20 ("No individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult.").

174. *But see* Mannheim, *supra* note 17, at 1539–40 (quoting *Chaplinsky*, 315 U.S. at 572) ("*Cohen* reflected a heavily contextual approach [because] it restricted the prong of the fighting words doctrine directed at those words that 'by their very utterance inflict injury' in favor of the prong directed at words that 'tend to incite an immediate breach of the peace.'").

175. *See infra* notes 176–211 and accompanying text (discussing *Gooding* and *Lewis*).

176. *Gooding v. Wilson*, 405 U.S. 518, 519 n.1 (1972) (quoting *Wilson v. State*, 156 S.E.2d 446, 449–50 (Ga. 1967)).

177. *Id.* at 518.

178. *Id.* at 534 (Blackmun, J., dissenting).

In addition, he had said to another officer, “You son of a bitch, if you ever put your hands on me again, I’ll cut you all to pieces.”<sup>179</sup>

When deciding whether the conviction should be affirmed, the Court focused on the breadth of the statute, noting that “the statute must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression.”<sup>180</sup> The Court implied that Wilson’s language could itself have been prohibited under a narrowly drawn statute,<sup>181</sup> but that the statute under which he was convicted was unconstitutionally broad.<sup>182</sup> However, the fighting words test cited in *Gooding* includes the “inflicts injury” prong,<sup>183</sup> which one would not have expected if the Court had modified the applicable test.

The reason that the statute was unconstitutionally overbroad in *Gooding* is important to note. When defining the words that might cause a breach of the peace, the Court made clear that the state is not permitted to refuse to consider factors that would *decrease* the likelihood that an actual breach will take place.<sup>184</sup> This qualification is important and modifies the fighting words analysis offered in *Chaplin-sky*—even if it were true that the average person would have thought “Fascist” a fighting word,<sup>185</sup> use of that word on that occasion did not seem at all likely to have resulted in a violent response.<sup>186</sup>

The *Gooding* Court gave examples of Georgia courts that had failed to take into account evidence that violence was not likely to result.<sup>187</sup> For example, one court suggested that words might be prohibited if they might cause a breach of the peace even if on a particular occasion

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179. *Id.*

180. *Id.* at 522 (majority opinion).

181. *Id.* at 520 (“It matters not that the words appellee used might have been constitutionally prohibited under a narrowly and precisely drawn statute.”).

182. *See id.* at 527 (“This definition makes it a ‘breach of peace’ merely to speak words offensive to some who hear them, and so sweeps too broadly. . . . [The statute], as construed, does not define the standard of responsibility with requisite narrow specificity.” (first quoting *Street v. New York*, 394 U.S. 576, 592 (1969); and then citing *Ashton v. Kentucky*, 384 U.S. 195 (1966) and *Cox v. Louisiana*, 379 U.S. 536 (1965))).

183. *See id.* at 522 (“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.’” (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942))).

184. *Id.* at 520–22.

185. *See supra* note 28 and accompanying text.

186. *See supra* note 27 and accompanying text.

187. *Gooding*, 405 U.S. at 525–27.

the words were “addressed to one who, on account of circumstances or by virtue of the obligations of office, cannot actually then and there resent the same by a breach of the peace.”<sup>188</sup> Thus, if a policeman because of good training or the responsibilities of office would not have responded with violence, the relevant standard would not have been met.

A different Georgia court had suggested that breaching the peace involves “disturbing the public peace or tranquility enjoyed by the citizens of a community.”<sup>189</sup> But, the *Gooding* Court noted, such a construction “makes it a ‘breach of peace’ merely to speak words offensive to some who hear them, and so sweeps too broadly.”<sup>190</sup> Basically, because the Georgia courts had interpreted the fighting words exception to involve the kinds of words that might as a general matter bring about a violent reaction even if in the particular case at hand there was no likelihood that there would be a violent reaction, the Georgia statute was including too much speech and thus could not survive constitutional review.<sup>191</sup>

The *Gooding* Court’s failure to analyze whether the “inflicts injury” prong had been met does not establish that the doctrine has been modified to exclude that prong.<sup>192</sup> Whether or not that prong was included, the *Gooding* Court was suggesting that the statute prohibited too much speech because of the failure to take into account factors indicating that no violence would in fact occur even when the average person would say that the language used would likely result in vio-

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188. *Id.* at 526 (citing *Elmore v. State*, 83 S.E. 799, 799 (Ga. Ct. App. 1914)).

189. *Id.* at 527 (citing *Samuels v. State*, 118 S.E.2d 231, 232 (Ga. Ct. App. 1961)).

190. *Id.* (citing *Street v. New York*, 394 U.S. 576, 592 (1969)).

191. *See id.* at 528 (“Because earlier appellate decisions applied § 26–6303 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 § 26–6303 to ‘fighting’ words defined by *Chaplinsky*.”).

192. *State v. Drahota*, 788 N.W.2d 796, 802 (Neb. 2010) (alteration in original) (footnotes omitted) (“Similarly, in *Gooding v. Wilson*, the Court held that a breach of the peace statute was overbroad because it was not limited to fighting words. The Court reasoned that because the statute could be applied ‘to utterances where there was no likelihood that the person addressed would make an immediate violent response, it is clear that [the statute is not limited] to “fighting” words defined by *Chaplinsky*.’ In effect, the *Gooding* Court read the ‘inflict injury’ prong out of the definition. Lower courts have followed the Supreme Court’s lead. ‘It is now clear that words must do more than offend, cause indignation or anger the addressee to lose the protection of the First Amendment.’” (first quoting *Gooding v. Wilson*, 405 U.S. 518, 528 (1972); and then quoting *Hammond v. Adkisson*, 536 F.2d 237, 239 (8th Cir. 1976)).

lence.<sup>193</sup> Because the statute was overbroad, the Court did not need to address, for example, whether the statute was too broad for yet another reason because it would provide the basis for a conviction even though the officer had not felt injured to the requisite extent.<sup>194</sup>

