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ABSTRACT

The doctrine of "fighting words" was first articulated by the United States Supreme Court in 1942 in the case of Chaplinsky v. New Hampshire when it declared one classificaton of language as outside the bounds of constitutional guarantees. Since then the Court has continually redrawn the line defining which speech is constitutionally protected, narrowing the nature of fighting words in the process. At various times the Court has equated fighting words with languaqe that inflicts injury, incites a breach of the peace, provokes retaliation or violent action, or is calculated to offend sensibilities. The Court has also found it necessary to consider other contextual factors, such as the cultural milieu and geographical location, in rendering its decisions concerning fighting words. The problem appears to be the vagueness of the doctrine. Given this vagueness, and the resulting inability of authorities to agree on where to draw the line, continuing revision of the doctrine seems inevitable. (RBW)

The Continuing Application of the Fighting Words Doctrine

by

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> Every juristic and philosophic authority recognized in this field admits that there are some speeches one is not free to make. The problem, on which they disagree, is how and where to draw the line.[1]
>
> - Justice Robert Jackson

Traditionally the Supreme Court has maintained that certain categories of speech are not protected by the First Amendment. One separate classification of language, fighting words, was declared outside the bounds of Constitutional guarantees by the Court in the early 1940's.[2] Since that time the Court has consistently redrawn the line defining which speech is Constitutionally protected, narrowing the nature of fighting words.

Regulations punishing verbal insults evolved from common law. Zechariah Chafee, a Harvard law rpofessor, noted the foundation of the law, that "the very utterance of such words is considered to inflict injury upon listeners, readers, or those defamed, or else to render highly probable an immediate breach of the peace."[3] Chafee's wording later served as the model for a judicial definition of fighting words.

While several states had laws punishing profane or abusive language, New Hampshire's statute was the first to be considered by the U.S. Supreme Court. A unanimous opinion upheld the conviction of a Jahovah's Witness for calling a police officer a "damned racketeer" and a "damned Fascist."[4] Echoing Chafee, the Court concluded that these fighting words, "which by their very utterance inflict injury or tend to incite an immediate breach of the peace," were beyond First Amendment protection.[5]

The Court did not design a standard for identifying fighting words, but it did refer to the earlier New Hampshire state court decision:

> The test is what men of common intelligence would understand would be words likely to cause an average adressee to fight. * * * The English language has a number of words and expressions which by general consent are "fighting words" when said without a disarming smile. * * * Such words, as ordinary men know, are likely to cause a fight. * * * The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the speaker - including "classical fighting words", words in current use less "classical" but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats.[6]

The measure of fighting words, according to this view, is not what provokes a particular individual, rather it is what is generally accepted as provocation. The state court also implied that the language must be considered in its context before categorized as fighting words. Is the speaker smiling? It is this

decision, Chaplinsky, that has served as precedent for all significant rulings of the Court on fighting words.

In 1949 the Court faced another case challenging the limits of freedom of speech. An unfrocked Catholic priest named Terminiello was convicted under a Chicago law prohibiting speech "which stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance."[7] Terminiello referred to Jews as "slimy scum" and called Mrs. Roosevelt a Communist. Members of the crowd responded with bricks, stones and bottles.

Writing for a sharply divided Court, Justice Douglas acknowledged that freedom of speech was not absolute, citing Chaplinsky. Douglas went on to claim, however, that free speech "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."[8] The Court did not rule whether Terminiello's language involved fighting words, but it did find the Chicago ordinance to be overbroad, invalidly punishing protected categories of speech. The decision in Chaplinsky was reaffirmed, but a violent reaction by an audience was seemingly eliminated as sufficient grounds for application of the fighting words doctrine.

Two years later a pair of cases, Feiner and Kunz, challenged the New York law. Feiner's conviction was upheld. Hisreferences to President Truman as a "bum" and the American Legion as "Nazi Gestapo" had produced the threat of a disturbance the Court ruled. "A speaker may not ... incite a breach of the peace by use of fighting words," the Court concluded.[9] Justice Douglas dissented finding that these were neither fighting words nor provocation for a riot.

In the companion case Kunz's conviction was overturned. Kunz had called Jews "Christ-killers" and labeled the Pope as the "anti-Christ." Despite these accusations, Kunz had been ignored by his audience. The distinction between the cases was lost on Justice Jackson who thought that Kunz's remarks were "equally inciting and more clearly fighting words."[10] To Justice Jackson, the audience response was an irrelevant consideration, but for the Court in 1951, the audience reaction, not the language itself, played the critical role in the determination of fighting words.

