FIGHTING WORDS AS FREE SPEECH

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I. INTRODUCTION

It is now settled that "above all else, the first amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[1] Despite the universal acceptance of this general principle, the United States Supreme Court has created several exceptions.[2] In appropriate cases libel,[3] obscenity,[4] commercial speech,[5] and offensive language[6] may be censored without contravention of the first amendment guarantee of freedom of expression. The source of each of these exceptions to the general principle of governmental neutrality regarding the content of expression is *Chaplinsky v. New Hampshire*.[7]

Chaplinsky is the only case in which the Supreme Court has affirmed a conviction based on the defendant's expression of fighting words.[8] It

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1. Police Dep't of Chicago v. Mosely, 408 U.S. 92, 95 (1972). *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 784-86 (1978); City of Madison, Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 175-76 (1976); Erznoznik v. City of Jacksonville, 422 U.S. 205, 215 (1975). *See generally* Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975).

2. *See* FCC v. Pacifica Foundation, 438 U.S. 726 (1978) (plurality opinion); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (same).

3. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Beauharnais v. Illinois, 343 U.S. 250 (1952).

4. *See, e.g.*, Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Miller v. California, 413 U.S. 15 (1973); Roth v. United States, 354 U.S. 476 (1957).

5. *See, e.g.*, Friedman v. Rogers, 440 U.S. 1 (1979); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Valentine v. Chrestensen, 316 U.S. 52 (1942).

6. *Compare* FCC v. Pacifica Foundation, 438 U.S. 726 (1978) *and* Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) *with* Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) *and* Cohen v. California, 403 U.S. 15 (1971).

7. 315 U.S. 568 (1942).

8. *But cf.* Youngdahl v. Rainfair, Inc., 355 U.S. 131, 138-39 (1957). (Supreme Court upholding an injunction prohibiting the intimidation or coercion of the company's employees by labor pickets, holding that the epithet "scab" was not protected speech when coupled with numerous acts of violence). Later cases, however, have made it clear that the term "scab" and similar epithets commonly employed during labor disputes are protected expression. *See, e.g.*, Letter

thus represents the origin and the acme of the fighting words doctrine. Chaplinsky, a Jehovah's Witness, engaged in religious evangelism on the public streets of Rochester, New Hampshire, despite the warning of the City Marshal "that the crowd was getting restless and that he would better go slow."[9] Some time later a traffic officer led Chaplinsky toward the local police station, apparently in an effort to protect him from the crowd that had grown violent.[10] They encountered the City Marshal again and Chaplinsky said to him, "You are a God damned racketeer" and "a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists."[11] The City Marshal did not react violently to Chaplinsky's statements but instead arrested him for violating a New Hampshire statute that provided: "No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name . . . ."[12] Chaplinsky claimed he made these statements because he was provoked by the failure of the police to make a reasonable effort to control the crowd while he was proselytizing and because the Marshal first called him a "damned bastard."[13]

Chaplinsky's subsequent conviction was affirmed by the United States Supreme Court on the basis of the narrow construction given the statute by the Supreme Court of New Hampshire:

> [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.[14]
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> . . . .
>
> 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 addressee, words whose speaking constitutes a breach of the peace by the speaker—

Carriers v. Austin, 418 U.S. 264, 282-83 (1974); Linn v. United Plant Guard Workers, 383 U.S. 53, 60-61 (1966).

It should be noted, however, that the Supreme Court, in dicta, continues to assert that fighting words are constitutionally punishable. *See, e.g.,* FCC v. Pacifica Foundation, 438 U.S. 726, 745 (1978) (plurality opinion); *id.* at 763 (Brennan, J., dissenting); Gooding v. Wilson, 405 U.S. 518, 523 (1972); *id.* at 536-37 (Blackmun, J., dissenting).

9. State v. Chaplinsky, 91 N.H. 310, 313, 18 A.2d 754, 758 (1941).

10. *Id.* at 313, 18 A.2d at 757. *See also* 315 U.S. at 570.

11. *Id.* at 312, 18 A.2d at 757. *See also* 315 U.S. at 569.

12. *Id.* at 312, 18 A.2d at 757. *See also* 315 U.S. at 569.

13. *Id.* at 315-16, 18 A.2d at 758-59. *See also* 315 U.S. at 570 (noting merely that Chaplinsky claimed the City Marshal had "cursed him.").

14. 315 U.S. at 573 (footnote omitted) (quoting 91 N.H. at 313, 18 A.2d at 758).

> 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.[15]

The narrow holding of the Supreme Court was simply that the New Hampshire statute was justified by the state's overriding interest in preserving the public peace by prohibiting "words likely to cause an average addressee to fight."[16] The Court did not find any constitutional infirmity in the application of the statute to punish Chaplinsky's unseemly language observing, "[a]rgument 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."[17] Consistent with the rationale of preventing responsive violence, the Court also upheld the refusal to admit evidence of truth or provocation as a defense.[18]

If the foregoing were the extent of the Supreme Court's opinion in *Chaplinsky*, its underlying rationale would be clear. Unfortunately, the Court added a bit of unnecessary dicta that has served to bedevil first amendment jurisprudence:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are 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.[19]

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15. *Id.* (quoting 91 N.H. at 321, 18 A.2d at 762).

16. *Id.* (quoting 91 N.H. at 320, 18 A.2d at 762).

17. *Id.* at 574.

18. *Id.*

19. *Id.* at 571-72 (footnotes omitted). The source of this passage was obviously Professor Chafee, one of the most concerned and committed advocates of free expression our nation has ever known. *See* Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 150 (1946):

> [P]rofanity and indecent talk and pictures, which do not form an essential part of any exposition of ideas, have a very slight social value as a step toward truth, which is clearly outweighed by the social interests in order, morality, the training of the young, and the peace of mind of those who hear and see.

Ironically, a reading of Professor Chafee's entire discussion of the issue of unseemly language discloses three startling facts. First, Chafee did not advocate the exclusion of such expression from constitutional protection, but merely attempted to rationalize a result which he believed settled. *Id.* at 149. Second, he believed that the real grievance against such expression is that it inflicts emotional injury or threatens to cause a breach of the peace. *Id.* at 149-51. Finally,

This ambiguous passage suggests three rationales in addition to the prevention of responsive violence to justify the censorship of fighting words: (1) that such words are not "speech" within the meaning of the first amendment because they are unnecessary to the expression of ideas and thus lack social utility;[20] (2) that such words are akin to verbal assaults and inflict emotional distress upon their recipient; and (3) that whatever slight social value such words may possess is per se outweighed by the psychic injury and responsive violence caused by them. Historical research indicates that *Chaplinsky* was intended to be a very narrow opinion premised on the sole ground that the first amendment did not foreclose the states from preserving the public peace by prohibiting words thought likely to cause a brawl. The expansive dicta was not intended to have any doctrinal significance.[21]

Subsequent Supreme Court cases demonstrate that the fighting words doctrine is to be narrowly limited to its original purpose and that the sole justification for the prohibition of fighting words is their perceived propensity to cause responsive violence by the individual to whom the offending words are addressed.[22]

In the almost forty years since *Chaplinsky* was decided, the Court has not upheld a single conviction for the use of fighting words. Instead, it has avoided the opportunity to address the issue by relying on the overbreadth principle that a statute that indiscriminately sweeps both unprotected and protected activity within its penal scope is unconstitutional on its face.[23] This has led Chief Justice Burger and Justice Blackmun to charge that "the Court, despite its protestations to the contrary, is merely paying lip service to *Chaplinsky*" and that, in

Chafee was well aware of the danger of abuse inherent in the penalization of such expression and urged that "all of these crimes of injurious words must be kept within very narrow limits if they are not to give excessive opportunities for outlawing heterodox ideas." *Id.* at 152.

20. This rationale for the suppression of distasteful expression was first suggested by dicta in Cantwell v. Connecticut, 310 U.S. 296, 309-10 (1940).

21. *See* Yarbrough, *The Burger Court and Freedom of Expression*, 33 WASH. & LEE L. REV. 37, 53-54 (1976). *Cf.* Beauharnais v. Illinois, 343 U.S. 250, 272-73 (1957) (Black, J., dissenting) (*Chaplinsky* does not make broad inroads on first amendment freedoms).

22. *See, e.g.*, Gooding v. Wilson, 405 U.S. 518 (1972); Cohen v. California, 403 U.S. 15 (1971); Terminiello v. Chicago, 337 U.S. 1 (1949).

23. *See, e.g.*, Lewis v. City of New Orleans, 415 U.S. 130 (1974); Plummer v. City of Columbus, 414 U.S. 2 (1973); Gooding v. Wilson, 405 U.S. 518 (1972). On the overbreadth doctrine generally, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW, 710-14 (1978); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

fact, the fighting words doctrine is moribund.[24]

In contrast to its disfavored status in the Supreme Court, the fighting words doctrine retains a surprising vitality in the lower courts.[25] *Village of Skokie v. National Socialist Party of America*[26] is merely one particularly vivid example of the invocation of this doctrine as a justification for the penalization of unseemly or offensive expression with political overtones. In *Village of Skokie* the court of appeals of Illinois upheld the issuance of an injunction prohibiting members of the National Socialist Party from wearing their party emblem, the swastika, during a planned demonstration in Skokie, Illinois, on the ground that it constituted fighting words.[27]

In the midst of the confusion and uncertainty as to the substantive content and continued vitality of the fighting words doctrine there has been, aside from the cursory descriptive treatment afforded by constitutional law hornbooks,[28] virtually no scholarly comment on the issue. Furthermore, those scholars who have commented on the issue have uniformly lamented the Supreme Court's failure to apply the fighting words doctrine vigorously as a justification for the suppression of unseemly expression.[29]

This article first explicates the current status of the fighting words doctrine and the elements necessary for its proper invocation. Then it advocates abandonment of the doctrine and recognition of fighting words as expression deserving of first amendment protection. Neither the governmental interest in the preservation of the public peace nor any other rationale offered in defense of the doctrine is adequate to justify its continued existence.

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24. Gooding v. Wilson, 405 U.S. 518, 537 (1972) (Blackmun, J., dissenting). *See also* Shea, *"Don't Bother to Smile When You Call Me That"—Fighting Words and the First Amendment*, 63 KY. L.J. 1, 12 (1975) ("[A] majority of the United States Supreme Court has gradually concluded that fighting words, no matter how narrowly defined, are a protected form of speech . . . .").

25. *See, e.g.*, Bousquet v. State, 548 S.W.2d 125 (Ark. 1977); Bolden v. State, 148 Ga. App. 315, 251 S.E.2d 165 (1978); Johnson v. State, 143 Ga. App. 826, 240 S.E.2d 207 (1977); State v. Boss, 195 Neb. 467, 238 N.W.2d 639 (1976).

26. 51 Ill. App. 3d 279, 366 N.E.2d 347 (1977), *rev'd*, 69 Ill. 2d 605, 373 N.E.2d 21 (1978).

27. 51 Ill. App. 3d at 292, 366 N.E.2d at 356.

28. *See, e.g.*, J. BARRON & C. DIENES, HANDBOOK OF FREE SPEECH AND FREE PRESS 67-76 (1979); J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 789-94 (1978); L. TRIBE, *supra* note 23, at 617-23.

29. *See* A. BICKEL, THE MORALITY OF CONSENT 72-73 (1975); A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 45-48 (1976); Rabinowitz, *Nazis in Skokie: Fighting Words or Heckler's Veto?*, 28 DEPAUL L. REV. 259 (1979); Shea, *supra* note 24.

In essence, my thesis is that the fighting words doctrine is nothing more than a quaint remnant of an earlier morality that has no place in a democratic society dedicated to the principle of free expression. The doctrine, which operates, at best, to penalize individuals for failing to show others the respect society deems proper and, at worst, to penalize individuals for vehement criticism of government officials, is simply not constitutionally justifiable. Whatever the desirability of maintaining a polite society, the first amendment prohibits the government from seeking its preservation by means of censoring expression entitled to constitutional protection.

II. THE FIGHTING WORDS DOCTRINE TODAY

Consistent with the doctrine's underlying rationale of protecting the public peace, the Supreme Court has enunciated the elements that must be satisfied before a court may justifiably find that a speaker's language constitutes unprotected fighting words. In addition to the requirement of intent,[30] common to all speech crimes,[31] four elements must be present before the doctrine will deprive a message of constitutional protection. First, the utterance must constitute an extremely provocative personal insult,[32] a factor requiring a judicial analysis of the content of the expression. Second, the words must have a direct tendency to cause an immediate violent response by the average recipient.[33] Third, the words must be uttered face-to-face to the addressee.[34] Fourth, the utterance must be directed to an individual, not a group.[35] These final three requirements are contextual in nature and mandate a judicial evaluation of the circumstances in which the speech is uttered. If any

30. *See, e.g.,* Cohen v. California, 403 U.S. 15 (1971); Ware v. City and County of Denver, 182 Colo. 177, 511 P.2d 475 (1973); City of Oak Park v. Smith, 79 Mich. App. 757, 262 N.W.2d 900 (1977); State v. Profaci, 56 N.J. 346, 266 A.2d 579 (1970).

31. *See, e.g.,* Scales v. United States, 367 U.S. 203 (1961); Smith v. California, 361 U.S. 147 (1954). *Cf.* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (defamatory statements not constitutionally protected, even though made without "actual malice", when directed toward non-public figures).

32. *See, e.g.,* Norwell v. City of Cincinnati, 414 U.S. 14 (1973); Cohen v. California, 403 U.S. 15 (1971); Street v. New York, 394 U.S. 576 (1969); Cantwell v. Connecticut, 310 U.S. 296 (1940).

33. *See, e.g.,* Gooding v. Wilson, 405 U.S. 518 (1972); Cohen v. California, 403 U.S. 15 (1971); Street v. New York, 394 U.S. 576 (1969); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

34. *See, e.g.,* Lewis v. City of New Orleans, 408 U.S. 913 (1972) (Powell, J., concurring); Gooding v. Wilson, 405 U.S. 518 (1972); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

35. *See, e.g.,* Gooding v. Wilson, 405 U.S. 518 (1972); Cohen v. California, 403 U.S. 15 (1971); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

of these four elements is absent, the expression may not be denied constitutional protection on the ground that it comes within the scope of the fighting words doctrine.