The *Gooding* Court held that a regulation is overbroad if it permits speech to be regulated merely because in some circumstances such speech might result in violence, where there was no reason to believe that the speech would result in violence on that particular occasion.<sup>195</sup> But if there has to be reason to believe that violence will result on a particular occasion, then the Court was including two conditions within its fighting words analysis of imminent violence: (1) the speech has to be the kind of language that people of common intelligence would know would result in an immediate breach of the peace,<sup>196</sup> and (2) the language had to be likely to cause a breach in the particular context in which it was communicated.<sup>197</sup>

While the Court did not offer a separate analysis of the “inflicts injury” prong, the Court might have used an analogous two-part test when seeking to apply this prong: (1) the speech has to be the kind of language that people of common intelligence would know would likely result in an injury (of sufficient severity),<sup>198</sup> and (2) the language had

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193. Some commentators fail to appreciate that the overbreadth of the statute meant that the Court did not have to decide whether the speech at issue qualified under the “inflicts injury” prong, just as the Court did not have to decide whether this speech qualified under the words that will cause an immediate violent response prong. *See* Friedlieb, *supra* note 4, at 390 (citing *Gooding*, 405 U.S. at 519, 528) (“[I]n *Gooding v. Wilson*, the Court struck down a Georgia law banning ‘opprobrious words or abusive language’ because it was applied in a case where no likelihood existed of an immediate violent response. Thus, the Court held that the law was unconstitutional because it merely banned speech that ‘inflicted injury’ without the accompanying threat of a breach of the peace.”).

194. An officer hearing this might not have felt injured but threatened. *See* William Cohen, *A Look Back at Cohen v. California*, 34 UCLA L. REV. 1595, 1605 (1987) (“*Gooding* . . . did not resolve the question of whether, in appropriate circumstances, threats or profanity aimed at police officers could still be punished under the *Chaplinsky* theory.”).

195. *Gooding*, 405 U.S. at 527. Ironically, there was violence on that occasion, although that violence was not caused by the verbal exchange. *See* *Wilson v. State*, 156 S.E.2d 446, 449 (Ga. 1967) (“The officers attempted to remove them from the door, and a scuffle ensued.”).

196. *See Gooding*, 405 U.S. at 523 (quoting *State v. Chaplinsky*, 18 A.2d 754, 762 (N.H. 1941) (“The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight.”)).

197. *See id.* at 525–27; *see also* Hurdle, *supra* note 3, at 1152–53 (“The *Gooding* Court also utilized the *Cohen* actual addressee standard to determine whether speech would incite violence.”).

198. *See supra* note 148 and accompanying text.

to be likely to cause injury to the person to whom it was actually addressed.<sup>199</sup>

In *Lewis v. City of New Orleans*,<sup>200</sup> the Court again addressed whether the use of opprobrious language could be prohibited. There was conflicting testimony about what happened.<sup>201</sup> The officer testified that Mallie Lewis had said, “[Y]ou god damn m. f. police.”<sup>202</sup> Justice Blackmun in his dissent argued that “[t]he speech uttered by Mrs. Lewis to the arresting officer ‘plainly’ was profane, ‘plainly’ it was insulting, and ‘plainly’ it was fighting. It therefore is within the reach of the ordinance, as narrowed by Louisiana’s highest court.”<sup>203</sup> However, the *Lewis* Court focused on the breadth of the relevant statute, which read: “It shall be unlawful and a breach of the peace for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty.”<sup>204</sup>

The Louisiana Supreme Court construed the relevant statute as “narrowed to ‘fighting words’ uttered to specific persons at a specific time . . . .”<sup>205</sup> But the United States Supreme Court reasoned that the statute “plainly has a broader sweep than the constitutional definition of ‘fighting words’ announced in *Chaplinsky* . . . and reaffirmed in *Gooding* . . . , namely, ‘those (words) which by their very utterance inflict injury or tend to incite an immediate breach of the peace.’”<sup>206</sup> The Louisiana Supreme Court had explained that “[p]ermitting the cursing or reviling of or using obscene or opprobrious words to a police officer while in the actual performance of his duty would be unreasonable and basically incompatible with the officer’s activities and the place where

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199. *Cf.* *State v. DeLoreto*, 827 A.2d 671, 684 (Conn. 2003) (“[N]or are true threats typical of contemporary manners such that we should expect police officers to have a ‘thick skin.’”). However, police officers are not expected to have a thick skin about some things, e.g., threats to physical safety. *See id.* (“A police officer is not trained to be fearless in the face of a credible threat that he will be the victim of a crime, and we can perceive of no reason that he should be . . .”).

200. 415 U.S. 130 (1974).

201. *Id.* at 138 (Blackmun, J., dissenting) (“Appellant’s and the officer’s respective versions of the incident are conflicting . . .”).

202. *Id.*

203. *Id.* at 141.

204. *Id.* at 132 (majority opinion) (quoting *NEW ORLEANS, LA.*, M.C.S. § 49–7 (1956)).

205. *Id.* (citing *City of New Orleans v. Lewis*, 269 So. 2d 450, 456 (La. 1972), *rev’d*, 415 U.S. 130 (1974)).

206. *Id.* (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) and *Gooding v. Wilson*, 405 U.S. 518, 522 (1972)).

such activities are performed.”<sup>207</sup> But that would include words that, while making the officer uncomfortable, would not likely lead to violence and might well not be viewed as personal insults.<sup>208</sup> In his concurrence in the result, Justice Powell noted that it was “unlikely . . . that the words said to have been used here would have precipitated a physical confrontation between the middle-aged woman who spoke them and the police officer in whose presence they were uttered.”<sup>209</sup>

If the *Lewis* Court had needed to apply the “inflicts injury” prong, then the Court might have had to decide whether a “god damn m. f. police”<sup>210</sup> should be viewed as “a harmless letting off of steam”<sup>211</sup> rather than as a personal insult. Or, the Court might have recognized the expression as an insult but might have thought the insult insufficiently extreme to qualify under the relevant standard. That might be because being called such a name was not considered sufficiently injurious to qualify.<sup>212</sup> Or, the Court might have been qualifying the personal insult prong just as it had qualified the fighting words prong, reasoning that just as police (because of good training or good self-control) might not

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207. *Id.* (quoting *Lewis*, 269 So. 2d at 456).