The following year the Court upheld the conviction of an Illinois man for making statements which "portray depravity, criminality, unchastity, or lack of virtue of a class of citizens."[11] Beauharnais, the defendant, had attacked the "aggressions, rapes, robberies, knives, guns and marijuana of the negro." The Court, again seriously divided, emphasized the lack of social value in Beauharnais' comments, finding that, like fighting words, they played "no essential part of any exposition of ideas."[12]

Both Justice Douglas and Black wrote vigorous dissents to the decision. Justice Black's opinion, joined by Douglas, provided a distinct narrowing of the Chaplinsky decision. Two aspects of Beauharnais' rhetoric caused it to be worthy of Constitutional protection, they argued. First, Beauharnais slandered a group, not a signle person. Black noted the difference:

> Chaplinsky had violated that law calling a man vile names "face-to-face." Whether the words used in their context here are "fighting words" in the same sense is doubtful, but whether so or not they are not addressed to or about individuals.[13]

In addition, Black and Douglas claimed that the statements were a part of a larger and more public debate on integration. As an element in the argument against integration, the remarks of Beauharnais should be protected.

In a separate dissent, Justice Douglas emphasized the emotional nature of public controversy and noted, "Debate and argument even in the courtroom are not always calm and dispassionate."[14] It is clear that in the decade after Chaplinsky the Court majority had done little to clarify or alter the fighting words doctrine. At least four members of the Court, however, were willing to narrow substantially what could be considered fighting language.

It took more than a decade for the next significant Court rulings. A pair of cases, Garrison and Cox, reached the Court from Louisiana in 1964. Writing now for the majority, Justice Douglas argued in Garrison that the Beauharnais decision should be reversed. According to Douglas, "The only line drawn by the Court is between 'speech' on the one side and conduct or overt acts on the other."[15] Only when intricately connected with behavior could speech be subject to legislative regulation. But Douglas did not suggest that the Chaplinsky ruling should be overturned. In the companion decision, Justice Goldberg reasserted that "a man may be punished...for uttering fighting words."[16]

The late 1960's and the early 1970's saw a flood of Vietnam War and obscenity cases reach the Court. Chaplinsky served as a precedent for most of the convictions relating to free speech. In Epton v. New York the Court repeated the claim that fighting words were an exception to the First Amendment.[17] While Street v. New York concluded with a similar ruling, Justice Harlan additionally provided a definition of fighting words as those "likely to provoke the average person to retaliation."[18] Though the Court repeatedly supported the principle of punishment for fighting words, no conviction based solely on the fighting words doctrine was affirmed by the Justices.

Lower court decisions based solely on Chaplinsky were generally reversed on the grounds that the specific language involved was not fighting words. In one case, the Court ruled that though the audience was shocked, it was the "content of the ideas" rather than the words that was to blame.[19] In another case, a defendant's shout of "fuck the draft" was ruled not a direct personal insult.[20] There was no specific addressee for the statement. Nevertheless, Justice Harlan's majority opinion concluded:

> This Court has also held that the States are free to ban the simple use ... of so-called fighting words, those personally abusive epithets, which are, as a matter of common knowledge, inherently likely to provoke violent reaction.[21]

The majority found nothing in the defendant's speech so provocative to qualify as fighting language, but it still sustained the validity of the fighting words doctrine.

In 1972 the new members of the Court began to play a role in the evolving definition. Justices Burger, Blackmun, Powell and Rhenquist in several cases strenuously dissented when the majority failed to classify certain language as fighting words. As a minority, however, the new members failed to alter the outcomes of those cases.

In Gooding v. Wilson a protestor was convicted of yelling "white son-of-a-bitch, I'll kill you." The Georgia Court of Appeals had upheld the judgment, but it noted that "no meaningful attempt has been made to limit or properly define these terms (fighting words)."[22] If the Georgia court anticipated that this statement would encourage the Supreme Court to clarify the Chaplinsky decision, to define "fighting words," then they erred. Writing for the majority, Justice Brennan proclaimed, "Our decisions since Chaplinsky have continued to recognize state power constitutionally to punish fighting words."[23] However, the Justices found the Georgia statute to be overbroad, punishing both protected and unprotected categories of speech. The Court also reasoned that the officer could not fully respond to this incitement due to role restraints, therefore there was minimal potential for violent reaction. By so ruling the Court abandoned the "average addressee" standard in favor of the response of the actual addressee. In dissent, Justice Blackmun vigorously protested that "the Court, despite its protestations to the contrary, is merely paying lip service to Chaplinsky."[24] According to the increasingly vocal minority, the fighting words doctrine had been emasculated, deprived of all real meaning.