The requirement that the words constitute a personally abusive epithet has been largely ignored by the commentators.[36] Instead, they have tended to view this element as submerged within the separate requirement that the words have a direct tendency to cause an immediate violent reaction from the average addressee. Both elements of the fighting words doctrine operate to limit its scope to situations constituting a serious threat to the public peace. Nevertheless, it is myopic to fail to recognize the requirement that the words constitute a personally abusive epithet as a separate and distinct element with its own unique focus and function. The personally abusive epithet element focuses on the content of the words uttered by the speaker. In contrast, the requirement of a likelihood of a violent reaction focuses on the circumstances in which the words are used.

This important difference can best be appreciated by comparing it to the Supreme Court's test governing the constitutionality of sanctions imposed on speech that advocates violation of the law or the use of violence. The two problems, subversive advocacy and fighting words, are not identical but merely analogous. Subversive advocacy presents the danger that a sympathetic audience will act upon the speaker's suggestion that a law be violated or that violence be used to achieve a commonly shared goal. In contrast, the fighting words doctrine is designed to protect against the danger that a recipient of the speaker's message will be so outraged that he will respond with violence against the speaker. In essence, the difference between subversive advocacy and fighting words is sympathetic versus hostile-listener violence. In this sense, the two doctrines are designed to deal with contrasting problems. Nevertheless, an analogy between the doctrines exists, even if the countervailing nature of the problems with which they are intended to cope makes it unprofitable to consider whether either doctrine could be generalized to deal with both situations.

In *Brandenburg v. Ohio*[37] the Supreme Court stated the test that must be applied to determine whether a statute proscribing the advocacy of illegal activity can withstand a first amendment challenge:

36. *See* J. BARRON & C. DIENES, *supra* note 28; J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 28; L. TRIBE, *supra* note 23; Rabinowitz, *supra* note 29; Shea, *supra* note 24.

37. 395 U.S. 444 (1969).

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[38]

The requirement that the speech be likely to produce illegal action or violence is a restatement of the Holmesian standard that the words must "create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[39] This element of the subversive advocacy test, with its focus on the circumstances in which the language is spoken, is analogous to the fighting words doctrine requirement that the words used must have a direct tendency to cause an immediate violent reaction from the recipient. The clear and present danger test proved entirely unsuitable as a tool for evaluating the constitutionality of governmental regulations proscribing the advocacy of fundamental political change. Rather than a neutral test, it constituted a formula under which political dissidents were invariably shuttled off to prison.[40] The ambiguity of this circumstance-focused standard, coupled with its excessive reliance on judicial fact finding of the most elusive nature,[41] permitted even the most conscientious judges to allow their subjective judgment as to the proximity and degree of danger to color their constitutional decisionmaking.[42] More impor-

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38. *Id.* at 447.

39. Schenck v. United States, 249 U.S. 47, 52 (1919).

40. *See, e.g.,* Dennis v. United States, 341 U.S. 494 (1951); Debs v. United States, 249 U.S. 211 (1919); Schenck v. United States, 249 U.S. 47 (1919).

41. *See, e.g.,* Dennis v. United States, 341 U.S. at 570 (Jackson, J., concurring):

> If we must decide that this Act and its application are constitutional only if we are convinced that petitioner's conduct creates a "clear and present danger" of violent overthrow, we must appraise imponderables, including international and national phenomena which baffle the best informed foreign offices and our most experienced politicians. . . . No doctrine can be sound whose application requires us to make a prophecy of that sort in the guise of a legal decision. The judicial process simply is not adequate to a trial of such far-flung issues. The answers given would reflect our own political predilections and nothing more.

42. *See, e.g.,* Letter from Learned Hand to Zechariah Chafee, Jr. (Jan. 2, 1921), *reprinted in* Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 770 (1975):

> I am not wholly in love with Holmesy's test and the reason is this. Once you admit that the matter is one of degree, while you may put it where it genuinely belongs, you so obviously make it a matter of administration, i.e. you give it to Tomdickandharry, D.J., so much latitude [here Learned Hand wrote and struck out 'as his own fears may require,' and continued] that the jig is at once up. Besides their Ineffabilities, the Nine Elder Statesmen, have not shown themselves wholly immune from the 'herd instinct' and what seems 'immediate and direct' today may seem very remote next year even though the circumstances surrounding the utterance be unchanged.

tantly, the clear and present danger test focused exclusively on the governmental interest in suppressing expression and ignored the countervailing social value, which even the most acerbic criticism of the existing government structure contains. In other words, the clear and present danger test inquired only whether there was any good reason to censor the speech; it never considered whether the expression should be constitutionally protected.

To alleviate these failings, *Brandenburg* relegated the circumstances-focused clear and present danger element to a secondary status in which its function would be merely to afford constitutional protection to the "harmless inciter."[43] As the primary element of its constitutional doctrine *Brandenburg* adopted the standard, first enunciated by Judge Learned Hand in *Masses Publishing Co. v. Patten*,[44] that the speaker's language must constitute actual incitement, and not mere advocacy of a political point of view.[45] This content-focused inquiry is analogous to the personally abusive epithet requirement of the fighting words doctrine. Both attempt to afford maximum constitutional protection to expressive activities by insulating speech from governmental sanction unless its content constitutes "triggers to action"[46] or "inherently inflammatory" remarks.[47] Although both assure adequate protection for the legitimate governmental interest in preventing violence, each constitutes "a qualitative formula, hard, conventional, difficult to evade."[48] In addition, the judicial focus on the content of the expression appreciably reduces the influence of the judge's subjective view of the danger or distastefulness of the expression on the decisionmaking process.

Most importantly, a content-based test approaches the difficult problems of subversive advocacy and fighting words from the proper perspective. Rather than inquiring whether the speech should be censored, this focus begins the process of constitutional adjudication by recognizing the societal value of the uninhibited communication of ideas and information. It erects a doctrine explicitly designed to afford

43. *See* Gunther, *supra* note 42, at 755.

44. 244 F. 535 (S.D.N.Y. 1917).

45. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). *See* Gunther, *supra* note 42, at 722, 724-29, 752-55; Kalven, *Professor Ernst Freund and* Debs v. United States, 40 U. CHI. L. REV. 235, 236 n.6 (1973).

46. Masses Publishing Co. v. Patten, 244 F. at 540.

47. Street v. New York, 394 U.S. at 592.

48. Letter from Learned Hand to Zechariah Chafee, Jr. (Jan. 2, 1921), *reprinted in* Gunther, *supra* note 42, at 770.

maximum protection to the values that lie at the very heart of the first amendment. "[T]he First Amendment's basic guarantee is of freedom to advocate ideas."[49] The constitutional guarantee extends much further, of course, but the bedrock principle is clear: "it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas."[50] In other words, the essence of the constitutional guarantee of freedom of speech is that the government may not penalize expression because it disagrees with the ideological message conveyed.[51] A necessary corollary to this fundamental first amendment principle is "that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."[52] This is true even when the offensive message concerns the person of the recipient, as in the case of words of disrespect or dislike.[53] Speech that conveys the idea that another's conduct is disgraceful or shameful cannot, for that reason alone, be censored.[54]

Thus, the personally abusive epithet requirement is central to the first amendment jurisprudence of the fighting words doctrine. The essential meaning of the first amendment is simply that no one may be penalized because of official disapproval of the ideas conveyed by his speech. Only when the speaker's message is encapsulated in a form inherently likely to provoke a reflexive violent response may the government assert a legitimate nonideological interest in its suppression. The primary requirement of the fighting words doctrine is hence designed to separate protected expressions of dislike or disrespect for another—to which the hearer's response, violent or otherwise, is essentially ideological—from those inherently provocative words that trigger responsive violence more the product of uncontrollable reflex than intellectual decision. Even this latter category of epithet, however, constitutes a "mixed utterance" that contains both "good" and "bad"

49. Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 688 (1959).

50. FCC v. Pacifica Foundation, 438 U.S. 726, 745-46 (1978) (plurality opinion).

51. *See, e.g.,* Healy v. James, 408 U.S. 169 (1972); Schacht v. United States, 398 U.S. 58 (1970); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). *See generally* Gard, *The Absoluteness of the First Amendment*, 58 NEB. L. REV. 1053 (1979).

52. Street v. New York, 394 U.S. at 592. *See also* Spence v. Washington, 418 U.S. 405, 412 (1974); Bachellar v. Maryland, 397 U.S. 564 (1970).

53. *See, e.g.,* Lewis v. City of New Orleans, 415 U.S. 130 (1974); Plummer v. City of Columbus, 414 U.S. 2 (1973); Gooding v. Wilson, 405 U.S. 518 (1972).

54. *See, e.g.,* Lewis v. City of New Orleans, 415 U.S. 130 (1974); Norwell v. City of Cincinnati, 414 U.S. 14 (1973); Gooding v. Wilson, 405 U.S. 518 (1972).

elements.[55] On the one hand, its ideological message should entitle it to constitutional protection; on the other hand, its inherent violence producing character should justify its censorship. The complex nature of such epithets necessitates a further inquiry into the circumstances of their use provided by the other three elements of the fighting words doctrine.[56]

The importance of the content-focused personally abusive epithet element cannot be overestimated. Its function mandates that first amendment analysis begin with an interpretation and application of the purpose of the constitutional provision. In essence it guarantees that the expression of ideas, no matter how offensive or distasteful, will be afforded constitutional protection. Only after this first amendment interest in the full protection of the expression of all ideas has been vindicated is the countervailing governmental interest in preventing breaches of the peace considered. This mode of analysis is illustrated by the courts' rigorous application of the requirement that only personally abusive epithets come within the scope of constitutionally unprotected fighting words.

This distinction between the protected expression of even hated ideas and the unprotected use of verbal brickbats was suggested in the Supreme Court's first encounter with the fighting words problem. In *Cantwell v. Connecticut*[57] the defendant, a Jehovah's Witness, stopped two Roman Catholics on a public street in New Haven, Connecticut, and, after receiving their permission, played a phonograph record entitled "Enemies", which contained an intemperate attack on the Roman Catholic religion.[58] Both men were angered by the recorded message, but neither attacked Cantwell.[59] Cantwell was convicted of inciting a breach of the peace on the theory that his expressive activity created a danger that those who heard his propaganda would react violently against him.[60] The United States Supreme Court unanimously reversed the conviction, reasoning that Cantwell did nothing more than express his religious beliefs, an activity that, "in spite of the probability of excesses and abuses," cannot be punished as a breach of the peace

55. The significance of complex, mixed utterances in first amendment jurisprudence was first identified in Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 11-12.

56. *See* notes 141-44 *infra*.

57. 310 U.S. 296 (1940).

58. *Id.* at 302-03, 309.

59. *Id.* at 303, 309.

60. *Id.* at 303.

consistent with the first amendment.[61] The Court suggested in dicta that expression rises to the level of unprotected fighting words only when it constitutes "[r]esort to epithets or personal abuse."[62]

The personally abusive epithet requirement precludes the punishment of the expression of ideas because of a listener's ideological opposition and is simply an application of "the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate."[63] This constitutional principle, which "more imperatively calls for attachment than any other,"[64] is essential to the very existence of an open, democratic society.[65] In other words, no people can be truly free if they are unable to express ideas regardless of how vehemently others may disagree ideologically.

Unfortunately, *Chaplinsky v. New Hampshire*,[66] the seminal fighting words case, was insensitive to this fundamental first amendment principle in a situation in which it should have been most stringently applied. Chaplinsky's conviction was affirmed on the ground that the words "God damned racketeer" and "damned Fascist,"[67] when addressed to a law enforcement officer who allegedly failed to provide protection for the disseminator of unpopular ideas, were likely to cause the average individual to respond violently.[68] The Supreme Court wholly ignored the issue of whether the words were objectionable merely because of the ideas they expressed. If the Court had considered this issue it could not have upheld Chaplinsky's conviction consistent with the first amendment. Clearly, Chaplinsky's statement was well within the category of criticism of government policy and personnel known as seditious libel and now recognized as entitled to the highest degree of

61. *Id.* at 310. The Court did suggest, however, that Cantwell's conduct might be punishable under "a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State . . . ." *Id.* at 311.

62. *Id.* at 309-10. For a more recent, and rather mundane, application of the personally abusive epithet requirement see Norwell v. City of Cincinnati, 414 U.S. 14 (1973), wherein the Supreme Court reversed the conviction of a sixty-nine year old man who "verbally and negatively protested" what "he obviously felt was a highly questionable detention by a police officer" simply because he had used "no abusive language or fighting words." *Id.* at 16.

63. United States v. Schwimmer, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting).

64. *Id. See also* Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 137 (1961) (Black J., dissenting).

65. *See* Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191, 205, 208-10. *See generally* Gard, *supra* note 51.

66. 315 U.S. 568 (1942).

67. *Id.* at 569.

68. *Id.* at 573-74.

constitutional protection.[69] Given the circumstances in which the remarks were uttered and the fact that Chaplinsky completed his sentenced by adding that not only the individual officer but also "the whole government of Rochester are Fascists or agents of Fascists,"[70] to treat Chaplinsky's allegation of governmental corruption and political extremism as a personally abusive epithet "strikes at the very center of the constitutionally protected area of free expression."[71]

Fortunately, the factual holding in *Chaplinsky* has been rejected in subsequent decisions of the Supreme Court.[72] Furthermore, *Chaplinsky* is irreconcilable with the later development of the personally abusive epithet element of the fighting words doctrine. Thus, for example, the Court held in *Edwards v. South Carolina*[73] that placards stating "I am proud to be a Negro" and "Down with Segregation" carried by civil rights demonstrators could not be censored on the basis of the fighting words doctrine.[74] The Court's rationale was engagingly simple: "The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views."[75]

The Court reached a similar result in *Street v. New York.*[76] Sidney Street, who protested against the sniper shooting of civil rights leader James Meredith, burned his American flag on a New York City street corner saying, "If they let that happen to Meredith we don't need an American flag."[77] He was convicted under a state statute that made it a crime "publicly [to] mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by words or act [any flag of the United States]."[78] Justice Harlan, writing for a majority of the Court, held that Street's conviction could not be justified on the ground that his lan-

69. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964). *See also* Kalven, *supra* note 65.

70. Chaplinsky v. New Hampshire, 315 U.S. at 569.

71. New York Times Co. v. Sullivan, 376 U.S. at 292 (holding unconstitutional a similar attempt to expand the scope of the common law of libel).