208. *Id.* at 133 (“At the least, the proscription of the use of ‘opprobrious language,’ embraces words that do not ‘by their very utterance inflict injury or tend to incite an immediate breach of the peace.’” (quoting *Gooding v. Wilson*, 405 U.S. 518, 522 (1972))).

209. *Id.* at 135 (Powell, J., concurring).

210. *Id.* at 138 (Blackmun, J., dissenting).

211. *Dennis v. United States*, 341 U.S. 494, 568 (1951) (Jackson, J., concurring).

212. Courts sometimes must decide whether the use of epithets are sufficiently extreme or outrageous to qualify for purposes of an intentional infliction of emotional distress claim. *Compare* *Margita v. Diamond Mortg. Corp.*, 406 N.W.2d 268, 271 (Mich. Ct. App. 1987) (“[A] panel of this Court found that racial epithets in the course of throwing the plaintiff out of the defendant’s retail store could be considered extreme and outrageous conduct under the circumstances.” (citing *Ledsinger v. Burmeister*, 318 N.W.2d 558, 562 (Mich. Ct. App. 1982))), *with* *Graham ex rel. Graham v. Guilderland Cent. Sch. Dist.*, 681 N.Y.S.2d 831, 833 (N.Y. App. Div. 1998) (Cardona, P.J., dissenting) (discussing “case law wherein the use of racial slurs and epithets has been held not to constitute the type of extreme and outrageous conduct necessary to sustain a cause of action for intentional infliction of emotional distress” (citing *Herlihy v. Metro. Museum of Art*, 633 N.Y.S.2d 106 (N.Y. App. Div. 1996) and *Leibowitz v. Bank Leumi Tr. Co. of N.Y.*, 548 N.Y.S.2d 513 (N.Y. App. Div. 1989))), *Herlihy*, 633 N.Y.S.2d at 113–14 (finding that falsely accusing someone of being a user of racial slurs “does not rise to the level of outrage required to recover under a cause of action that is limited to only the most egregious of acts”), *and* *Leibowitz*, 548 N.Y.S.2d at 521 (finding that the use of religious and ethnic slurs “in this case did not rise to such an extreme or outrageous level as to meet the threshold requirements for” intentional infliction of emotional distress).

respond with fisticuffs to words that might provoke others,<sup>213</sup> police might also be trained to become inured to such comments rather than find them deeply offensive and harmful.<sup>214</sup>

The Court in *City of Houston v. Hill* addressed “whether a municipal ordinance that makes it unlawful to interrupt a police officer in the performance of his or her duties is unconstitutionally overbroad under the First Amendment.”<sup>215</sup> Noting that “[t]he Houston ordinance is much more sweeping than the municipal ordinance struck down in *Lewis*,”<sup>216</sup> the Court concluded that the ordinance was substantially overbroad and unconstitutional.<sup>217</sup> The Court saw no need to ask the state courts to construe the statute, believing the ordinance “not susceptible to a limiting construction because . . . its language is plain and its meaning unambiguous.”<sup>218</sup>

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213. *Lewis*, 415 U.S. at 135 (Powell, J., concurring) (“[A] properly trained officer may reasonably be expected to ‘exercise a higher degree of restraint’ than the average citizen, and thus be less likely to respond belligerently to ‘fighting words.’” (quoting *Lewis v. City of New Orleans*, 408 U.S. 901, 913 (1972) (Powell, J., concurring))).

214. *See* *Resek v. City of Huntington Beach*, 41 F. App’x 57, 59 (9th Cir. 2002) (“Along with good judgment, intelligence, alertness, and courage, the job of police officers requires a thick skin. Theirs is not a job for people whose feelings are easily hurt.”); *Commonwealth v. Hock*, 728 A.2d 943, 947 (Pa. 1999) (“We recognize that the police often place their lives in jeopardy to ensure the safety of the citizenry and thus perform a task that is valuable, necessary and, at times, heroic. Accordingly, the prospect of a citizen verbally abusing a police officer appears particularly objectionable. It does not follow, however, that Section 5503(a) may be used as a vehicle to protect the police from all verbal indignities, especially under the dubious hypothesis that officers are likely to break the law when affronted. The police must expect that, as part of their jobs, they will be exposed to daily contact with distraught individuals in emotionally charged situations.”); *see also* Frank Rudy Cooper, “*Who’s the Man?*”: *Masculinities Studies, Terry Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671, 735 n.348 (2009) (quoting James J. Fyfe, *Training to Reduce Police-Civilian Violence*, in *AND JUSTICE FOR ALL: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE* 163, 164 (William A. Geller & Hans Toch eds., 1995)) (discussing training designed to help police not personalize insults directed towards them).

215. 482 U.S. 451, 453 (1987).

216. *Id.* at 462.

217. *Id.* at 467.

218. *Id.* at 468.



*Cantwell*,<sup>219</sup> *Terminiello*,<sup>220</sup> *Street*,<sup>221</sup> *Cohen*,<sup>222</sup> *Gooding*,<sup>223</sup> *Lewis*,<sup>224</sup> and *Houston*<sup>225</sup> all involved statutes that were overbroad. For the first time in a fighting words case, the *R.A.V.* Court struck down a statute because it was too narrow.<sup>226</sup>

In *R.A.V. v. City of St. Paul*, the Court examined the constitutionality of the following statute:

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.<sup>227</sup>

The Minnesota Supreme Court had construed the “modifying phrase ‘arouses anger, alarm or resentment in others’ [as] limit[ing] the reach of the ordinance to conduct that amounts to ‘fighting words,’ *i.e.*, ‘conduct that itself inflicts injury or tends to incite immediate violence.’”<sup>228</sup> The *R.A.V.* Court noted that it was “bound by the construction given to it by the Minnesota court,”<sup>229</sup> *i.e.*, that the statute merely prohibits “conduct that itself inflicts injury or tends to incite immediate violence.”<sup>230</sup>

Yet, it might be noted that the Court’s options were not as limited by the Minnesota Supreme Court’s construction as the *R.A.V.* opinion implied. The Louisiana Supreme Court had interpreted the statute at

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219. *See supra* notes 35–80 and accompanying text.