The new minority likewise dissented when the Court overturned convictions for "god damn mother fucking police"[25] and "chicken shit mother fucker."[26] Justice Powell, joined by Burger and Blackmun, offered a different interpretation of fighting words, arguing that Chaplinsky "extends to the willful use of scurrilous language calculated to offend the sensibilities of an unwilling audience."[27] In this version both speaker and audience intent play crucial parts, but equally important is the abandonment of immediate reaction as a determinant of fighting words. There is no indication that one whose sensibilities have been offended will react with violence.

Though the membership of the Court has again changed, to date no majority opinion has included this expanded view of fighting language. The history of the fighting words doctrine, however, is replete with changes of interpretation. The trend toward narrowing the bounds of fighting words may be reversed.

This rendition of the evolution of the fighting words controversy demonstrates that the Court faces serious problems with the vagueness of the doctrine, but the Court has no apparent remedies. It is clearly unreasonable to establish a black list of all unacceptable language. While they were the first judicially sanctioned fighting words, "damned Fascist" and "damned racketeer" would now be unlikely to provoke the average listener to violence. In fact, in 1974 the Court ruled the word "Fascist" to be protected speech.[28] Though the New Hampshire state court recognized the existence of "classical" fighting words, neither that court nor any other has identified those terms.

The alternative is the course the Court has chosen, a fluid definition open to continuing reinterpretation. Fighting words have been equated, at various times, with language that inflicts injury, incites a breach of the peace, provokes retaliation or violent reaction, or is calculated to offend

sensibilities. The body of words that causes such results obviosly changes over time. In addicion, the cultural milieu, geographical location and other contcxtual factors (a disarming smile) must be considered to distinguish fighting words from protected speech. This variability contributes to the problem Justice Jackson noted, that even authorities disagree on where to draw the line. Continuing revision of the doctrine is then inevitable.

Whether future Courts are more conservative or liberal in composition, it is unlikely that they will repudiate the fighting words doctrine. Individuals will no more likely have complete freedom to speak fighting words than they will be free to lie under oath, shout "fire" in the theatre or misrepresent products in face-to-face sales. For society condemns the consequences of each of the verbal acts, the fight as well as the fraud. The fighting words doctrine will continue, and so will the disagreement on what it means.

Notes

[1]Kunz v. New York, 340 U.S. 300 (1951).

[2]Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[3]Zechariah Chafee, Free Speech in the United States (Boston: Harvard University Press, 1941), p. 149.

[4]315 U.S. 568.

[5]Id. at 572.

[6]Id. at 573.

[7]Vern Countryman, Douglas of the Supreme Court (Garden City, NY: Doubleday, 1959), p. 182.

[8]Terminiello v. Chicago, 337 U.S. 1 (1949).

[9]Feiner v. New York, 340 U.S. 315 (1951).

[10]340 U.S. 299 (1951).

[11]Countryman, p. 275.

[12]Beauharnais v. Illinois, 343 U.S. 257 (1952).

[13]Id. at 272.

[14]Id. at 287.

[15]Garrison v. Louisiana, 379 U.S. 82 (1964).

[16]Cox v. Louisiana, 379 U.S. 563 (1964).

[17]390 U.S. 29 (1967).

[18]394 U.S. 576 (1969).

[19]Bachellar v. Maryland, 397 U.S. 564 (1970).

[20]Cohen v. California, 403 U.S. 20 (1971).

[21]Id.

[22]405 U.S. 521 (1972).

[23]Id.

[24]Id. at 537.

[25]Lewis v. New Orleans, 415 U.S. 130 (1974).

[26]Lucas v. Arkansas, 416 U.S. 919 (1974).

[27]Rosenfield v. New Jersey, 408 U.S. 901 (1972).

[28]Carriers v. Austin, 418 U.S. 264 (1974).