72. The Supreme Court has expressly held that the use of the word fascist is "part of the conventional give-and-take in our economic and political controversies" and hence protected under federal labor law. Letter Carriers v. Austin, 418 U.S. 264, 284 (1974) (quoting Cafeteria Employees Local 302 v. Angelos, 320 U.S. 293, 295 (1943)).

73. 372 U.S. 229 (1963).

74. *Id.* at 236.

75. *Id.* at 237.

76. 394 U.S. 576 (1969).

77. *Id.* at 578-79.

78. *Id.* at 577-78 (quoting N.Y. PENAL LAW § 1425, sub. 16, ¶ d (McKinney 1909)).

guage constituted fighting words.[79] Finding that "any shock effect of appellant's speech must be attributed to the content of the ideas expressed," the Supreme Court reaffirmed the basic first amendment principle that "the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."[80]

Justice Harlan also authored the opinion of the Court in *Cohen v. California*.[81] The defendant, Paul Robert Cohen, wore a jacket with the words "Fuck the Draft" plainly visible on the back in a Los Angeles courthouse corridor.[82] He was convicted of disturbing the peace by "offensive conduct," which the state court defined as "behavior which has a tendency to provoke *others* to acts of violence or to in turn disturb the peace."[83] Reversing the conviction, the Supreme Court held that the first amendment precludes the states from proscribing expression on the ground that it is officially deemed vulgar or offensive.[84] The Court also held that the scurrilous message on Cohen's jacket fell outside the category of unprotected fighting words.[85] In so holding, Justice Harlan defined the narrow class of speech that may be censored as 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."[86] Thus, *Cohen* incorporated the holding of *Street* into the constitutional doctrine first enunciated in *Chaplinsky* by limiting its scope to personally abusive insults and expressly excluding speech that offends because of the controversial nature of its ideological message. Applying this test, Cohen's conviction could not withstand constitutional scrutiny because no one "could reasonably have regarded the words on appellant's jacket as a

79. *Id.* at 592.

80. *Id.* (citing Cox v. Louisiana, 379 U.S. 536, 546-52 (1965)); Edwards v. South Carolina, 372 U.S. 229, 237-38 (1963); Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949). Subsequent Supreme Court decisions have reiterated this fundamental rule of constitutional law. *See, e.g.,* Spence v. Washington, 418 U.S. 405, 412 (1974); Bachellar v. Maryland, 397 U.S. 564, 567 (1970)(quoting Street v. New York, 394 U.S. at 592).

81. 403 U.S. 15 (1971).

82. *Id.* at 16 (quoting People v. Cohen, 1 Cal. App. 3d 94, 97, 81 Cal. Rptr. 503, 505 (1969)). Although women and children were present in the corridor, no one who saw the jacket threatened Cohen with violence or even voiced an objection. *Id.* at 20, 22.

83. *Id.* at 17 (quoting People v. Cohen, 1 Cal. App. 3d at 99, 81 Cal. Rptr. at 506) (emphasis in original).

84. *Id.* at 25-26.

85. *Id.* at 20.

86. *Id.*

direct personal insult."[87] In other words, a difference of constitutional magnitude exists between the phrase "Fuck the Draft" and the epithet "Fuck you."

Ware v. City and County of Denver[88] follows the constitutional teaching of *Cohen* and nicely illustrates both the protected status of the expression of ideas and the necessity for judicial analysis of the usage intended by the utterance of words that are commonly used as abusive epithets. In *Ware*, the defendant, a member of the audience at a meeting held on the campus of the University of Denver, shouted "fuck you" in response to an answer given by a representative of the United States Department of Justice to a question from the audience.[89] Reversing the defendant's conviction for disorderly conduct, the Supreme Court of Colorado reasoned perceptively: "It is apparent from the record that the outbursts of the defendant and others were responses to political opinions and the voicing of contrary opinions."[90]

The most difficult question raised by the personally abusive epithet requirement concerns the proper treatment of racial and religious slurs. This issue severely tests the general principle that a listener's ideological objection to the content of a communication cannot form the foundation for a fighting words conviction. Recently, in *Village of Skokie v. National Socialist Party of America*,[91] this issue was presented in a factual context guaranteed to arouse emotion on all sides. Frank Collin, leader of the National Socialist Party of America, a small group of neo-Nazis, announced his group's intention to stage a demonstration in Skokie, Illinois, to protest a Skokie Park District requirement that the neo-Nazis post a $350,000 insurance policy as a pre-condition to the use of Skokie parks.[92] The Village of Skokie secured an injunction from the circuit court of Cook County, Illinois, prohibiting the group from marching or parading in Skokie in the party's storm trooper uniform or marching, parading, or displaying the swastika in Skokie.[93] On appeal, the appellate court of Illinois had no difficulty reversing the portion of the injunction prohibiting the wearing of the storm trooper uniform because this uniform constituted a symbolic expression of the

87. *Id.*
88. 182 Colo. 177, 511 P.2d 475 (1973).
89. *Id.*
90. *Id.* at 178, 511 P.2d 475.
91. 51 Ill. App. 3d 279, 366 N.E.2d 347 (1977), *rev'd*, 69 Ill. 2d 605, 373 N.E.2d 21 (1978).
92. *Id.* at 283, 366 N.E.2d at 349-50.
93. *Id.* at 284-85, 366 N.E.2d at 351.

Nazi political philosophy.[94] This holding is consistent with the fundamental first amendment principle that ideological outrage at the content of a communication is an inadequate predicate to the application of the fighting words doctrine.

The constitutionality of the injunction against the display of the swastika presented, in the view of the appellate court, a much more difficult question. Although the neo-Nazis denied that they endorsed genocide, it was undisputed that their political philosophy, represented by the swastika, included the opinion "that American Jews have excessive influence in government and close ties to international Communism."[95] The Court thus had to decide whether a symbol, which embodies a racial or religious slur and thereby presents a serious danger of responsive violence by the audience, could be censored because it constituted unprotected fighting words.

This question was made more difficult because most people regard the ideas represented by the swastika with particular abhorrence, and because of the particular sensitivity of the locale chosen by the neo-Nazis for their demonstration. Skokie is a village containing approximately 70,000 people, of whom approximately 40,500 are Jewish. Included within this Jewish population are many survivors and relatives of survivors of the concentration camps of the Third Reich.[96] No doubt the expression of such a symbolic slur in Skokie presented a grave risk of a reflexive violent response by the targets of the symbolic message.[97] Indeed, this potential for violence convinced the appellate court to affirm that portion of the injunction prohibiting the display of the swastika.[98]

The Supreme Court of Illinois reversed the decision of the appellate court in a per curiam opinion.[99] Although the court upheld the reversal of that portion of the injunction prohibiting the neo-Nazis from wearing their storm trooper uniforms, it further held that the probability of responsive violence did not distinguish the constitutionality of prohibit-

94. *Id.* at 288-89, 366 N.E.2d at 354-55.

95. Collin v. Smith, 447 F. Supp. 676, 680 (N.D. Ill.), *aff'd* 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

96. 51 Ill. App. 3d at 282, 366 N.E.2d at 349.

97. There was substantial evidence of a present danger of uncontrollable violence that would result from the display of the swastika in Skokie. *See id.* at 284, 366 N.E.2d at 350-51.

98. *Id.* at 293, 366 N.E.2d at 357.

99. Village of Skokie v. National Socialist Party of America, 69 Ill.2d 605, 373 N.E.2d 21 (1978).

ing the display of the swastika.[100] Instead, the court held that the personally abusive epithet requirement, designed to afford constitutional protection to the expression of all ideas, mandated the reversal of the injunction:

> The display of the swastika, as offensive to the principles of a free nation as the memories it recalls may be, is symbolic political speech intended to convey to the public the beliefs of those who display it. It does not, in our opinion, fall within the definition of "fighting words" . . . .[101]

The wisdom of the decision rendered by the Supreme Court of Illinois was confirmed in *Collin v. Smith*.[102] In that case the federal district court recognized that "the [United States Supreme] Court has several times emphasized that care must be taken to insure that what is restricted is insulting and offensive *language*, not the communication of offensive *ideas*."[103] Indeed, the principle is so basic that ultimately the Skokie city officials abandoned the argument that the swastika constituted unprotected fighting words.[104]

Judicial recognition that the danger of responsive violence cannot justify governmental censorship of racial and religious slurs is well-founded. "[S]uch outbursts of violence are not the necessary consequence of such speech and, more important, such violence when it does occur is not the serious evil of the speech."[105] The serious evil of racial and religious slurs is the extraordinary hatefulness and ugliness of the ideas they espouse and the more remote danger that these ideas will be accepted and acted upon by some group of fanatics, or perhaps even by an entire nation.[106] In essence, the objection to such slurs, including those symbolized by the swastika, is ideological in character.

The holding that the swastika could not be censored consistent with the first amendment on the ground that it constitutes fighting words was entirely correct and compatible with our national tradition of uninhibited interchange of ideas. In a democratic society even the most odious ideas must be afforded constitutional protection if the society is

100. *Id.* at 612-15, 373 N.E.2d at 22-24.

101. *Id.* at 615, 373 N.E.2d at 24.

102. 447 F. Supp. 676 (N.D. Ill.), *aff'd*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

103. *Id.* at 690 (emphasis in original).

104. *See* Collin v. Smith, 578 F.2d at 1203.

105. H. KALVEN, THE NEGRO AND THE FIRST AMENDMENT 14-15 (1965). *See also* Collin v. Smith, 447 F. Supp. at 697.

106. *See* H. KALVEN, *supra* note 105, at 13-14.

to retain its essential characteristic of popular self-governance. The possibility that an addressee's justifiable outrage at the content of the ideas expressed may be manifested by unlawful violence cannot be permitted to sanction a different result.[107] This is the laudable function of the personally abusive epithet requirement of the fighting words doctrine.

Although a personal invective directed to one private person by another presents the strongest justification for the doctrine, it is virtually impossible to find fighting words cases that do not involve either the expression of opinion on issues of public policy or words directed toward a government official, usually a police officer.[108] Nevertheless, the Supreme Court, consistent with the basic proposition that the protection of the first amendment extends to purely private communications,[109] has uniformly enunciated the general principle that the expression of the idea of dislike or disrespect by one private individual for another is also constitutionally protected.[110]

The Supreme Court's opinion in *Gooding v. Wilson*[111] is the best illustration of this application of the personally abusive epithet element of the fighting words doctrine. Wilson sought federal habeas corpus relief from his conviction for cursing a police officer on grounds that the state statute under which he was convicted was unconstitutionally vague and overbroad.[112] The statute provided: "Any person who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor."[113] The Supreme Court set aside Wilson's conviction on the ground that the statute was facially unconstitutional without considering whether the language used by

107. *See* Collin v. Smith, 447 F. Supp. at 690: "Even where the audience is so offended by the ideas being expressed that it becomes disorderly and attempts to silence the speaker, it is the duty of the police to attempt to protect the speaker, not to silence his speech if it does not consist of unprotected epithets."

108. *But see* Plummer v. City of Columbus, 414 U.S. 2 (1973) (conviction of cab driver for vulgar sexual proposition to female passenger reversed on overbreadth grounds); Rozier v. State, 140 Ga. App. 356, 231 S.E.2d 131 (1976) (vulgar sexual proposition to sixteen year old female held not fighting words).

109. Givhan v. Western Line Consol. School Dist., 439 U.S. 410 (1979).

110. *See, e.g.*, Lewis v. City of New Orleans, 415 U.S. 130 (1974); Plummer v. City of Columbus, 414 U.S. 2 (1973); Gooding v. Wilson, 405 U.S. 518 (1973).

111. 405 U.S. 518 (1972).

112. *Id.* at 519.

113. *Id.* (quoting GA. CODE ANN. § 26-6303).

Wilson constituted fighting words.[114] The first amendment, the Court held, requires that the governing statute be narrowly drawn so as not to encompass within its proscription speech that is constitutionally protected.[115] The statute in *Gooding* went too far. Dictionary definitions of the statutory terms included language that merely conveyed disgrace or harsh insults, and the state courts failed to limit these statutory terms by judicial construction to encompass only constitutionally punishable fighting words.[116] Explicitly relying on state cases concerning communications between purely private individuals, the Supreme Court held the statutory definition of fighting words in *Gooding* unconstitutionally overbroad because it proscribed expression that was merely offensive, vulgar, insulting, or disgraceful to the person to whom it was addressed.[117]

If a court determines that the speaker's language constitutes a personally abusive epithet, the second element of the fighting words doctrine requires that the words, and the circumstances in which they are spoken, have a direct tendency to cause an immediate violent response by the addressee.[118] This element recognizes that while the doctrine is premised on the governmental interest in preventing breaches of the peace, there is no constitutional justification for proscribing all verbal invectives. For the doctrine to remain consistent with its underlying rationale, only those epithets that actually cause an irresistible impulse to violence within the addressee may be constitutionally censored. Thus, a proper application of the second element of the fighting words doctrine mandates a sensitive analysis of the circumstances in which the words are uttered, and an appreciation of the distinction between arousal of anger or outrage in the recipient of the language and creation of an uncontrollable reflexive and violent response.

The Supreme Court paid lip service to this crucial second element in *Chaplinsky* when it affirmed the constitutionality of the state statute on the ground that it proscribed only those words that "have a direct tendency to cause acts of violence by the persons to whom, individually,

114. *Id.* at 520.
115. *Id.* at 520-22.
116. *Id.* at 525-27.
117. *Id.*
118. *See, e.g.,* Gooding v. Wilson, 405 U.S. 518 (1972); Cohen v. California, 403 U.S. 15 (1971); Terminiello v. Chicago, 337 U.S. 1 (1949); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

the remark is addressed."[119] Unfortunately, the *Chaplinsky* Court, in its application of this requirement of a likelihood of an immediate, reflexive, violent response, substituted an assumption for analysis. Failing to evaluate the probable effect of Chaplinsky's insulting language on the City Marshal or the relevance of the factual context in which the words were used, the Court simply assumed that certain words inevitably "trigger uncontrollable violent impulses on the part of the addressee of the words."[120] Fortunately, later Supreme Court cases have largely rejected *Chaplinsky*'s ill-considered behavioral assumption.