220. *See supra* notes 81–97 and accompanying text.

221. *See supra* notes 116–139 and accompanying text.

222. *See supra* notes 150–174 and accompanying text.

223. *See supra* notes 176–197 and accompanying text.

224. *See supra* notes 200–214 and accompanying text.

225. *See supra* notes 215–218 and accompanying text.

226. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (“The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.” (citing *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991))).

227. *Id.* at 380 (quoting ST. PAUL, MINN., LEGIS. CODE § 292.02 (1983)).

228. *Id.* (citing *In re Welfare of R.A.V.*, 464 N.W.2d 507, 510 (Minn. 1991), *rev’d sub nom. R.A.V.*, 505 U.S. 377).

229. *Id.* at 381.

230. *Id.* at 380 (citing *In re Welfare of R.A.V.*, 464 N.W.2d at 510).

issue in *Lewis* as confined to fighting words,<sup>231</sup> and the *Lewis* Court had nonetheless held that the statute was overbroad.<sup>232</sup> Nonetheless, the United States Supreme Court accepted the Minnesota Supreme Court's conclusion that the statute only barred fighting words and came to the paradoxical conclusion that even if "all of the expression reached by the ordinance is proscribable under the 'fighting words' doctrine, [the Court] nonetheless conclude[s] that the ordinance is facially unconstitutional in that it prohibits *otherwise permitted* speech solely on the basis of the subjects the speech addresses."<sup>233</sup>

The *R.A.V.* Court explained that "the ordinance applies only to 'fighting words' that insult, or provoke violence, 'on the basis of race, color, creed, religion or gender,'"<sup>234</sup> which meant that fighting words on other bases such as political affiliation, sexual orientation, or union membership were not in addition proscribed.<sup>235</sup> Yet, it is at best misleading to suggest that these other expressions were "otherwise permitted,"<sup>236</sup> because there was another Minnesota statute prohibiting speech that constituted fighting words.<sup>237</sup> Here, presumably, the complaint was that *this* statute criminalized certain fighting words but not others which means that a particular statute would have to either ban all fighting words or none at all.<sup>238</sup>

The *R.A.V.* Court offered an exception to this all-or-none rule: "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no

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231. *Lewis v. City of New Orleans*, 415 U.S. 130, 132 (noting that the Louisiana Supreme Court "took the position that, as written, '[the statute] is narrowed to "fighting words" uttered to specific persons at a specific time'" (quoting *City of New Orleans v. Lewis*, 269 So. 2d 450, 456 (La. 1972))).

232. *Id.* at 134 ("Since § 49-7, as construed by the Louisiana Supreme Court, is susceptible of application to protected speech, the section is constitutionally overbroad and therefore is facially invalid."); see also *R.A.V.*, 505 U.S. at 412–13 (White, J., concurring) (citing *Lewis*, 415 U.S. at 132–33) ("We have stricken legislation when the construction supplied by the state court failed to cure the overbreadth problem.").

233. *R.A.V.*, 505 U.S. at 381 (emphasis added).

234. *Id.* at 391.

235. See *id.* ("Those who wish to use 'fighting words' in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered.").

236. *Id.* at 381.

237. See MINN. STAT. § 609.72 (2019), *invalidated by* *State v. Hensel*, 901 N.W.2d 166, 169 (Minn. 2017).

238. *R.A.V.*, 505 U.S. at 419 (Stevens, J., concurring) ("Within a particular 'proscribable' category of expression, the Court holds, a government must either proscribe *all* speech or no speech at all.").

significant danger of idea or viewpoint discrimination exists.”<sup>239</sup> Thus, the Court explained, “A State might choose to prohibit only that obscenity which is the most patently offensive *in its prurience*—*i.e.*, that which involves the most lascivious displays of sexual activity.”<sup>240</sup> Yet, one would have thought that St. Paul might have thought these fighting words especially important to proscribe, which presumably would mean that the announced exception had been met in this case.<sup>241</sup>

For purposes here, though, the *R.A.V.* analysis is noteworthy for a few additional reasons. The case involved an attempted cross burning in the yard of an African-American family.<sup>242</sup> The attempt was made sometime between 1:00 a.m. and 3:00 a.m.<sup>243</sup>

The incident was described in the following way:

Early on June 21, 1990, Russ and Laura Jones, an African-American couple with five children who had recently moved to a predominantly white, working-class neighborhood in St. Paul, Minnesota, awoke to the sound of voices in their front yard. Looking outside, the Jones family saw in their fenced-in yard a small burning cross, a device long associated with the racist tactics of the Ku Klux Klan. Fearing for their safety, the family called the police.<sup>244</sup>

Waking to discover a burning cross in the yard would be terrifying.<sup>245</sup> For fighting words analysis, however, there was no hint that any member of the family was even tempted to confront these perpetrators with violence, *so the fighting words exception would not have been*

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239. *Id.* at 388 (majority opinion).

240. *Id.*

241. *See id.* at 407 (White, J., concurring) (“This selective regulation reflects the city’s judgment that harms based on race, color, creed, religion, or gender are more pressing public concerns than the harms caused by other fighting words.”).

242. *Id.* at 379 (“In the predawn hours of June 21, 1990, petitioner and several other teenagers allegedly assembled a crudely made cross by taping together broken chair legs. They then allegedly burned the cross inside the fenced yard of a black family that lived across the street from the house where petitioner was staying.”).

243. *In re Welfare of R.A.V.*, 464 N.W.2d 507, 508 (Minn. 1991) (“The City of St. Paul alleges that between 1:00 a.m. and 3:00 a.m. on June 21, 1990, R.A.V. participated in burning a cross inside the fenced yard of an African American family’s home.”), *rev’d sub nom.* *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

244. Thomas H. Moore, *R.A.V. v. City of St. Paul: A Curious Way to Protect Free Speech*, 71 N.C. L. REV. 1252, 1256 (1993) (footnotes omitted).

