NO ESSENTIAL REASON TO RESTRICT THE FREEDOM OF SPEECH: WHY IT IS TIME TO KNOCK OUT *CHAPLINSKY V. NEW HAMPSHIRE* AND THE FIGHTING WORDS DOCTRINE

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I. INTRODUCTION

Chaplinsky v. New Hampshire (1942) famously established the Fighting Words Doctrine in First Amendment jurisprudence.[1] The Supreme Court of the United States declared in the case that persons of average intellect know that certain words and phrases will generally lead other persons to fight.[2] Since the Court found such words to be inessential to either the free exchange of ideas or the path to truth, the Court held that such language is not protected by the First Amendment.[3] According to a LexisNexis search, *Chaplinsky* has been cited in 122 opinions by Supreme Court Justices since 1942, often approvingly. Both *Chaplinsky* and the Fighting Words Doctrine were last cited as good law in an opinion of the Court in *United States v. Alvarez* (2012).[4] Although the Court has never overruled *Chaplinsky* or the Fighting Words Doctrine, several decades of First Amendment case law cast doubt upon both the case and the doctrine.[5] Indeed, amazingly, the Supreme Court of the United States has *not* upheld a conviction on fighting words grounds since it decided *Chaplinsky*.[6] There are several reasons why this is the case. The standard is vague and overbroad.[7] For eighty years, cases in different contexts have been carving out exceptions to the Fighting Words Doctrine and when it should be applied.[8] Particularly since the Court has held that offensive speech receives First Amendment protection, the validity of the Court's reasoning in *Chaplinsky* is disputable at best, especially given that it is steeped in an outdated idea of toxic masculinity. The uncertainty surrounding the Fighting Words Doctrine risks it being enforced in a discriminatory manner toward minority groups, with a particular risk of racially discriminatory enforcement.[9] Finally, the Fighting Words Doctrine

1. Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942).
2. *Id.*
3. *Id.* at 572.
4. United States v. Alvarez, 567 U.S. 709, 717 (2012) (explaining that categories of unprotected expression include "so-called 'fighting words,' *see Chaplinsky v. New Hampshire*").
5. Burton Caine, *The Trouble with "Fighting Words":* Chaplinsky v. New Hampshire *Is a Threat to First Amendment Values and Should be Overruled*, 88 MARQ. L. REV. 441, 545 (2004).
6. ERWIN CHEMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS 92 (2017); Caine, *supra* note 5, at 444.
7. Caine, *supra* note 5, at 461–63.
8. *Id.* at 545.
9. *See, e.g.*, Watts v. United States, 394 U.S. 705, 705 (1969).

is meant to prevent violence and protect social order, but these values are already sufficiently carried out by other free speech jurisprudence that hold there is no constitutional protection for speech that incites imminent lawless action or is a true threat.[10] Since the reasoning justifying the decision has faded away due to the establishment of other case law, this Article will advocate that the *Chaplinsky* precedent and the Fighting Words Doctrine should be overruled. Instead of a misguided attempt to provide more power to the government to silence speakers through criminal punishment, the First Amendment requires us to promote more civil dialogue through public education and private consequences, and this can be done while advancing a free speech culture.

This Article will proceed as follows. Part II recounts the facts of the *Chaplinsky* case. Part III explores the Court's opinion in the case and critically analyzes its reasoning and holding, finding that the ruling was problematic even when it was adopted in 1942. Part IV traces the development of other First Amendment jurisprudence in the nearly eight decades since *Chaplinsky*, demonstrating why the precedential value of the case has eroded over time. Part V illuminates how the Fighting Words Doctrine creates dangers of targeting speakers from minority communities, and how this is especially the case with race. Part VI explains the Court's rationales for overruling constitutional precedents in other contexts, and argues that the reasoning in those cases leads to the conclusion that it is finally time to overrule *Chaplinsky* and end the Fighting Words Doctrine. Finally, Part VII provides First Amendment-compliant alternatives to the Fighting Words Doctrine that encourage civility in public discourse and cultivate respect for the peaceful free exchange of ideas. All told, although *Chaplinsky* famously declared that so-called fighting words are "no essential part of any exposition of ideas,"[11] decades of relevant case law now demand that *Chaplinsky* is no longer an essential reason to restrict the freedom of speech.