In *Terminiello v. Chicago*[121] the Supreme Court, asserting that it was unnecessary to reach the fighting words issue,[122] made it clear that the Court would no longer rely on simplistic assumptions to decide the difficult issue of whether there was a probability of an immediate violent response by the recipient of the offensive language. Terminiello, a suspended priest, was convicted for an ugly and vicious speech denouncing Blacks and Jews, which he gave in a rented hall in Chicago. During the speech Terminiello referred to the howling, violent mob of approximately one thousand persons outside the hall as "slimy scum," "snakes," and "bedbugs."[123] The trial court instructed the jury that the statutory term "breach of the peace" included speech that "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance . . . ."[124] The Supreme Court held that the breach of the peace ordinance, as so construed, could not withstand constitutional scrutiny:

> Accordingly a function of free speech under our system of government is to invite dispute. It 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. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a

119. 315 U.S. at 573 (footnote omitted) (quoting State v. Chaplinsky, 91 N.H. at 313, 18 A.2d at 758).

120. Rutzick, *Offensive Language and the Evolution of First Amendment Protection*, 91 HARV. C.R.-C.L. L. REV. 1, 8 (1974).

121. 337 U.S. 1 (1949).

122. *Id.* at 3.

123. *Id.* at 26 (Jackson, J., dissenting). Mr. Justice Jackson's dissenting opinion contains a full description of Terminiello's speech and the surrounding circumstances. *See id.* at 14-22.

124. *Id.* at 3-4.

> clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. . . . There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.
>
> The ordinance as construed by the trial court seriously invaded this province. It permitted conviction of petitioner if his speech stirred people to anger, invited public dispute, or brought about a condition of unrest. A conviction resting on any of those grounds may not stand.[125]

Terminiello thus established the requirement that the words must create a likelihood of an immediate, violent, reflexive response by the recipient as a meaningful element of the fighting words doctrine. It is not sufficient that the addressee might feel anger or outrage. Only when the addressee experiences an uncontrollable violent impulse will the fighting words doctrine declare the speech unprotected by the first amendment. In addition, the Court clearly established that it would no longer indulge in the simplistic assumption that certain words inevitably provoke such a reaction. Instead, the likelihood of an immediate violent reaction becomes a factual inquiry largely dependent on the circumstances surrounding the use of the offensive language.

This distinction between speech that arouses anger and speech that causes reflexive violence is so central to first amendment jurisprudence that it has been repeatedly recognized by the Supreme Court.[126] Thus, for example, in *Coates v. City of Cincinnati*[127] the issue was the constitutionality of a city ordinance that prohibited the assembly of three or more persons who "conduct themselves in a manner *annoying* to persons passing by . . . ."[128] The Ohio Supreme Court had defined the statutory term to mean "to trouble, to vex, to impede, to incommode, to provoke, to harass or to irritate."[129] The United States Supreme Court had no difficulty in pinpointing the constitutional infirmity in the ordinance: "Our decisions establish that mere public intolerance or animosity cannot be the basis for abridgment of these constitutional

125. *Id.* at 4-5.

126. *See, e.g.*, Lewis v. City of New Orleans, 415 U.S. 130 (1974); Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963).

127. 402 U.S. 611 (1971).

128. *Id.* (quoting CINCINNATI, OHIO, CODE OF ORDINANCES § 901-L6 (1956)) (emphasis added).

129. *Id.* at 612 (quoting City of Cincinnati v. Coates, 21 Ohio St. 2d 66, 69, 255 N.E.2d 247, 249 (1970)).

freedoms."[130]

This distinction was drawn with even greater clarity in *Cohen*. Defining fighting words as "those personally abusive epithets which . . . are . . . inherently likely to provoke violent reaction,"[131] the Supreme Court found the rationale of the lower court "plainly untenable" because "[a]t most it reflect[ed] an 'undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression.' "[132] In *Lucas v. Arkansas*[133] the statute, which the appellants were convicted of violating, proscribed speech that would "arouse to anger" the recipient. There was substantial evidence that the words used by the appellants would ordinarily have such an effect.[134] Although the dissenters claimed to be "at a loss to understand what this Court further requires in a narrowing interpretation" of the fighting words doctrine,[135] the answer had long been clear to the Supreme Court, which summarily vacated the conviction in *Lucas*.[136]

The proper standard has also been clear to many lower courts.[137] Thus, for example, reversing the conviction of an individual who foolishly referred to two police officers as "big shits," the Alabama court of criminal appeals in *Skelton v. City of Birmingham*[138] concisely summarized the controlling legal principle in its effort to place a constitutional construction on a local fighting words ordinance: "In short, the statute requires that the words be calculated to cause an immediate breach of the peace. It is not enough if they merely arouse anger or resentment."[139]

It is also well established that the Supreme Court will stringently

130. *Id.* at 615.

131. 403 U.S. at 20.

132. *Id.* at 23 (quoting Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 508 (1969)). *See also* Rosenfeld v. New Jersey, 408 U.S. 901, 905 (1972) (Powell, J., dissenting) ("Perhaps appellant's language did not constitute 'fighting words'. . . . While most of those attending the school board meeting were undoubtedly outraged and offended, the good taste and restraint of such an audience may have made it unlikely that physical violence would result."); Ashton v. Kentucky, 384 U.S. 195, 198 (1966) (statute prohibiting "any writing calculated to create disturbances of the peace" held unconstitutional).

133. 416 U.S. 919 (1974).

134. *Id.* at 919-20 (Blackmun, J., dissenting).

135. *Id.* at 920 (Blackmun, J., dissenting).

136. *Id.* at 919.

137. *See, e.g.*, Hammond v. Adkisson, 536 F.2d 237 (8th Cir. 1976); *In re* S.L.J., 263 N.W.2d 412 (Minn. 1978); State v. Authelet, 385 A.2d 642 (R.I. 1978).

138. 342 So. 2d 933 (Ala. Crim. App.), *modified and aff'd*, 342 So. 2d 937 (Ala. 1976).

139. *Id.* at 937.

evaluate the words spoken, and the circumstances in which they are uttered, to determine whether a substantial likelihood of an immediate violent response actually exists. Indeed, the Court has reversed several fighting words convictions precisely because the evidence disclosed that such a probability of reflexive violence was lacking.[140] Perhaps the best illustration of the proper operation of this requirement is the Supreme Court's finding that the Georgia opprobrious words statute was unconstitutionally overbroad:

> Suppose that one, at a safe distance and out of hearing of any other than the person to whom he spoke, addressed such language to one locked in a prison cell or on the opposite bank of an impassable torrent, and hence without power to respond immediately to such verbal insults by physical retaliation . . . .[141]

In the Supreme Court's view, the censorship of the offending language could not be justified in either of these situations simply because there was no danger of an immediate violent response.[142] Thus, the question of whether the offending language constitutes unprotected fighting words requires an analysis not only of the words themselves, but also of several other facts "such as the relation of the parties, the circumstances under which the language was used, and the manner of the speaker."[143]

The requirement of substantial likelihood of a reflexive violent response is now firmly established. The more subtle issue today is whether courts should apply an objective or a subjective test to determine whether the requisite danger of an immediate violent reaction by the addressee exists. The lower courts are seriously divided on this question of whether the constitutional touchstone should be the anticipated response of the average or of the particular addressee.[144] Further, several commentators have suggested that the Supreme Court

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140. *See, e.g.*, Cohen v. California, 403 U.S. 15 (1971); Bachellar v. Maryland, 397 U.S. 564 (1970); Street v. New York, 394 U.S. 576 (1969).

141. Gooding v. Wilson, 405 U.S. at 526 (quoting Elmore v. State, 15 Ga. App. 461, 461-63, 83 S.E. 799, 799-800 (1914)). The Georgia court of appeals had cited these examples as situations where the opprobrious words statute would proscribe the speech. In contrast, the United States Supreme Court cited these possible applications of the Georgia statute as evidence of its unconstitutional overbreadth. *Id.* at 525-26.

142. *Id.* at 525-26, 528.

143. Meyers v. State, 253 Ark. 38, 41-42, 484 S.W.2d 334, 337 (1972).

144. Cases that seemingly adopt the objective test focusing on the anticipated response of the average addressee include Anniskette v. State, 489 P.2d 1012 (Alaska 1971); Meyers v. State, 253 Ark. 38, 484 S.W.2d 334 (1972); Clanton v. State, 357 So. 2d 455 (Fla. Dist. Ct. App. 1978); Bolden v. State, 148 Ga. App. 315, 251 S.E.2d 165 (1978); Bale v. Ryder, 290 A.2d 359 (Me. 1971); *In re* S.L.J., 263 N.W.2d 412 (Minn. 1978); State v. Boss, 195 Neb. 467, 238 N.W.2d 639 (1976); City of

recently repudiated the objective standard of the average addressee and now requires a substantial threat of violence by the particular addressee before offensive language can be deemed unprotected fighting words.[145] Indeed, Professor Shea has argued that adoption of a subjective test is responsible for the Court's habitual reversal of fighting words convictions and that only a return to an objective standard will suffice to allow the doctrine to remain a viable instrument for the censorship of unseemly expression.[146]

Careful analysis demonstrates that the Supreme Court consistently adheres to the objective standard, a test that, if properly applied, is surprisingly speech protective. The Court first committed itself to the objective fighting words test in *Chaplinsky* when it endorsed the construction given the statute by the state court: "The word 'offensive' is not to be defined in terms of what a particular addressee thinks. . . . The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight."[147] Since *Chaplinsky*, the Supreme Court has repeatedly endorsed the objective standard.[148] In *Ashton v. Kentucky*[149] the Court held that the departure from the objective standard was reversible error because "[i]t involves calculations as to the boiling point of a particular person or a particular group."[150]

Those commentators who suggest that the Court recently adopted a subjective standard focusing on the reaction of the particular addressee seek support for their view in the *Cohen* and *Gooding* opinions.[151] Such an interpretation of these opinions, however, is extremely dubi-

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Cincinnati v. Karlan, 39 Ohio St. 2d 107, 314 N.E.2d 162 (1974); State v. Authelet, 385 A.2d 542 (R.I. 1978).

Cases that appear to adopt a subjective standard include: Harbin v. State, 358 So. 2d 856 (Fla. Dist. Ct. App. 1978); City of Chicago v. Blackmore, 15 Ill. App. 3d 994, 305 N.E.2d 687 (1973); Downs v. State, 278 Md. 610, 366 A.2d 41 (1976); State v. Profaci, 56 N.J. 346, 266 A.2d 579 (1970); Garvey v. State, 537 S.W.2d 709 (Tenn. Crim. App. 1975); Lane v. Collins, 29 Wis.2d 66, 138 N.W.2d 264 (1965).

145. *See, e.g.*, J. BARRON & C. DIENES, *supra* note 28, at 72-73; J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 28, at 793; L. TRIBE, *supra* note 23, at 618; Shea, *supra* note 24, at 14-22.

146. *See* Shea, *supra* note 24, at 14-24.

147. Chaplinsky v. New Hampshire, 315 U.S. at 573 (quoting 91 N.H. at 320, 18 A.2d at 762).

148. *See, e.g.*, Gooding v. Wilson, 405 U.S. at 523; Cohen v. California, 403 U.S. at 20; Bachellar v. Maryland, 397 U.S. at 567; Street v. New York, 394 U.S. at 592.

149. 384 U.S. 195 (1966).

150. *Id.* at 200. *See also* Coates v. City of Cincinnati, 402 U.S. 611, 614-15 (1971).

151. *See, e.g.*, J. BARRON & C. DIENES, *supra* note 28, at 72-73; J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 28, at 793; L. TRIBE, *supra* note 23, at 618; Shea, *supra* note 24, at 14-22.

ous. In *Cohen* the Court explicitly embraced the objective standard in its brief summary of the required elements of the fighting words doctrine.[152] The only reason to suspect any deviation from the traditional test is the Court's observation that there was "no showing that anyone who saw Cohen was in fact violently aroused,"[153] and that there was "no evidence that substantial numbers of citizens are standing ready to strike out physically" in response to Cohen's jacket.[154] Neither observation necessarily contemplates the adoption of a subjective test of fighting words. As a practical matter, although the fact that a particular addressee fails to respond violently cannot be conclusive on the issue of whether an ordinary, reasonable addressee would so react,[155] the failure of a substantial number of persons to respond violently is at least evidence that the ordinary reasonable person would not react violently. This rationale is consistent with the Supreme Court's emphatic conclusion that the constitutional standard must be the ordinary, law-abiding citizen and not "some persons . . . with . . . lawless and violent proclivities."[156]

The argument that the Supreme Court abandoned the objective standard in *Gooding* is no more persuasive. Again the Court specifically endorsed the *Chaplinsky* test focusing on the average addressee[157] and, further, cited the *Ashton* holding with approval.[158] The clue to the supposed adoption of a subjective test relied upon by the commentators is the Court's statement that the constitutional flaw in the Georgia statute, as construed by the state courts, was that it was not limited to words that "have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed."[159] This statement, however, was a direct quotation from *Chaplinsky*.[160] It strains credibility to suggest that the Supreme Court intended to overrule a central principle of *Chaplinsky* by a mere favorable quotation from that very case.[161]

152. 403 U.S. at 20.

153. *Id.*

154. *Id.* at 24.

155. *See, e.g.,* Hammond v. State, 255 Ark. 56, 498 S.W.2d 652 (1973); Bolden v. State, 148 Ga. App. 315, 251 S.E.2d 165 (1978); State v. Authelet, 385 A.2d 642 (R.I. 1978) *Contra,* People v. Douglas, 29 Ill. App. 3d 738, 331 N.E.2d 359 (1975).

156. 403 U.S. at 24.

157. 405 U.S. at 523.

158. *Id.* at 527.

159. *Id.* at 524.

160. *See* 315 U.S. at 573 (quoting 91 N.H. at 313, 18 A.2d at 758).

161. The Court's statement that the statute which was capable of application where "there was

The more reasonable interpretation of both *Chaplinsky* and *Gooding* is that the Court was attempting, rather inartistically, to state two separate elements of the fighting words doctrine: first, that the offensive language must be addressed individually to the person of the hearer; and second, that the words must be likely to cause the ordinary reasonable person in the circumstances of the addressee to react violently.