245. *See R.A.V.*, 505 U.S. at 380 n.1 (noting that there might have been a terror prosecution).

triggered. Even if the Minnesota Supreme Court was construing the ordinance narrowly, there was no likelihood that this particular expression would have resulted in the targeted individual responding violently, so one would have thought that, following *Gooding*<sup>246</sup> and *Lewis*,<sup>247</sup> this conviction could not stand.

The Minnesota Supreme Court had defined fighting words as “those which by their very utterance *inflict injury* or tend to incite an immediate breach of the peace,”<sup>248</sup> which the United States Supreme Court cited with approval.<sup>249</sup> But if the “inflict injury” prong had officially been dropped,<sup>250</sup> then the Minnesota construction would have been overbroad and subject to reversal.<sup>251</sup> In his concurrence in the judgment, Justice White suggested that the statute was overbroad, not because the “inflicts injury” component was included but because the Minnesota court had failed to specify which injuries were included and which not.<sup>252</sup>

When analyzing fighting words, the Court has included the “inflicts injury” prong even after *R.A.V.*<sup>253</sup> The *Alvarez* Court cited *Chaplinsky* with approval, noting *Chaplinsky’s* exception from First Amendment

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246. See *supra* notes 176–197 and accompanying text.

247. See *supra* notes 200–214 and accompanying text.

248. *In re Welfare of R.A.V.*, 464 N.W.2d at 510 (emphasis added) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

249. See *R.A.V.*, 505 U.S. at 381.

250. *But see* Barton, *supra* note 115, at 1303 (noting that “the Supreme Court has never explicitly addressed whether the inflict-injury arm was mere surplusage”).

251. See *supra* notes 200–218 and accompanying text (discussing the overbroad statutes struck down in *Lewis and Hill*).

252. *R.A.V.*, 505 U.S. at 413 (White, J., concurring) (alteration in original) (“[T]he Minnesota court was far from clear in identifying the ‘injur[ies]’ inflicted by the expression that St. Paul sought to regulate.”).

253. See *Virginia v. Black*, 538 U.S. 343, 359 (2003); see also *Snyder v. Phelps*, 562 U.S. 443, 465 (2011) (Alito, J., dissenting) (“This Court has recognized that words may ‘by their very utterance inflict injury’ and that the First Amendment does not shield utterances that form ‘no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.’” (citing *Chaplinsky*, 315 U.S. at 572)). *Texas v. Johnson* and *Hustler Magazine, Inc. v. Falwell* provide earlier examples. *Texas v. Johnson*, 491 U.S. 397, 409 (1989) (“Nor does Johnson’s expressive conduct fall within that small class of ‘fighting words’ that are ‘likely to provoke the average person to retaliation, and thereby cause a breach of the peace.’ [Chaplinsky, 315 U.S. at 574]. No reasonable onlooker would have regarded Johnson’s generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange fisticuffs.”); *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 56 (1988).

protection of “so-called ‘fighting words.’”<sup>254</sup> In *Brown v. Entertainment Merchants Ass’n*, the Court included fighting words within the “well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.”<sup>255</sup>

One would expect that the Court would be very careful when describing this “well-defined and narrowly limited class[] of speech.”<sup>256</sup> Regrettably, when analyzing the fighting words category, the Court has been inconsistent with respect to what the criteria are and how they should be applied.<sup>257</sup> The Court sometimes includes an injury component in the test but has neither applied it nor limited its application.<sup>258</sup>

In most if not all of the cases in which the Court has struck down applications of the fighting words test, the Court has interpreted the statute under which the individual was convicted to be overbroad because of prohibiting too much speech, e.g., speech that invites dispute<sup>259</sup> or perhaps that is offensive.<sup>260</sup> But the statutes having been overbroad in any event has meant that there was no need for the Court to announce that the “inflicts injury” prong has been excised.<sup>261</sup> By the

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254. *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (citing *Chaplinsky*, 315 U.S. at 571–72).

255. 564 U.S. 786, 791 (2011) (quoting *Chaplinsky*, 315 U.S. at 571–72); *see also* *Morse v. Frederick*, 551 U.S. 393, 410 (2007) (Thomas, J., concurring) (quoting *Chaplinsky*, 315 U.S. at 571–72).

256. *Chaplinsky*, 315 U.S. at 571–72.

257. *Compare supra* notes 219–225 and accompanying text, *with supra* notes 226–233 and accompanying text.

258. *See supra* Part II(B).

259. *Terminiello v. Chicago*, 337 U.S. 1, 5 (1948).

260. *Gooding v. Wilson*, 405 U.S. 518, 527 (1972) (“This definition makes it a ‘breach of peace’ merely to speak words offensive to some who hear them, and so sweeps too broadly.”).

261. Some of the lower federal courts have noted that the injury prong has been included by the Court. *See Wilson v. Attaway*, 757 F.2d 1227, 1246 (11th Cir. 1985) (“Whether words are ‘fighting’ words, that is, words ‘which by their very utterance inflict injury or tend to incite an immediate breach of the peace,’ . . . depends ‘upon the circumstances of their utterance.’” (first citing *Chaplinsky*, 315 U.S. at 572; and then citing *Lewis v. City of New Orleans*, 415 U.S. 130, 135 (1974) (Powell, J., concurring))); *Knight Riders of Ku Klux Klan v. City of Cincinnati*, 72 F.3d 43, 46 (6th Cir. 1995) (“[I]f a reasonable onlooker would regard the expressive conduct ‘as a direct personal insult or an invitation to exchange fisticuffs,’ it is not entitled to First Amendment protection.” (citing *Texas v. Johnson*, 491 U.S. 397, 409 (1989))); *Sandul v. Larion*, 119 F.3d 1250, 1255 (6th Cir. 1997) (“Sandul’s words and actions do not rise to the level of fighting words. The actions were not likely to inflict injury or to incite an immediate breach of the peace.”); *McDermott v. Royal*, 213 F. App’x 500, 502 (8th Cir. 2007) (“Specifically, in *City of Houston v. Hill*, [482 U.S. 451, 461–62 (1987)], the Supreme Court

same token, however, the Court did not need to construe the non-excised “inflicts injury” component (because the statutes were overbroad in any case<sup>262</sup>), so it is unclear whether that prong is still included in the fighting words test or how significant an injury must be sustained before that part of the fighting words test has been triggered or even whether the *only* kind of injury that would count would be one that was so severe as to invite an immediate violent response.<sup>263</sup>