II. THE STORY OF WALTER CHAPLINSKY AND HIS CASE IN THE LOWER COURTS

Walter Chaplinsky was a native of Shenandoah, Pennsylvania.[12] As a child, Chaplinsky converted his religion to became a Jehovah's Witness after some proselytizers visited his family's rural farm in the early 1930s.[13] Both Chaplinsky and his younger brother became proselytizers themselves,

10. *See, e.g.*, Cohen v. California, 403 U.S. 15, 18 (1971).

11. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

12. Shawn Francis Peters, *Walter Chaplinsky: The Freedom to Proselytize*, *in* 100 AMERICANS MAKING CONSTITUTIONAL HISTORY: A BIOGRAPHICAL HISTORY, 34 (Melvin I. Urofsky ed., CQ Press 2004).

13. *Id.*

eventually going door-to-door throughout Schuylkill County, Pennsylvania to distribute Bibles and other materials promoting the faith of Jehovah's Witnesses.[14] In adulthood, Chaplinsky moved to Philadelphia to canvass for the Witnesses full-time, earning the title of "pioneer" within the religion.[15] After being elevated to a "special pioneer" (which gave him additional duties, including providing Bible study to people in their homes), Chaplinsky settled in Manchester, New Hampshire in 1939.[16] However, he encountered problems with local police there, as his religious canvassing, done without obtaining a permit, led to a conviction for "peddling without a license."[17] After serving a forty-day jail sentence, Chaplinsky moved to Dover, New Hampshire.[18] On April 6, 1940, he was engaging in religious proselytizing in favor of the Jehovah's Witness faith in nearby Rochester, New Hampshire.[19]

On what U.S. Supreme Court Justice Frank Murphy would later characterize as "a busy Saturday afternoon," Chaplinsky was preaching to passers-by and distributing literature on a street corner.[20] A number of pedestrians took offense to Chaplinsky's speech and literature, which advocated controversial positions on multiple subjects, such as Jehovah's Witnesses' refusal to engage in a salute of the American flag.[21] He was also alleged to have made disparaging remarks about organized religion, which he purportedly called a "racket."[22] Complaints of Chaplinsky's controversial expressions reached Rochester City Marshal Jim Bowering, the local chief of police, but Bowering's initial response was that Chaplinsky was within his free speech rights to speak and distribute literature on the street corner.[23]

Citizens present on the same street corner as Chaplinsky apparently did not agree with Marshal Bowering's assessment, because some became violent.[24] A crowd gathered and its members started jeering Chaplinsky.[25] Bowering gave a warning to Chaplinsky that those gathering around him were "getting restless," but it appears Chaplinsky continued his preaching in spite of this.[26] William Bowman, a veteran, was so angry with what Chaplinsky said that he threw a punch at the preacher.[27] Upon being struck, Chaplinsky implored Bowering: "Marshall, I want you to arrest this man."[28]

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14. *Id.*
15. *Id.* at 34.
16. *Id.*
17. *Id.* at 35.
18. *Id.*
19. *Id.*
20. Chaplinsky v. New Hampshire, 315 U.S. 568, 570 (1942).
21. Peters, *supra* note 12, at 35.
22. Michael J. Mannheimer, *The Fighting Words Doctrine*, 93 COLUM. L. REV. 1527, 1533 (1993).
23. Caine, *supra* note 5, at 447.
24. *Id.*
25. Peters, *supra* note 12, at 35.
26. Chaplinsky v. New Hampshire, 315 U.S. 568, 570 (1942).
27. Caine, *supra* note 5, at 447.
28. *Id.*