This entire objective-subjective debate focuses on whether the ordinary addressee test should be applied when the target of the offensive words is a police officer.[162] In *Gooding* the addressees were police officers and the Supreme Court suggested that this would have been a relevant issue if the case had not been disposed of on overbreadth grounds.[163] Three months later Justice Powell suggested that the Court should apply a separate standard when the recipient is a police officer:

> If these words had been addressed by one citizen to another, face to face and in a hostile manner, I would have no doubt that they would be "fighting words." But the situation may be different where such words are addressed to a police officer trained to exercise a higher degree of restraint than the average citizen.[164]

Because the fighting words doctrine is premised upon a perceived danger of breach of the peace, Justice Powell's suggestion has a great deal of merit. A police officer takes an oath of office to maintain the public peace and assumes a public obligation to keep, not breach, the peace. In addition, police officers are frequently confronted with coarse language and harsh epithets and quickly gain experience in coping peaceably with angry citizens. They receive special sensitivity and public relations training in how to reduce community tensions and resolve such situations in a nonviolent fashion.[165] Under these circumstances several courts, which have addressed the issue of why personally abusive epithets directed at a police officer should be punishable, have not relied on the governmental interest in protecting the public peace, but have premised their opinion on the governmental in-

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no likelihood that the person addressed would make an immediate violent response" was overbroad because it was not limited to " 'fighting' words defined by *Chaplinsky*" is equally ambiguous. *See* 405 U.S. at 528.

162. In each of the cases cited at note 144, *supra*, the addressee was a police officer.

163. 405 U.S. at 519-20 n.1, 526.

164. Lewis v. City of New Orleans, 408 U.S. 913 (1972), *citing* MODEL PENAL CODE 250.1, Comment 4 (Tent. Draft No. 13, 1961).

165. *See* MODEL PENAL CODE § 250.1, Comment 4(c) at 14 (Tent. Draft No. 13, 1961).

terest in promoting respect for law enforcement officials.[166]

The Supreme Court, however, has repeatedly ruled this governmental interest impermissible as a justification for the censorship of abusive language.[167] Protecting the addressee from expressions of disrespect is particularly suspect when the addressee is a governmental official, such as a police officer. One of the most serious flaws of the Supreme Court's opinion in *Chaplinsky* was its failure to explore the relationship between the punishment of disrespectful words directed at a police officer and the constitutionally disreputable crime of seditious libel.[168] Placing aside the constitutionally impermissible desire to promote respect for the police, even the most abusive epithet will not be likely to cause a police officer, trained to keep the peace, to react violently.[169]

It would be inappropriate, however, to equate the adoption of a special standard to deal with the problem of the police officer-recipient with the adoption of a subjective fighting words test. In *Gooding* the Supreme Court suggested that a special standard would be applied in this situation when it condemned the following state court opinion: "[T]he use of language of this character is a violation of the statute, even though it be addressed to one who, on account of circumstances or by virtue of the obligations of office, can not actually then and there resent the same by a breach of the peace . . . ."[170]

Logically, the oath, experience, training, and obligations of police

166. *See, e.g.*, Lucas v. State, 254 Ark. 584, 494 S.W.2d 705 (1973), *vacated and remanded*, Lucas v. Arkansas, 416 U.S. 919 (1974); City of Saint Paul v. Morris, 258 Minn. 467, 104 N.W.2d 902 (1960); People v. Fenton, 102 Misc. 43, 168 N.Y.S. 725 (1917).

167. *See* text accompanying note 69 *supra*.

168. *See* Rutzick, *supra* note 120, at 9-11. *See also* City of New Orleans v. Lewis, 263 La. 809, 269 So. 2d 450 (1972), *rev'd*, 415 U.S. 130 (1974), wherein Justice Tate, dissenting, observed:

> The police, our front line soldiers in the battle against crime, deserve the respect and support of our officials and citizens. Nevertheless, ever since this nation fought for and obtained its freedom, it has not been a crime to curse or use opprobrious language about the public officers of our democratic republic. If, for instance, the present ordinance had made it a crime wantonly to curse or revile members of the United States Supreme Court or of the state judiciary (or the Governor, or the legislators or any other public officer or servant), as well as the police, I am certain that not one of the majority would deem such an enactment constitutional. The right to criticize our public officers, be they judges or policemen, has, since our earliest days, been deemed a basic right of all Americans. The harshness or unfairness of language used in such critical commentary does not remove it from the protection of our constitution.

Id. at 835, 269 So. 2d at 459-60. *See also* New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Wood v. Georgia, 370 U.S. 375 (1962).

169. *See* Gooding v. Wilson, 405 U.S. at 526; People v. Lukowsky, 94 Misc. 500, 159 N.Y.S. 599 (1916).

170. 405 U.S. at 526 (quoting Elmore v. State, 15 Ga. App. 461, 461-63, 83 S.E. 799, 799-800

officers can be treated as a factual circumstance to be considered in the application of an objective fighting words test. On the other hand, it is equally logical to treat the question of a special standard for police not as a choice between an objective or subjective test, but rather as an issue of the generality of application of the objective test. In other words, it is certainly consistent with an objective test to apply a more specific standard of "the ordinary reasonable police officer"[171] in appropriate situations. Indeed, the adoption of a standard of the ordinary reasonable professional has never been deemed inconsistent with an objective standard of liability.[172] Presently, the Supreme Court requires that the offending language be likely to cause an immediate violent response by an average addressee to be constitutionally punishable. Even if the Court does adopt a special standard for police officers there is no reason to believe that the Court has abandoned an objective test to measure the likelihood of such a violent response.

The third element of the fighting words doctrine requires the speaker to utter the offending words face-to-face to the recipient. This element compliments the requirement that there must be a likelihood of an immediate violent reaction by specifying one objective circumstance that must exist before it is reasonable to assume that such a danger is present. Although the Supreme Court has consistently enunciated this requirement,[173] it has not yet had an occasion to explicitly apply it. Several state court opinions, however, are illustrative of the proper application of this element. At a minimum, this element requires that the words must be used in the physical presence of the addressee.[174]

In *Anniskette v. State*[175] the Supreme Court of Alaska reversed disorderly conduct and disturbing the peace convictions of the defendant

(1914)). In Lewis v. City of New Orleans, 415 U.S. at 132-33 n.2, the Supreme Court suggested that the question of a special standard for police officers was still open.

171. People v. Benders, 63 Misc. 2d 572, 575, 312 N.Y.S.2d 603, 608-09 (1970).

172. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 161-66 (4th ed., 1971); RESTATEMENT (SECOND) OF TORTS § 289, Comment m (1965); Seavey, *Negligence—Subjective or Objective*, 41 HARV. L. REV. (1927). *Cf.* MODEL PENAL CODE § 250.1, Comment 44 (Tent. Draft No. 13, 1961 (Policeman "would have to be more than human to take the same detached and tolerant view of insults loudly addressed to himself as he might take toward two strangers belaboring each other verbally." *Id.*).

173. *See* Lewis v. City of New Orleans, 408 U.S. 913 (1972) (Powell, J., concurring); Gooding v. Wilson, 405 U.S. 518 (1972); Chaplinsky v. New Hampshire, 315 U.S. 658 (1942).

174. *See, e.g.,* Anniskette v. State, 489 P.2d 1012 (Alaska 1971); State v. Oliveira, 115 N.H. 559, 347 A.2d 165 (1975).

175. 489 P.2d 1012 (Alaska 1971).

who repeatedly telephoned the home of the state trooper late at night and berated him with abusive language.[176] Assuming that defendant's language constituted fighting words, the court held that telephonic communications fall outside the category of face-to-face utterances because "[t]he time necessary for the officer to travel from his residence to that of the defendant should have allowed enough cooling off so that any desire on the part of the officer to inflict violence on the defendant should have been dissipated."[177]

Moreover, the face-to-face element is not satisfied by mere technical physical presence, but contemplates an extremely close physical proximity. The cases suggest that this element is not present when the addressee has to give chase to inflict bodily injury upon the speaker. Thus, *Garvey v. State*[178] held that the face-to-face requirement was not met when the defendant, driving past a police station, shouted "sooey" at a police officer.[179] In *In re S.L.J.*[180] a fourteen year old girl was stopped by two police officers and instructed to hurry home because it was past curfew. She started away and then turned and, from a distance of fifteen to thirty feet from the officers, shouted, "Fuck you pigs."[181] The Supreme Court of Minnesota reversed the girl's conviction for disorderly conduct, reasoning: "With the words spoken in retreat from more than fifteen feet away rather than eye-to-eye, there was no reasonable likelihood that they would tend to incite an immediate breach of the peace . . . ."[182]

The final element of the fighting words doctrine enunciated by the United States Supreme Court requires that the offending language be "directed to the person of the hearer."[183] Some commentators have been confused by the Court's alternate phrasing of this element that the unseemly words must "have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed,"[184] and have erroneously concluded that, rather than stating a separate ele-

176. *Id.* at 1013.
177. *Id.* at 1014-15.
178. 537 S.W.2d 709 (Tenn. Crim. App. 1975).
179. *Id.* at 710.
180. 263 N.W.2d 412 (Minn. 1978).
181. *Id.* at 415.
182. *Id.* at 420.
183. Cohen v. California, 403 U.S. at 20 (quoting Cantwell v. Connecticut, 310 U.S. at 309).
184. Gooding v. Wilson, 405 U.S. at 523 (quoting Chaplinsky v. New Hampshire, 315 U.S. at 573).

ment, the Court was adopting a subjective test of the probability of a violent response.[185] As previously demonstrated, however, the Court consistently adheres to an objective test of reflexive violence.[186] In addition, the fighting words doctrine requires that the words must be descriptive of a particular individual and addressed to that individual. Following the mandate of the Supreme Court, several state courts recognized this separate element of the doctrine; at the same time, these courts adopted an objective standard to test the likelihood of a violent reaction.[187]

In *Hess v. Indiana*[188] the Supreme Court explicitly invoked this requirement of the fighting words doctrine as a justification for reversing a conviction for disorderly conduct. Hess, a participant in an antiwar demonstration on the campus of Indiana University, was convicted for his statement, "We'll take the fucking street later (or again)."[189] In a per curiam opinion, the Court rejected the argument that this language constituted unprotected fighting words:

> Even if under other circumstances this language could be regarded as a personal insult, the evidence is undisputed that Hess' statement was not directed to any person or group in particular. Although the sheriff testified that he was offended by the language, he also stated that he did not interpret the expression as being directed personally at him, and the evidence is clear that appellant had his back to the sheriff at the time. Thus, under our decisions, the State could not punish this speech as "fighting words."[190]

Similarly, in *Eaton v. City of Tulsa*[191] the Court reversed the criminal contempt conviction of the petitioner who during testimony referred to his alleged assailant as "chicken shit."[192] The Court, in its per curiam opinion, pointedly noted that the offending words were "not directed at the judge."[193]

The state courts have followed the Supreme Court in relying on the

185. *See* Rabinowitz, *supra* note 29, at 266; Shea, *supra* note 24.

186. *See* notes 147-61 *supra*.

187. *See, e.g.,* Clanton v. State, 357 So. 2d 455 (Fla. App. 1978); State v. Boss, 195 Neb. 467, 238 N.W.2d 639 (1976); City of Kent v. Kelley, 44 Ohio St. 2d 43, 337 N.E.2d 788 (1975); State v. Authelet, 385 A.2d 642 (R.I. 1978).

188. 414 U.S. 105 (1973).

189. *Id.* at 107.

190. *Id.* at 107-08.

191. 415 U.S. 697 (1974).

192. *Id.*

193. *Id.* at 698.

requirement that the offensive words must be descriptive of a particular person and addressed to that person as grounds for the reversal of fighting words convictions. Thus, the court of appeals of California found that defendant's use of the word "motherfuckers" did not constitute unprotected fighting words where there was no evidence "to show that the epithet or expletive mouthed by the petitioner was directed at anyone."[194] In *State v. Authelet*[195] a police officer was called to investigate a complaint of rowdyism by a group of youths who would run into nearby woods whenever police approached the scene. The arresting officer waited in the woods while other police approached from another direction and overheard the defendant shout to his companions, "Here come the god damn fucking pigs again."[196] Reversing the conviction, the court relied on the fact that the statement was not directed to the arresting officer.[197] Similarly, in *Downs v. State*[198] the disorderly conduct conviction of a defendant who stated to friends in a restaurant, "the fucking niggers in the County are not better than goddam policemen," was reversed because "[t]here was no direct evidence that it was spoken to anyone other than the persons sitting in the booth with Downs."[199]

As important as the final element has been in the application of the fighting words doctrine, it would seem that, as applied in the foregoing cases, it is really just another way of stating the separate requirements that the words must constitute a personally abusive epithet and must be addressed in a face-to-face manner to the object of the epithet. There is, however, another possible application of this final element which would serve a unique function. Returning to the Court's language that the unseemly words must be likely to cause a reflexive violent response "by the person to whom, *individually*, the remark is addressed,"[200] it is apparent that this requirement could be interpreted to clearly distinguish the fighting words doctrine from the hostile audience doctrine. Thus, when offensive words are addressed to an individual, the fighting words analysis would be applied, but when addressed to a group, the

194. Jefferson v. Superior Court, 51 Cal. App. 3d 721, 726, 124 Cal. Rptr. 507, 509 (1975).
195. 385 A.2d 642 (R.I. 1978).
196. *Id.* at 643.
197. *Id.* at 650.
198. 278 Md. 610, 366 A.2d 41 (1976).
199. *Id.* at 618, 366 A.2d at 46.
200. Gooding v. Wilson, 405 U.S. at 523 (quoting Chaplinsky v. New Hampshire, 315 U.S. at 573) (emphasis added).

hostile audience doctrine would be appropriate. Distinguishing between the circumstances when these doctrines should be applied is particularly important. Although both are designed to cope with the problem of audience violence directed against a speaker, the hostile audience doctrine is applicable whenever there is a real and substantial threat of audience violence against the speaker without regard to the nature of the language used by him.[201] On the other hand, the hostile audience doctrine requires the police to exert every reasonable effort to protect the speaker from the violent crowd and permits the arrest of the speaker as a last resort when police protection would no longer be effective.[202]

This interpretation of the final element of the fighting words doctrine is consistent with the Court's original fighting words decision. In *Chaplinsky* the words that formed the basis for the conviction were addressed to a single individual, the City Marshal. When the Court later cited *Chaplinsky* as support for the affirmance of a group libel conviction in *Beauharnais v. Illinois*,[203] Justice Black, a member of the *Chaplinsky* Court, vigorously dissented:

> The Court's reliance on *Chaplinsky v. New Hampshire* . . . is also misplaced. New Hampshire had a state law making it an offense to direct insulting words at an *individual* on a public street. Chaplinsky had violated that law by calling a man vile names "face-to-face." We pointed out in that context that the use of such "fighting" words was not an essential part of exposition of ideas. 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*.[204]

As the federal district court recognized in *Collin v. Smith*,[205] the rationale for Justice Black's sharp limitation of the fighting words doctrine remains valid today. Many public policies have a differential impact on identifiable groups of people, and individuals speaking on the merits or demerits of such policies often become intemperate in their language. Clearly, the failure to limit the fighting words doctrine

201. *See* Feiner v. New York, 340 U.S. 315 (1951).