The Court has sometimes required that the expression be of the kind that would invite an immediate breach of the peace and would in fact be likely to bring about a breach of the peace,<sup>264</sup> but at other times has only required that the speech be of the “correct” sort without examining whether in fact violence was likely to occur.<sup>265</sup> The Court’s approach to the “inflicts injury” prong and to the conditions under which the fighting words exception has been met is regrettable, especially where the Court has insisted that the relevant statutes not be overbroad. If the Court were serious about enforcing the overbreadth prohibition and if the “inflicts injury” prong had been removed from the test, then one would have expected to Court to strike as overbroad any construction incorporating the “inflicts injury” component. The Court’s having failed to do so casts doubt on what the proper standard is or, perhaps, on the Court’s insistence that statutes not be overbroad.<sup>266</sup>

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clarified that the First Amendment protects verbal criticism and challenge, including profanity, directed to police officers unless the speech consists of ‘fighting words,’ namely, words that themselves inflict injury or incite immediate breach of the peace.”); *see also* *Sambo’s Rests., Inc. v. City of Ann Arbor*, 663 F.2d 686, 697 (6th Cir. 1981) (Keith, J., dissenting) (“The Supreme Court has held, however, that some types of speech are not worthy of First Amendment protection. ‘Fighting words’ are included in the category of unprotected speech. . . . [T]he Supreme Court defined ‘fighting words’ as ‘those (words) which by their very utterance inflict injury or tend to incite an immediate breach of the peace.’” (citing *Chaplinsky*, 315 U.S. at 572)).

262. *See supra* notes 192–195 and accompanying text.
263. *See* *Purtell v. Mason*, 527 F.3d 615, 624 (7th Cir. 2008) (“Although the ‘inflict-injury’ alternative in *Chaplinsky*’s definition of fighting words has never been expressly overruled, the Supreme Court has never held that the government may, consistent with the First Amendment, regulate or punish speech that causes emotional injury but does not have a tendency to provoke an immediate breach of the peace.”).
264. *See supra* notes 176–214 and accompanying text (discussing *Gooding* and *Lewis*).
265. *See supra* notes 10–74 and accompanying text (discussing *Chaplinsky*).
266. *See supra* notes 104–114 and accompanying text (discussing the Court’s failure to vacate *Feiner*’s conviction under an overbroad statute).

## II. STATE APPLICATIONS

The United States Supreme Court's contradictory signals about fighting words has led the state courts to develop different approaches to the kinds of expressions that might be prohibited. The difficulty thereby posed is not that state laws differ but that federal constitutional guarantees are being interpreted in different ways in different jurisdictions. Individuals who say the same words in identical contexts are subject to prosecution in some states but not in others, even though the applicable protections (under the First Amendment to the United States Constitution) should provide the same protection in all of the states.

### *A. State Courts with More Robust Fighting Words Exceptions*

The state courts have implicitly recognized the United States Supreme Court's ambivalence with respect to which expressions count as fighting words and are thus subject to regulation. For example, the Court's continued citation of *Chaplinsky* without qualification<sup>267</sup> suggests that the test offered in *Chaplinsky* is still good law. Some states employ the *Chaplinsky* approach where it is not necessary to establish that an imminent breach of the peace is likely to occur in the very circumstances in which the expression is communicated.<sup>268</sup>

When discussing why a particular defendant's language was criminalizable under the fighting words exception, the Connecticut Supreme Court noted that "[t]he cumulative force of this evidence leads to the conclusion that the defendant's language *could have aroused* a violent reaction by not only Montigny, but also the crowd."<sup>269</sup> In this case, the

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267. See *United States v. Alvarez*, 567 U.S. 709, 717 (2012); *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 791 (2011); *Virginia v. Black*, 538 U.S. 343, 359 (2003); see also *Iancu v. Brunetti*, 139 S. Ct. 2294, 2312 (2019) (Sotomayor, J., concurring in part and dissenting in part) (second alteration in original) (citations omitted from quote) ("In *Chaplinsky v. New Hampshire*, for example, the Court accepted the New Hampshire Supreme Court's narrowing of a state statute covering 'any offensive, derisive or annoying word' to reach only those words that would strike the average person as being 'plainly likely to cause a breach of the peace by the addressee[.]' '[T]hus construed,' this Court decided, the statute did not violate the right to free speech." (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 569, 573 (1942))); *Snyder v. Phelps*, 562 U.S. 443, 465 (2011) (Alito, J., dissenting) ("This Court has recognized that words may 'by their very utterance inflict injury' and that the First Amendment does not shield utterances that form 'no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" (citing *Chaplinsky*, 315 U.S. at 57)).

268. See *supra* notes 25–36 and accompanying text.

269. *State v. Szymkiewicz*, 678 A.2d 473, 479 (Conn. 1996) (emphasis added).

individuals were physically present where the words were uttered.<sup>270</sup> However, when the defendant was swearing,<sup>271</sup> she was in handcuffs and being led away by a policeman.<sup>272</sup> There was no indication that either the police officer or the store detective was even tempted to engage in fisticuffs with the defendant.<sup>273</sup> By the same token, the Iowa Supreme Court construed certain objectionable words as fighting words, even though they had been articulated while on the telephone so there was no danger of an immediate physical altercation taking place when the words were uttered.<sup>274</sup>

The Montana Supreme Court criticized the idea that the fighting words characterization should depend upon the person at whom they were directed.<sup>275</sup> The court explained, “Were we to adopt this ‘who is likely to respond belligerently’ rationale, any troglodyte could wander the streets calling young children and old men ‘f\* \* \* \* \* pigs’ because, due to their age or infirmity, they, like the well-trained policeman, will not be able to respond in a violent fashion.”<sup>276</sup> But the question here is

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270. *Id.* at 476.

271. *Id.*

272. *See id.* at 475.

273. *Id.* at 476.

274. *Tim O’Neill Chevrolet, Inc. v. Forristall*, 551 N.W.2d 611, 617 (Iowa 1996) (“We think a fact-finder could easily characterize ‘dishonest,’ ‘dead beat,’ and ‘liar’ as ‘fighting words’ because they attack a person’s integrity. We think any reasonable person would conclude that their very utterance would tend to incite an immediate breach of the peace. And such conclusion is not lessened by the fact that the words were uttered in a telephone conversation.”). *But see State v. Dugan*, 303 P.3d 755, 767 (Mont. 2013) (“We agree with the proposition that ‘there is little likelihood of an immediate breach of the peace when one can abruptly hang up the receiver.’” (citing *Walker v. Dillard*, 523 F.2d 3, 5 n.7 (4th Cir. 1975))); *State v. Correa*, 222 P.3d 1, 8–9 (N.M. 2009) (“It is also significant that Defendant’s taunting, even though his words may have been threatening, occurred at a distance. The amount of provocation created by Defendant’s words might have been greater if Defendant were closer to the officers. In this case, Defendant refused to leave his porch, indicating that he feared or sought to avoid actual confrontation with the officers. Indeed, Officer Townsend testified that the officers were waiting for Defendant to come outside so that they could place him under arrest for disorderly conduct. If Defendant had advanced beyond his porch or physically threatened the officers, they would have seized upon the opportunity to arrest him.”).

275. *State v. Robinson*, 82 P.3d 27, 31 (Mont. 2003) (“[W]e fail to see the logic in concluding that words (such as ‘f\* \* \* \* \* pig’) may or may not be deemed ‘fighting words’ depending upon the intended recipient. If the object is a fellow citizen, they are considered fighting words. If, on the other hand, the object is a police officer, who, if well-trained to exercise restraint, will be less likely to respond belligerently, the words are somehow less provocative.”).

276. *Id.* The South Dakota Supreme Court has taken the opposite approach. *See State v. Suhn*, 759 N.W.2d 546, 550 (S.D. 2008) (“The circuit court’s findings



not whether as a matter of public policy those unwilling to engage in fisticuffs should be subject to nasty and insulting comments, but whether the First Amendment protects such speech, negative implications for peaceful people notwithstanding.

*B. State Courts with More Restricted Fighting Words Exceptions*

Other state courts have limited the fighting words exception, reading Supreme Court precedent to require a substantial likelihood that the imminent breach of the peace will occur in the very circumstances in which the expression occurs.<sup>277</sup> Expressions that are generally understood to qualify as fighting words will nonetheless not provide the basis for a disturbing the peace conviction if uttered in a context where violence is unlikely to occur.

The Washington Supreme Court offered a test that is both categorical and context dependent. The court suggested that for a particular expression to count as fighting words “when a civilian is the addressee,”<sup>278</sup> the following test would be used: “[A]n objective test must be applied to evaluate the words spoken. But to pass constitutional muster, the court in applying the test must look at the words in the actual context or situation in which they were said.”<sup>279</sup>

The case involved Camby, a restaurant patron, who had been asked to leave the restaurant following other patrons’ complaints.<sup>280</sup> Camby told the doorman, Gray, that he (Camby) was going to take him (Gray) outside and “kick [his] ass.”<sup>281</sup> Gray asked a policeman for assistance, and the policeman also asked Camby to leave.<sup>282</sup> When Camby repeated

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do not support a conclusion that Suhn’s words were ‘fighting words.’ The circuit court simply relied on its findings that one person might have ‘taken offense,’ been sensitive to, or been ‘offended’ by Suhn’s epithet to the police. In this context, the circuit court concluded that words constituted ‘fighting words,’ unprotected by the First Amendment. We disagree. Just because someone may have been offended, annoyed, or even angered by Suhn’s words does not make them fighting words. As offensive or abusive as Suhn’s invective to the police may have been, ‘when addressed to the ordinary citizen,’ Suhn’s words were not ‘inherently likely to provoke violent reaction.’ The circuit court erred in determining that Suhn’s utterances were unprotected speech.” (citing *Cohen v. California*, 403 U.S. 15, 20 (1971)).

277. See e.g., *City of Seattle v. Camby*, 701 P.2d 499, 501 (Wash. 1985); *In re Nickolas S.*, 245 P.3d 446, 451 (Ariz. 2011).

278. *Camby*, 701 P.2d at 500.

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

his threats to Gray,<sup>283</sup> the policeman arrested Camby.<sup>284</sup> Both Gray and the policemen testified that Gray had not been provoked by Camby and that Gray had had no intention of going outside to fight Camby.<sup>285</sup>

The Washington court explained that for an expression to count as fighting words, “the words must be directed at a particular person or group of persons.”<sup>286</sup> In addition, the words themselves must be “those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.”<sup>287</sup> In the court’s view, both of these conditions were met.<sup>288</sup> The last step involves “look[ing] at the words in the context or situation in which they were made.”<sup>289</sup> The court explained, “Looking at the actual situation presented in this case, we find an intoxicated defendant being escorted out of a restaurant by a mild mannered, unaroused doorman-host with a police officer present.”<sup>290</sup> While “[a] civilian addressee need not, in fact, be incited to breach the peace,”<sup>291</sup> more had to be shown to establish that “a substantial risk of assault [was] created.”<sup>292</sup> The court found “as a matter of law that the words spoken in this situation [were] not ‘fighting words’ and that no substantial risk of assault was created.”<sup>293</sup>

The Arizona Supreme Court endorsed and (allegedly) adopted the Washington approach.<sup>294</sup> When deciding whether a student who had called a teacher a bitch several times<sup>295</sup> had expressed speech falling into the fighting words exception, the court rejected that the student’s “insults would likely have provoked an ordinary teacher to ‘exchange

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283. *Id.* (citation omitted) (“At that point, Camby told Gray to ‘come outside so I can kick your fucking ass’. [The policeman] again told Camby to be quiet and leave. Camby retorted, ‘I’ll either get him tonight or later.’”).

284. *Id.*

285. *Id.*

286. *Id.* at 501 (citing *Cohen v. California*, 403 U.S. 15, 20 (1971)).

287. *Id.* (quoting *Cohen*, 403 U.S. at 20).

288. *Id.* (“Presuming the first two steps are present, which in this case they are . . .”).