202. *See, e.g.*, Edwards v. South Carolina, 372 U.S. 229, 232-33 (1963); Feiner v. New York, 340 U.S. at 326-27 (Black, J., dissenting); Wolin v. Port Authority of New York, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968).

203. 343 U.S. 250 (1952).

204. *Id.* at 272 (Black, J. dissenting) (emphasis in original).

205. 447 F. Supp. 676, 690-91 (N.D. Ill.), *aff'd*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

could have a serious chilling effect on such political expression.[206] Furthermore, from the perspective of the government's interest in preventing breaches of the peace, there is much merit in Justice Jackson's observation that "whether one may be the cause of mob violence by his own personification or advocacy of ideas which a crowd already fears and hates, is not to be solved merely by going through a transcript of the speech to pick out 'fighting words.' "[207]

Cohen v. California can certainly be read to support this distinction between the fighting words and hostile audience doctrines. The message on the back of Cohen's jacket was addressed indiscriminately to all passersby who happened to see it. The Supreme Court explicitly noted that it was not addressed to any particular individual,[208] thus rejecting the holding of the California court that the fighting words doctrine was applicable to a statement made to a large group. This interpretation of *Cohen* was apparently accepted by the Court in *Rosenfeld v. New Jersey*.[209] Rosenfeld was convicted for a speech he made at a local school board meeting in which he used the word "motherfucking" on four occasions to describe teachers, the local school board, the town, and the nation.[210] The Court summarily vacated the conviction and remanded the conviction for reconsideration in light of *Cohen* and *Gooding*.[211] Even the dissenters recognized that the traditional elements of the fighting words doctrine were not present since "the offensive words were not directed at a specific individual."[212]

Thus the Supreme Court, through the process of case-by-case adjudication, has developed an astonishingly consistent body of precedent that clearly enunciates the essential elements of the fighting words doctrine. The offending language (1) must constitute a personally abusive epithet, (2) must be addressed in a face-to-face manner, (3) must be directed to a specific individual and be descriptive of that individual, and (4) must be uttered under such circumstances that the words would have a direct tendency to cause an immediate violent response by the average recipient. If any of these four elements is absent, the doctrine

206. *See* Beauharnais v. Illinois, 343 U.S. at 273-75 (Black, J., dissenting); *id.* at 286-87 (Douglas, J., dissenting).

207. Terminiello v. City of Chicago, 337 U.S. 1, 35 (1949) (Jackson, J., dissenting).

208. Cohen v. California, 403 U.S. at 20.

209. 408 U.S. 901 (1972).

210. *Id.* at 904 (Powell, J., dissenting).

211. *Id.* at 901-02.

212. *Id.* at 905 (Powell, J., dissenting).

may not justifiably be invoked as a rationale for the suppression of the expression.

III. Fighting Words as Free Speech: Toward Judicial Protection for Unseemly Insults

Contrary to the argument of several commentators,[213] it is neither fortuitous nor a sign of doctrinal confusion that the Supreme Court has upheld only one conviction for the use of fighting words in its history. The doctrine is explicitly designed to be applicable only in those extremely rare circumstances when offensive personal insults present a substantial probability of causing a breach of the public peace by the addressee. Indeed, it is indicative of the infrequency with which situations involving a proper application of the fighting words doctrine arise that *Chaplinsky*, the only case affirming such a conviction, itself represents at best a dubious invocation of the legal principle it announced.

In light of the Supreme Court's clear exposition of the required elements of the doctrine, generally conscientious application of it, and consistent reversal of improper fighting words convictions, it would appear on first impression that the fighting words problem is a relatively minor one in the universe of first amendment concerns. Unfortunately, the view that the problem has been favorably resolved is the product of a myopic preoccupation with cases decided by the Supreme Court. The status of the fighting words doctrine in the state courts is dramatically different. At this level of the judicial system one finds an extraordinary number of cases invoking the doctrine and, in the words of Justice Douglas, "State Courts . . . have consistently shown either inability or unwillingess to apply its teaching."[214]

The sheer number of fighting words cases litigated at the state appellate court level would not be as alarming if, as one commentator has suggested, the doctrine was being invoked to protect the aged and infirm from "the vilest personal verbal abuse."[215] This, however, is a romantic vision that exists only in the imagination of a law professor. Common sense suggests that a complaint by a private individual that he has been the victim of a personally abusive insult by another private individual is extremely unlikely to elicit any meaningful police re-

213. *See* note 29 *supra*.
214. Karlan v. City of Cincinnati, 416 U.S. 924, 928 (1974) (Douglas, J., dissenting).
215. Shea, *supra* note 24, at 22.

sponse. Indeed, one searches case law in vain to find decisions where such complaints resulted in criminal prosecution. Instead, the doctrine is invoked almost uniformly in circumstances in which its application is wholly inappropriate, such as when the speaker is discussing issues of political or societal importance or addressing a police officer trained in self-restraint.[216] Moreover, the vision of the speaker as an unmitigated bully engaging in a totally unjustifiable verbal assault upon a hapless victim is equally erroneous. Most cases involve speakers who understandably lose their self-control momentarily when addressing issues of public importance or when subjected to unusual emotional stress. Juvenile behavior by youths also plays a prominent role in the reported decisions.[217]

Justice Brandeis suggested that expression cannot be suppressed by governmental censorship, "unless the evil apprehended is relatively serious."[218] To observe that state courts misapply the fighting words doctrine, it is unnecessary to argue, in the abstract, against the existence of an important governmental interest in preventing breaches of the peace. State courts typically apply the fighting words doctrine in situations in which the danger of a violent reaction to the speaker's language is remote and the grievance being asserted against the speech is decidedly trivial. *Fenton v. Stear*,[219] one of the few reported cases in which the addressee was not a police officer, is illustrative. In *Fenton*, a high school student was sitting in a parked automobile in a shopping center one evening. One of his teachers passed by in another automobile. When a companion noted the teacher's presence, the student replied, "He's a prick." The teacher, who overheard the remark, confirmed the student's character assessment by instituting disciplinary proceedings that resulted in the student's suspension from school.[220] The suspension was judicially upheld on the grounds that the remark constituted unprotected fighting words, despite the court's strong implication that the reasonable person would have ignored it.[221] Incredibly, the court relied on the fact that the offending words would be deemed de minimis by a state civil or criminal court as a rationale for upholding

216. *See* note 108 *supra* and accompanying text.

217. *See, e.g.*, Fenton v. Stear, 423 F. Supp. 767 (W.D. Pa. 1976); *In re* S.L.J., 263 N.W.2d 412 (Minn. 1978); State v. Authelet, 385 A.2d 642 (R.I. 1978).

218. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis and Holmes, J.J., concurring).

219. 423 F. Supp. 767 (W.D. Pa. 1976).

220. *Id.* at 769.

221. *Id.* at 771.

the punishment imposed on the student.[222]

Turning to the vast bulk of fighting words cases, which involve language directed at police officers, the problem of consistent misapplication of the doctrine to inappropriate and trivial cases is compounded by the intractable danger of discretionary and selective enforcement by law enforcement officials:

> In arrests for the more common street crimes (e.g., robbery, assault, disorderly conduct, resisting arrest), it is usually unnecessary that the person also be charged with the less serious offense of addressing obscene words to the officer. The present type of ordinance tends to be invoked only where there is no other valid basis for arresting an objectionable or suspicious person. The opportunity for abuse, especially where a statute has received a virtually open-ended interpretation, is self-evident.[223]

Many commentators have recognized that this problem of discriminatory enforcement is particularly acute in the fighting words context.[224] The danger is not simply that the penal law will be selectively invoked against members of racial or other minority groups and speakers who espouse ideological views unpopular with enforcement officials, although this danger is very real.[225] The more prevalent danger is that police will use this unfettered discretionary authority to punish trivial expressions of disrespect and sincere allegations of official misconduct. The normal expectation would be that few such cases would be reported if for no other reason than the propensity of police to use the arrest power as a sanction and not pursue the criminal prosecution:

> Arrest for disorderly conduct usually is not synonymous with "invoking the criminal process" but is synonymous with imposing punishment—that of being detained, having to go to the station, having to put up bail or to stay in jail, and having to appear in court or forfeit the bail money. Most arrests for disorderly conduct involve an abuse of power by the arresting officer, as most of the officers we have interviewed readily acknowledge.

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222. *Id.*

223. Lewis v. City of New Orleans, 415 U.S. at 136 (Powell, J., concurring).

224. *See, e.g.,* MODEL PENAL CODE § 250.1, Comment 4 (Tent. Draft No. 13, 1961); K. DAVIS, POLICE DISCRETION 14-16, 145-46 (1975); Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like,* 3 CRIM. L. BULL. 205 (1967); Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice,* 69 YALE L.J. 543 (1960).

225. *See, e.g.,* Haiman, *Speech v. Privacy: Is There a Right Not to Be Spoken To?,* 67 NW. U.L. REV. 153, 191-92 (1972); Rutzick, *supra* note 120, at 28; Note, *"Offensive Language" and the First Amendment,* 53 B.U.L. REV. 834, 857 & nn. 184-85 (1973).

> Some of them even take the initiative to boast about how effectively they use the disorderly conduct statute.
>
> The Supreme Court of the United States in a line of unanimous decisions has held that words alone may not constitutionally be an offense unless they are fighting words, but the effective law in Chicago often is that verbal defiance of an officer, without fighting words, is usually punished by an arrest. The police make the effective law on such a subject; the Supreme Court's version of the law is merely some words in a book.[226]

Suprisingly, the reported cases reflect these abuses. Many involve grievances which are trivial at best. For example, in *People v. Smith*[227] a police officer in an unmarked car looked back after narrowly avoiding a collision and saw the driver of the other auto extend his finger upward in a universally understood gesture and move his lips in what the officer believed to be an obscene utterance.[228] The state court of appeals reversed the defendant's conviction, noting that his conduct, although perhaps immature, "was a spontaneous reaction to a sudden emergency which commonly occurs every day."[229] The appalling fact is that the defendant was forced to bear the burden of protracted litigation before a court recognized that "[i]n such minor stress circumstances, many drivers utter profane words—a *normal reaction* in everyday traffic congestion."[230]

Unfortunately, the original conviction in *Smith* is not an aberration. Another case involved a defendant who asked a police officer who had stopped him for a routine traffic check, "What the fuck are you bothering me for?"[231] Similarly, in *Clanton v. State*, the allegedly unprotected fighting words constituted a complaint that a police officer attempting to search an auto during a routine stop lacked a "Goddam search warrant."[232] Such arrests for unseemly language are not always the result

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226. K. DAVIS, *supra* note 224, at 15.

227. 79 Mich. App. 757, 262 N.W.2d 900 (1977).

228. *Id.* at 759, 262 N.W.2d at 901.

229. *Id.* at 762, 262 N.W.2d at 903.

230. *Id.* (emphasis added).

231. State v. Profaci, 56 N.J. 346, 348, 266 A.2d 579, 581 (1970). *See also* Lewis v. City of New Orleans, 415 U.S. at 131 n.1 (Mother said to police officer arresting her young son: "you god damn m.f. police—I am going to [the Superintendent of Police] about this"); State v. Reed, 56 N.J. 354, 356, 266 A.2d 584, 585 (1970) (Defendant stated to police officer who intervened in nonviolent commercial dispute: "[W]ho the hell do you think you are? . . . Jesus Christ. I don't give a God damn who the hell you are.").

232. 357 So. 2d 455, 456 (Fla. App. 1978). *See also* Reese v. State, 17 Md. App. 73, 77, 299 A.2d 848, 852 (1973) (Auxiliary police officer overheard defendant say to companion that he "did

of spontaneous police decisions. In *Waller v. City of St. Petersburg*[233] the officers were on routine patrol when they heard the defendant shout "Pig" at them. They arranged a meeting with their lieutenant several blocks away where they decided to return to the scene and arrest the defendant if he repeated the insult because "[w]e were losing quite a bit of face there on 22nd Street."[234] Ultimately, the defendant's conviction was affirmed on the ground that when the police attempted to effectuate the arrest, allegedly by the use of excessive force, a riot almost broke out among bystanders.[235]

Waller is indicative of a large number of cases in which the facts are hotly disputed: the defendant is either guilty of the use of fighting words or the unfortunate victim of unprovoked police misconduct.[236] For example, in *Williams v. District of Columbia*[237] the defendant and four friends were standing in front of a laundromat managed by the defendant when a police officer ordered them to move because they were allegedly blocking the flow of pedestrian traffic on the thirteen to fourteen foot wide sidewalk.[238] At the trial, which resulted in a conviction ultimately reversed on appeal, a hopeless conflict arose between the testimony of the officer, who claimed that the defendant had said, "I dare you to lock my Goddamn ass up," and all other witnesses who denied that the defendant had used any profane words and alleged that he had been subjected to unprovoked police brutality.[239]

In *Norwell v. City of Cincinnati*[240] a sixty-nine year old immigrant who, without the use of any offensive language, protested a dubious detention by a police officer, was convicted of disorderly conduct. Contrary to the argument of Justice Blackmun, the fact that this case had to

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not want to play the fucking pinballs" because he had already lost too much money); City of Saint Paul v. Morris, 258 Minn. 467, 468, 104 N.W.2d 902, 903 (1960) (Defendant, protesting an arrest, said to police officer: "You white mother f-kers, what are your picking on us for, why don't you pick on the white people?").

233. 245 So. 2d 685 (Fla. App. 1971), *rev'd*, City of St. Petersburg v. Waller, 261 So. 2d 151 (Fla. 1972).

234. 245 So. 2d at 685-86.

235. City of St. Petersburg v. Waller, 261 So. 2d at 153, 155.

236. *See, e.g.*, Lewis v. City of New Orleans, 415 U.S. 130 (1974); People v. Douglas, 29 Ill. App. 3d 738, 331 N.E.2d 359 (1975); State v. Boss, 195 Neb. 467, 238 N.W.2d 639 (1976). *See also* MODEL PENAL CODE § 250.1, Comment 4 (Tent. Draft No. 13, 1961).

237. 419 F.2d 638 (D.C. Cir. 1969).

238. *Id.* at 642.

239. *Id.* at 642-43.

240. 414 U.S. 14 (1973).

be litigated all the way to the United States Supreme Court before the unjust conviction was reversed hardly inspires confidence that "[c]ourts are capable of stemming abusive application of statutes."[241]

Whether or not the triviality of the fighting words problem or the pervasive discriminatory misapplication of the governing statutes are alone sufficient reasons for the abandonment of the fighting words doctrine, they are certainly considerations that justify subjecting the doctrine to careful scrutiny in order to determine whether it is sound as a matter of constitutional principle.

Momentarily removing the epithetical label "fighting words," it should be readily apparent that such expression has substantial societal value which, absent a countervailing governmental interest of the greatest magnitude, should entitle it to constitutional protection. Such expression, of course, is simply offensive language which conveys one's dislike or disrespect for the person addressed. Simply stated, the issue presented is why, if offensive language and expressions of dislike or disrespect for another are each entitled to the protection of the first amendment, should the combination of the two be deemed unprotected.

Expressions of dislike or disrespect for another are precisely the type of ideological communications that are within the very core of the protection accorded by the first amendment. "[T]he First Amendment's basic guarantee is of freedom to advocate ideas."[242] That this advocacy of ideas includes the notion that another's behavior is disgraceful or distasteful to the speaker should not lessen its protected status.[243] Indeed, if the addressee is a public official, such as a police officer, the critical speech falls within the category of seditious libel and is entitled to the greatest constitutional protection.[244] Although criticism annoys the recipient, such annoyance cannot justify censorship. Rather, it is a reason for affording first amendment protection.[245]

The Supreme Court has also established that offensive language is

241. Lewis v. City of New Orleans, 415 U.S. at 142 n.2 (Blackmun, J., dissenting) (citing *Norwell* as a favorable example of courts conscientiously preventing misuse of the fighting words doctrine).

242. Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 688 (1959).

243. *See, e.g.*, Lewis v. City of New Orleans, 415 U.S. 130 (1974); Gooding v. Wilson, 405 U.S. 518 (1972).

244. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Kalven, *supra* note 65.

245. *See, e.g.*, FCC v. Pacifica Foundation, 438 U.S. 726, 745 (1978); Edwards v. South Carolina, 372 U.S. 229, 237 (1963); Terminiello v. City of Chicago, 337 U.S. 1, 4-5 (1949).

entitled to constitutional protection.[246] Simply stated, it is a fundamental constitutional principle that "communication need not meet standards of acceptability."[247] The rationale for this principle is not merely the common sense view that rather trivial considerations of etiquette should not be used as an excuse for the censorship of serious ideological speech. The Court broadened the rationale by recognizing that "words are often chosen as much for their emotive as their cognitive force."[248] The particular words chosen by the speaker are important in conveying the depth of the speaker's concern about the topic under discussion. "For example, it can hardly be maintained that phrases like, 'Repeal the Draft,' 'Resist the Draft,' or 'The Draft Must Go' convey essentially the same message as 'Fuck the Draft.' Clearly something is lost in the translation."[249]

Equally important, "[e]motions sway speakers and audiences alike. Intemperate speech is a distinctive characteristic of man."[250] If we, as a nation, wish to maintain our proud heritage of recognizing that expression should be "uninhibited, robust, and wide-open" we must accept the human reality that it will often "include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials."[251] The first amendment recognizes the human frailty of people and accepts the fact that speakers, momentarily caught in the passion of the ideological message they espouse, occasionally lose their self-control and breach the societal norms of propriety in language. "But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."[252]

There are also sound pragmatic reasons why the first amendment

246. *See, e.g.,* Lewis v. City of New Orleans, 415 U.S. 130 (1974); Papish v. Board of Curators, 410 U.S. 667 (1973); Cohen v. California, 403 U.S. 15 (1971). *But cf.* FCC v. Pacifica Foundation, 438 U.S. 726 (1978) (offensive language may be proscribed on the electronic media due to the presence of children and captive audiences).

247. Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971).

248. Cohen v. California, 403 U.S. at 26.

249. Haiman, *supra* note 225, at 189.

250. Beauharnais v. Illinois, 343 U.S. 250, 286-87 (1952) (Douglas, J., dissenting).

251. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

252. Cantwell v. Connecticut, 310 U.S. 296, 310 (1940). *See also* Baumgartner v. United States, 322 U.S. 665, 673-74 (1944) ("[O]ne of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation.").

affords constitutional protection to offensive language. Such language, even though unacceptable to majority attitudes, is quite common in many subcultures in our society.[253] The danger is thus very real that judgments based on the propriety of the words chosen by the speaker will reflect a myopic ethnocentricity, and ultimately merely the subjective indignation of a particular judge or jury.[254] This concern, however, is but one aspect of the inherent vagueness of the entire concept of offensive words that makes their punishment constitutionally inappropriate:

> Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below. For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.[255]

Interestingly, in the context of language spoken face-to-face to the addressee, it is artificial to distinguish between words that express disrespect or dislike and words that are offensive. Such distasteful language is itself a recognized and conventional manner of expressing such attitudes toward another:

> The natural inclination is to feel that if an execratory expletive is offensive enough it must be illegal regardless of "technicalities." The difficulty is that it is quite impossible to determine how offensive any particular expression is. To begin with, curses, oaths, expletives, execrations, imprecations, maledictions, and the whole vocabulary of insults are not intended or susceptible of literal interpretation. They are expressions of annoyance and hostility—nothing more. To attach greater significance to

253. *See, e.g.*, FCC v. Pacifica Foundation, 438 U.S. 726, 776 (1978) (Brennan, J., dissenting); Haiman, *supra* note 225, at 191-92; Rutzick, *supra* note 120, at 28; Note, *supra* note 225, at 854.

254. *See, e.g.*, FCC v. Pacifica Foundation, 438 U.S. at 775 (1978) (Brennan, J., dissenting); Von Sleichter v. United States, 472 F.2d 1244, 1250 (D.C. Cir. 1972) (Wright, J., dissenting):

> [I]t is not the function of judges to decide on the basis of their own sensibilities which words retain "shock quality" and which "are today's common idiom." No case that I know of authorizes use of the judicial process to figuratively wash out the mouths of criminal defendants who use language which some judge, on his own, considers "dirty" or "offensive."

255. Cohen v. California, 403 U.S. at 25. *See also* Smith v. United States, 431 U.S. 291, 316 (1977) (Stevens, J., dissenting) ("[T]he line between communications which 'offend' and those which do not is too blurred to identify criminal conduct. It is also too blurred to delimit the protections of the First Amendment.").

> them is stupid, ignorant, or naive. Their significance is emotional, and it is not merely immeasurable but also variable. The emotional quality of exclamations varies from time to time, from region to region, and as between social, cultural, and ethnic groups. The standards of verbal behavior of those social groups within which judges move are not fairly applicable to the entire population.[256]

The Supreme Court traditionally has invoked the governmental interest in preserving the public peace as a rationale for censoring offensive language addressed in a face-to-face manner to the object of the speaker's dislike or disrepect. The Court apparently assumes that an offensive word, a personally abusive epithet, will cause the ordinary, reasonable recipient to reflexively and irresistibly react with immediate violence.[257] This assumption needs to be critically examined before it is accepted as a justification for the censorship of speech otherwise entitled to constitutional protection. Two essential premises of the fighting words doctrine must be kept in mind in evaluating whether the supposed likelihood of responsive violence is a real concern. First, the Court has emphasized that, although the hearer may be angered by the expression, the recipient's anger is no justification for the expression's censorship and may, indeed, be a reason to accord it constitutional protection.[258] Thus, the fighting words doctrine is premised on the theory that such an unseemly insult will arouse uncontrollable violence, not merely anger, in the hearer. Second, the Supreme Court has clearly stated that the standard for determining the likelihood of such an irresistible violent reaction is the ordinary reasonable person.[259] Under this objective test, it is irrelevant that "[t]here may be some persons about with . . . lawless and violent proclivities."[260] Thus, to justify use of the fighting words doctrine as a means of protecting the government's interest in preservation of the public peace, a personally abusive

256. City of St. Paul v. Morris, 258 Minn. 467, 480-81, 104 N.W.2d 902, 910-11 (1960) (Loevinger, J., dissenting) (footnote omitted). *See also* Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 50 (1974).

257. Doctrinally, the fighting words principle requires that the speaker's language constitute both a personally abusive epithet and be likely to cause an immediate violent response. *See* text accompanying notes 30-36 *supra*. Nevertheless, the continued existence of the fighting words doctrine presumes that there exist personally abusive epithets which will cause reactive violence. *See* Rutzick, *supra* note 120, at 8.

258. *See, e.g.*, Gooding v. Wilson, 405 U.S. 518 (1972); Coates v. City of Cincinnati, 402 U.S. 611 (1971); Terminiello v. City of Chicago, 337 U.S. 1 (1949).

259. *See* notes 147-61 *supra* and accompanying text.

260. Cohen v. California, 403 U.S. at 23.

insult must not merely annoy or anger the ordinary, reasonable person in today's society. The insult must cause such a person to uncontrollably respond with immediate violence.

There may have been a time in this country when a gentleman was duty bound to respond to an offensive word with a challenge to duel[261] and when the adage "you must not call a man a bastard unless you are prepared to prove it on his front teeth"[262] contained a kernel of truth. One suspects, however, that our society has changed, if not necessarily progressed. Adages such as the one written by Rudyard Kipling at the turn of the century today ring of the quaint morality of a bygone era. The relevant question is whether unseemly insults are likely to cause the ordinary reasonable law abiding person in today's society to react with an uncontrollable violent impulse. All of the available evidence suggests that the answer is no.

The very nature of the fighting words problem suggests that it invariably arises in situations in which "the danger . . . has matured by the time of trial or it was never present."[263] Nevertheless, in none of the fighting words cases litigated in the United States Supreme Court has the personally abusive epithet uttered by the defendant been followed by violence from the person addressed. A similar absence of responsive violence in the lower court cases necessitates a conclusion that the Court's assumption that personally abusive epithets will cause an irresistible violent impulse in the addressee is contrary to common experience. That offensive insults may cause anger or annoyance, but not immediate violence, is confirmed by modern psychology.[264]

Upon reflection, it should not be surprising that offensive language, even if directed face-to-face to a particular individual, creates no substantial likelihood of responsive violence. If the Court finds it impossible, especially given the racial, ethnic, and cultural pluralism of our nation, to identify which words are offensive,[265] how can it reasonably be assumed that the judiciary can make the more difficult determination of which offensive words are likely to trigger a violent response?

261. *See* Wade, *Tort Liability for Abusive and Insulting Language*, 4 VAND. L. REV. 63, 82-83 (1950).

262. R. KIPLING, *The Drums of the Fore and Aft*, in KIPLING'S STORIES 8 (1931).

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

264. *See* Letter from Professor Percy Tannenbaum to Professor John Kaplan, *reprinted in* W. COHEN & J. KAPLAN, BILL OF RIGHTS 141-44 (1976); *see also* D. ZILLMANN, HOSTILITY AND AGGRESSION 276-78 (1979).

265. *See* text accompanying notes 253-57 *supra*.

Unlike the hostile audience problem, fighting words by definition occur only when the unseemly language is addressed face-to-face to a particular individual. The recipient is less likely to respond violently in a face-to-face confrontation, however, because of the absence of a sympathetic crowd to hide his identity and bolster his courage. Moreover, "[l]anguage likely to offend the sensibility of some listeners is now fairly commonplace in many social gatherings as well as in public performances."[266] For better or worse, in our society even the ultimate insult, "[m]-f-, is an everyday expression that punctuates everyday street language. The term has been 'debased by overuse to non-meaning.' "[267] The entire matter was perceptively summarized by the Eighth Circuit Court of Appeals:

> Some persons might be offended by being called a "bum" or an "S.O.B." yet others might consider the source of the insult and laugh it off. It is highly doubtful that the government has much of a legitimate interest in punishment of "name calling" between private parties. . . . It is improbable that most scurrilous or offensive speech, even though directed at a specific person, will result in anything more than public inconvenience, annoyance or unrest.[268]

That the Supreme Court's assumption that an offensive word directed face-to-face to another will be likely to cause an immediate and uncontrollable violent response is totally unfounded can be seen clearly by comparing the law's response to criminal libel legislation. Under the doctrine of criminal libel a person becomes subject to penal sanctions if he addresses a defamatory statement to another in the presence of third persons.[269] Whatever the likelihood that a person might respond to an offensive word with immediate violence, certainly it is no greater, and probably less, than the likelihood that a person might respond violently to an unfounded allegation that she is a cheat, thief, murderer, prostitute, or liar. Nevertheless, the Supreme Court has insightfully held that the governmental interest in preventing breaches of the peace cannot justify the criminalization of libelous utterances:

> Changing mores and the virtual disappearance of criminal libel prosecutions lend support to the observation that ". . . under modern conditions, when the rule of law is generally accepted as a substitute for private phys-

266. Eaton v. City of Tulsa, 415 U.S. 697, 700 (1974).

267. Stewart v. United States, 428 F. Supp. 321, 323 (D.D.C. 1976) (quoting Von Sleichter v. United States, 472 F.2d 1244, 1248 (D.C. Cir. 1972)).