289. *Id.*

290. *Id.* at 502.

291. *Id.*

292. *Id.*

293. *Id.* at 500.

294. *See In re Nickolas S.*, 245 P.3d 446, 451 (Ariz. 2011) (“Based on the Supreme Court’s decisions, we agree with the Washington Supreme Court that analyzing whether particular speech constitutes fighting words involves a three-step inquiry.” (citing *Camby*, 701 P.2d at 501)).

295. *See id.* at 452.

fisticuffs' with the student or to otherwise react violently."<sup>296</sup> Ironically, while attempting to apply the Washington standard, the Arizona court instead applied a different standard. The Arizona court realized that the relevant "inquiry is not whether a reasonable person 'might' react violently, but instead whether someone in the circumstances of the addressee would likely react violently in the context in which the words were spoken."<sup>297</sup> The court then shifted the standard from the reasonable person to the reasonable teacher—"we do not believe that his insults would likely have provoked an ordinary teacher to 'exchange fisticuffs' with the student or to otherwise react violently."<sup>298</sup> But the Washington court had been more focused on the particular victim, noting that the "mild mannered, unaroused doorman-host with a police officer present"<sup>299</sup> did not seem likely to engage in fisticuffs. The question was not merely whether a reasonable person in that profession would respond violently but whether the person at whom the comments were addressed would so respond. Thus, even the courts who realize that Supreme Court precedent *may* limit *Chaplinsky* cannot agree about how that case has been limited.

#### CONCLUSION

The United States Supreme Court has recognized a fighting words exception, which is one of the "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."<sup>300</sup> But Court practices defy that description, because the category is neither well-defined nor narrowly limited. The Court has sent contradictory signals about whether it is necessary that the comments are likely to bring about violence in the context in which they are uttered. Further, the Court has sometimes included an "inflicts injury" prong within the fighting words exception and sometimes not. Finally, the Court has not adequately explained whether or how offensive insults as opposed to offensive ideas fit within the jurisprudence.

Unsurprisingly, the state interpretations of the jurisprudence vary significantly. Some state courts have bridged the gap between words

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296. *Id.* (citing *Texas v. Johnson*, 491 U.S. 397, 409 (1989)).

297. *Id.*

298. *Id.*; *see also* *State v. Baccala*, 163 A.3d 1, 10 (Conn. 2017) ("In sum, these cases affirm the fundamental principle that there are no per se fighting words; rather, courts must determine on a case-by-case basis all of the circumstances relevant to whether a reasonable person in the position of the actual addressee would have been likely to respond with violence.").

299. *Camby*, 701 P.2d at 502.

300. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

that will injure and words that will cause a breach of the peace by suggesting that the words designed to injure will themselves bring about an immediate breach of the peace.<sup>301</sup> Other courts have not seen a need to bridge the gap between inflicting injury and provoking an immediate breach of the peace.<sup>302</sup>

Some state courts interpret the Federal Constitution to require that violence will likely occur in the very circumstances in which the words are offered, while other state courts offer a different interpretation.<sup>303</sup> In short, state courts do not know what the prevailing jurisprudence requires, permits, and prohibits, which means that neither the courts nor the legislatures can know the parameters within which they can effectuate public policy.

This lack of clarity has costs. Individuals may be subject to criminal prosecution when the First Amendment, properly understood, precludes such punishment. Or, individuals may be forced to endure verbal assaults which they would not be forced to endure but for a “mistaken” interpretation of the First Amendment. In addition, the lack of clarity invites inconsistent enforcement of First Amendment guarantees across jurisdictions, which itself is problematic.

At its first opportunity, the Court should clarify the jurisprudence, making clear what the First Amendment permits and prohibits. Doing

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301. *In re S.J.N-K.*, 647 N.W.2d 707, 711–12 (S.D. 2002) (“‘Fighting words,’ as defined in *Chaplinsky* are those words that ‘inflict injury’ or ‘incite an immediate breach of peace.’ They have also been defined as ‘[t]hose personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke a violent reaction.’” (first quoting *Chaplinsky*, 315 U.S. at 572; and then quoting *Cohen v. California*, 403 U.S. 15, 20 (1971))); *In re Spivey*, 480 S.E.2d 693, 698 (N.C. 1997) (“At the hearing on this matter, there was testimony concerning the hurt and anger caused African-Americans when they are subjected to racial slurs by white people.”); *id.* at 699 (“[I]n context, his repeated [racial slurs] presents a classic case of the use of ‘fighting words’ tending to incite an immediate breach of the peace which are not protected by . . . the Constitution.”); *City of Billings v. Nelson*, 322 P.3d 1039, 1045 (Mont. 2014) (alteration in original) (“Nelson argues the words ‘spic bastard,’ though ‘harsh, co[a]rse, hurtful, vulgar, unpleasant, distasteful, or rude,’ are not fighting words. She also argues she was not face-to-face with M.C. because she remained inside her vehicle. The use of a racial slur is the type of speech that would, by its very utterance, inflict injury and tend to incite a breach of the peace.” (citing *State v. Dugan*, 303 P.3d 755, 761 (Mont. 2013))).

302. *See, e.g.*, *State v. Vaughn*, 366 S.W.3d 513, 521 (Mo. 2012) (en banc) (“Acts that cause immediate *substantial* fright, intimidation, or emotional distress are the sort of acts that inherently tend to inflict injury or provoke violence.”).

303. *See supra* Part III.

so would promote uniformity of application<sup>304</sup> and would promote confidence that rules are being applied consistently rather than to serve other purposes.<sup>305</sup> The failure to clarify an allegedly well-defined and narrow category undermines confidence in the First Amendment and in the Court, a result that no one should desire.

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304. See Note, *supra* note 3, at 1144 (“A statute that mimics the ‘breach of the peace’ prong of *Chaplinsky* confers significant discretion upon an enforcing officer and thus invites abuse.”).

305. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 415–16 (1992) (Blackmun, J., concurring) (“I fear that the Court has been distracted from its proper mission by the temptation to decide the issue over ‘politically correct speech’ and ‘cultural diversity,’ neither of which is presented here.”).