268. Tollett v. United States, 485 F.2d 1087, 1093 (8th Cir. 1973).

269. See the statutes collected in Garrison v. Louisiana, 379 U.S. 64, 70 n.7 (1964).

ical measures, it can hardly be urged that the maintenance of peace requires a criminal prosecution for private defamation."[270]

Similar considerations convinced the ALI Reporters who drafted the Model Penal Code that the proscription of criminal libel was no longer appropriate:

> It goes without saying that penal sanctions cannot be justified merely by the fact that defamation is evil or damaging to a person in ways that entitled him to maintain a civil suit. Usually we reserve the criminal law for harmful behavior which exceptionally disturbs the community's sense of security. . . . It seems evident that personal calumny falls in neither of these classes in the U.S.A., that it is therefore inappropriate for penal control, and that this probably accounts for the paucity of prosecutions and the near desuetude of private criminal libel legislation in this country . . . .[271]

The considerations that have led the Supreme Court to hold that the governmental interest in preventing breaches of the peace cannot justify the continued constitutionality of criminal libel legislation are equally applicable to the fighting words doctrine. In neither circumstance is there any real likelihood that the ordinary, reasonable law-abiding person in today's society will be aroused beyond anger to an uncontrollable and immediate violent reaction.

Even if we assume, contrary to reality, that fighting words elicit an irresistible impulse to an immediate violent reaction in the addressee, the doctrine fares no better. The relevant question then becomes whether the doctrine has any perceptible effect on preventing or deterring either the use of personally abusive epithets or the violent reactions of addressees. It is ludicrous to assume that the type of person who responds violently to a verbal insult would be deterred from doing so because of the availability of a criminal sanction against the speaker, especially when it is doubtful that the government would consider the matter serious enough to warrant prosection.[272] No doubt a recipient

270. Garrison v. Louisiana, 379 U.S. at 69 (quoting Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 924 (1963)).

271. MODEL PENAL CODE § 250.7, Comment 2 (Tent. Draft No. 13, 1961), *quoted in* Garrison v. Louisiana, 379 U.S. at 69-70.

272. *See* Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1054 (1936). *Cf.* Bohlen, *Consent as Affecting Civil Liability for Breaches of the Peace*, 24 COLUM. L. REV. 819, 831 (1924) ("Is it not against common experience to suppose that the person intent upon satisfying his grievances by the primitive method of taking it out of the hide of his enemy would stop to consider the effect of his conduct upon his right to recover or his liability to pay damages?").

response of "wait here while I call a police officer" is even more improbable than a violent reaction. In reality, most reasonable people have become accustomed to personally abusive epithets as a rare and unpleasant, but inescapable, aspect of modern living in our society. Furthermore, the entire premise of the fighting words doctrine is that such epithets cause a visceral, violent reaction, by definition not subject to intellectual control. Similarly, the increasing prevalence of unseemly language in our society and the fact that such words are generally used by people only when emotionally upsetting circumstances cause them to momentarily lose their self-control[273] suggest that the fighting words doctrine has been understandably unsuccessful in deterring the use of unseemly insults. There is no reason to believe that the doctrine will be any more successful in this regard in the future. Thus, even if personally abusive epithets cause reactive violence, it is dubious that the fighting words doctrine would successfully reduce the probability or incidence of violence.

The final flaw in the protection of the public peace rationale for the fighting words doctrine is that it totally ignores the equities of the situation and unjustly imposes criminal punishment on the individual engaged in expression that, absent the lawless propensity of the hearer, would be unequivocally entitled to first amendment protection. It unjustifiably "makes a man a criminal simply because his neighbors have no self-control and cannot refrain from violence."[274] No one has ever suggested that a person who commits an assault on another can defeat civil or criminal liability by claiming he was first addressed with a personally abusive epithet.[275] Except for the anomalous fighting words doctrine, the law is clear that the person who insults another and is assaulted in response is "the victim, not the author of a breach of the peace."[276]

Perhaps in recognition of the frailty of the protection of the public peace rationale,[277] a minority on the Supreme Court has sought to rein-

273. *See* text accompanying note 217 *supra.*

274. Ashton v. Kentucky, 384 U.S. 195, 200 (1966) (quoting Z. CHAFFEE, *supra* note 19, at 151).

275. *See* 6 AM. JUR. 2d *Assault and Battery* §§ 61, 151 (1963); 6A C.J.S. *Assault and Battery* §§ 18, 86 (1975).

276. A. DICEY, LAW OF THE CONSTITUTION 274 (9th ed., 1939).

277. *See* Lewis v. City of New Orleans, 415 U.S. 130, 135 (1974) (Powell, J., concurring) (little likelihood that recipient would respond with immediate violence); Rosenfeld v. New Jersey, 408 U.S. 901, 903 (1972) (Burger, C.J., dissenting) (same); *id.* at 905 (Powell, J., dissenting) (same).

vigorate the long discredited dicta in *Chaplinsky v. New Hampshire*[278] that offensive words can be censored either because (1) such words inflict emotional distress upon the recipient, or because (2) such language is not "speech" within the protection of the first amendment since, arguably, it is not necessary to convey any ideas.[279]

It should be explicitly recognized that neither rationale can be persuasively limited to justify only the proscription of fighting words as they have been historically defined by the Supreme Court. Instead, these rationales attack the broader premise that offensive words are entitled to first amendment protection. Moreover, it should be expressly understood that the *Chaplinsky* dicta has never been relied upon by the Supreme Court as a justification for the fighting words doctrine.[280] If accepted, the position of the dissenting Justices would turn the constitutional clock back at least forty years. Nevertheless, these arguments should be briefly addressed because of the vigor with which they have been asserted and because a plurality of the Court recently relied upon them in a factually dissimilar case, *FCC v. Pacifica Foundation*.[281] That case held that the unique and subordinate constitutional status of the electronic media and the presence of captive listeners and children in the audience combined to justify the censorship of certain offensive words on the radio.[282] Whatever the merits of the Court's holding in *Pacifica*,[283] neither of the rationales suggested by the dicta in *Chaplinsky* adequately justify the censorship of offensive words absent the additional elements present in *Pacifica*.

The Supreme Court has repeatedly rejected the notion that offensive language causes such severe emotional distress to the hearer that it

But see Lewis v. City of New Orleans, 415 U.S. at 141 (Blackmun, J., dissenting) (likely that police officer would react to verbal abuse with violence).

278. 315 U.S. 568, 571-72 (1942).

279. *See, e.g.*, Lewis v. City of New Orleans, 415 U.S. at 14-42 (Blackmun, J., dissenting); *id.* at 911-12 (Rehnquist, J., dissenting); Cohen v. California, 403 U.S. 15, 27 (1971) (Blackmun, J., dissenting).

280. *See* text accompanying notes 19-22 *supra*.

281. 438 U.S. 726 (1978) (plurality opinion). *See also* Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (plurality opinion) (upholding use of zoning power to regulate location of adult movie houses).

282. FCC v. Pacifica Foundation, 438 U.S. at 748-51.

283. *Pacifica* has been severely criticized by academic commentators. *See, e.g.*, Gard & Endress, *The Impact of Pacifica Foundation on Two Traditions of Freedom of Expression*, 27 CLEV. ST. L. REV. 465 (1979); Waters, *Pacifica and the Broadcast of Indecency*, 16 HOUS. L. REV. 551 (1979).

should be deprived of first amendment protection.[284] Even assuming that unseemly expressions cause serious mental disturbance in the hearer, the Court's traditional constitutional conclusion is entirely appropriate. The dangers of recognizing such an amorphous and limitless grievance as a justification for governmental censorship would seriously undermine the paramount societal values embodied in the first amendment. "[T]he interest in protecting 'sensibilities' has no physical component. The only manner in which an individual's 'sensibilities' are known to be affected is by the individual's statement to that effect. There is no objective measure of the extent of harm to 'sensibilities' from the utterance of any specific words."[285] This innate vagueness of the interest in preventing emotional injury to listeners suggests that any attempt at judicial enforcement will inevitably result in the imposition of judges' subjective linguistic preferences on society, discrimination against ethnic and racial minorities, and ultimately the misuse of the rationale to justify the censorship of the ideological content of the speaker's message.[286] Offensive words are an inevitable byproduct of strenuous discussions by citizens who are deeply moved by the subject matter of their expression and who are unable to express the extent of their emotional commitment without the use of language that others might deem unseemly, but that the speaker believes essential to convey his actual meaning.[287]

Despite these persuasive reasons for refusing to grant judicial recognition to the asserted interest in preventing injuries to individual sensibilities, many commentators persist in arguing that offensive words constitute verbal assaults that ought to be censored by the government.[288] The issue which has never been seriously addressed, however, is whether such words, which are unhappily "fairly commonplace in many social gatherings as well as in public performances,"[289] cause any more severe reaction than mere discomfort and momentary unpleasantness. Stated in this fashion the issue is whether "[a]doption of the suggested principle would open up a wide vista of litigation in the field

284. *See, e.g.,* Spence v. Washington, 418 U.S. 405 (1974); Cohen v. California, 403 U.S. 15 (1971); Street v. New York, 394 U.S. 576 (1969); Terminiello v. City of Chicago, 337 U.S. 1 (1949).

285. Rutzick, *supra* note 120, at 7.

286. *See* text accompanying notes 253-56 *supra.*

287. *See* notes 246-52 *supra* and accompanying text.

288. *See, e.g.,* A. BICKEL, *supra* note 29, at 72-73; Rabinowitz, *supra* note 29, at 277-79; Shea, *supra* note 24, at 22.

289. Eaton v. City of Tulsa, 415 U.S. 697, 700 (1974) (Powell, J., concurring).

of bad manners, where relatively minor annoyances had better be dealt with by instruments of social control other than the law."[290]

Tort law, the branch of our jurisprudence primarily responsible for the redress of personal injuries, provides the basis for the proper judicial response to the issue of whether offensive words cause such severe emotional distress to the hearer that they should be officially prohibited. From its very beginnings in this Nation to the present day, the law of torts has consistently held that although personally abusive epithets may cause momentary hurt feelings, such a minor injury is simply too trivial for the law to recognize.[291] Dean Prosser aptly summarized the rationale for refusing to allow offensive words to form the basis of a legal complaint:

> [W]here there is petty insult, indignity, annoyance or threat, the case conspicuously lacks the necessary assurance that the asserted mental distress is genuine, or that if genuine it is serious and reasonable. When a citizen who has been called a son of a bitch testifies that the epithet has destroyed his sleep, ruined his digestion, wrecked his nervous system and permanently impaired his health, other citizens who have on occasion been called the same thing without catastrophic harm may have legitimate doubts if he was really so upset, or that if he were his sufferings could possibly be so reasonable and justified under the circumstances as to be entitled to compensation.[292]

A claim that such language is not "speech" within the protection of the first amendment cannot intelligibly rationalize the fighting words doctrine. If the Court determines that the expression at issue is unworthy of the label "speech" then no justification for its suppression is necessary.[293] The analytical premises of this extraordinarily harsh and restrictive doctrine, which operates as an absolutist interpretation of the first amendment in reverse, were destroyed by Professor Kalven two decades ago.[294] It has been abandoned by the Supreme Court in every area of first amendment jurisprudence[295] except obscenity, in which the

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290. Magruder, *supra* note 272, at 1035.

291. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 46, Comment d (1965); W. PROSSER, HANDBOOK OF THE LAW OF TORTS 54-55 (4th ed., 1971).

292. Prosser, *Insult and Outrage*, 44 CALIF. L. REV. 40, 44-45 (1956).

293. *See* Roth v. United States, 354 U.S. 476 (1957); Beauharnais v. Illinois, 343 U.S. 250 (1952); Valentine v. Chrestensen, 316 U.S. 52 (1942). *See also* H. KALVEN, *supra* note 105, at 46; Kalven, *supra* note 55, at 10-11.

294. Karst, *supra* note 1, at 30 (citing Kalven, *supra* note 55). *See also* H. KALVEN, *supra* note 105, at 44-50.

295. *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,

Court has fallen into a hopeless quagmire.[296] Even the solitary academic advocate of this two level theory admits that it is not suited for application to the problem of fighting words or offensive language.[297]

IV. CONCLUSION

Since *Chaplinsky v. New Hampshire*, the United States Supreme Court has relied exclusively on the governmental interest in preventing breaches of the peace to justify the continued constitutionality of the fighting words doctrine. The Court has held that under this doctrine offensive language can be censored only if it (1) constitutes a personally abusive epithet; (2) addressed in a face-to-face manner; (3) to a specific individual; and (4) uttered under such circumstances that the words have a direct tendency to cause an immediate violent response by the ordinary, reasonable recipient. Only in the rare case in which these four elements coalesce may the government proscribe expression without violating the first amendment.

The reported cases demonstrate that the fighting words doctrine is seldom, if ever, used for its intended purpose. Instead, it is almost uniformly invoked in a selective and discriminatory manner by law enforcement officials to punish trivial violations of a constitutionally impermissible interest in preventing criticism of official conduct. Under these circumstances, it is important to recognize that the doctrine is, at best, a quaint remnant of a bygone morality. Analytically, it is fallacious to believe that personally abusive epithets, even if addressed face-to-face to the object of the speaker's criticism, are likely to arouse the ordinary law abiding person beyond mere anger to uncontrollable reflexive violence. Further, even if one unrealistically assumes that reflexive violence will result, it is unlikely that the fighting words doctrine can successfully deter such lawless conduct.

Traditionally, the fighting words doctrine has been justified on the improbable supposition that it is commonly invoked to protect one private individual from being insulted by another private individual.

425 U.S. 748 (1976) (commercial speech); Gooding v. Wilson, 405 U.S. 518 (1972) (fighting words); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (libel).

296. *See, e.g.*, Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Miller v. California, 413 U.S. 15 (1973); Roth v. United States, 354 U.S. 476 (1957). *See also* Smith v. United States, 431 U.S. 291, 311 (1977) (Stevens, J., dissenting); Paris Adult Threatre I v. Slaton, 413 U.S. at 73 (Brennan, J., dissenting); Stanley v. Georgia, 394 U.S. 557 (1969).

297. *See* Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L. J. 899, 920-21, 923-24 (1979).

Even in this situation, however, the interest in preventing minor indignation and hurt feelings is too trivial for the law's cognizance: "There is no occasion for the law to intervene with balm for wounded feelings in every case where a flood of billingsgate is loosed in an argument over a back fence."[298] When considered in light of the predominant societal interest in free and uninhibited expression, even candid and unpleasant expression, the fighting words doctrine cannot withstand first amendment scrutiny.

298. W. PROSSER, *supra* note 291, at 54.