Marshal Bowering's tolerance for Chaplinsky appears to have waned by this point, as his response was, "I will if I feel like it."[29] Bowman temporarily left the scene, but upon his return, Bowman tried to use a flagpole to impale Chaplinsky, knocking Chaplinsky to the ground in the process.[30] Bowman's act spurred others in the mob to take action, and according to one account, they "swarmed over" Chaplinsky and engaged in a "drubbing" of the man.[31] Some persons grabbed the literature Chaplinsky had been distributing and hurled it in various directions.[32] An unnamed deputy sheriff physically assaulted Chaplinsky and referred to him as, "[y]ou son of a bitch."[33] An American flag was presented to Chaplinsky, and members of the mob insisted that he salute it.[34] Chaplinsky would not do so, so members of the crowd physically battered him further.[35]

In what was ostensibly an act to protect Chaplinsky from further violence, law enforcement attempted to escort him from the scene.[36] The Supreme Court of the United States described the police activity as follows: "[T]he traffic officer on duty at the busy intersection started with Chaplinsky for the police station, but did not inform him that he was under arrest or that he was going to be arrested."[37] According to one account, some of the officers accompanying Chaplinsky "berated and physically abused" Chaplinsky as they were removing him from the scene of the mob violence.[38] According to another account, law enforcement pulled Chaplinsky from the scene by "shoving him along roughly."[39] Regardless of how one characterizes the police action, it caused Chaplinsky to again plead with Bowering, asking the marshal why he was being taken away instead of the men who heckled and assaulted him: "Will you please arrest the ones who started this fight?"[40] Marshal Bowering's response was to tell Chaplinsky, "Shut up, you damned bastard and come along."[41] After being berated and beaten by a mob while police passively watched, and then, afterward, effectively being taken into police custody and referred to in such a negative way by the chief law enforcement officer in the municipality, Chaplinsky could apparently take no more.[42] According to witnesses who later testified at Chaplinsky's trial, he replied to Bowering by telling him, "[y]ou are a God damned racketeer" and

29. *Id.*
30. Peters, *supra* note 12, at 35.
31. *Id.*
32. *Id.*
33. Caine, *supra* note 5, at 447.
34. *Id.*
35. *Id.*
36. Mannheimer, *supra* note 22, at 1534.
37. Chaplinsky v. New Hampshire, 315 U.S. 568, 570 (1942).
38. Peters, *supra* note 12, at 35.
39. Caine, *supra* note 5, at 447.
40. *Id.*
41. *Id.* at 448.
42. *Id.*

"a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists."[43] Chaplinsky later admitted that he said all of those words, except for the word "God."[44]

No one who accosted Chaplinsky that day was arrested or charged. Instead, for calling Bowering "a God damned racketeer" and "a damned Fascist," Chaplinsky was charged with violating Section 2 of Chapter 378 of the State of New Hampshire Public Laws.[45] That law at the time stated the following:

> 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, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.[46]

Chaplinsky was convicted at a municipal court trial for violating this statute.[47] He appealed that conviction and received a trial de novo with a jury in a New Hampshire Superior Court where he was found guilty a second time.[48] At trial, Chaplinsky tried unsuccessfully to introduce evidence that on April 6, 1940, he was engaged in an enterprise to "preach the true facts of the situation of the Bible to the people" and that the mob had taken some violent action against him of which the police were unaware.[49]

Chaplinsky next appealed his conviction to the Supreme Court of New Hampshire, which affirmed his conviction.[50] The state's highest court had interpreted the same statute two times in the previous fifty years.[51] In one case, *State v. Brown* (1895), the New Hampshire Supreme Court upheld a conviction of a defendant who had said to another person in the street, "You are a God damned blackmailer."[52] In the *Brown* decision, the New Hampshire Supreme Court declared that "[t]he fact that the forbidden words express the truth does not justify their use" if the words are used to provoke the person to whom it is directed to violence.[53] In another case, *State v. McConnell* (1900), the court sustained the conviction of a defendant who called a woman, in the words of the court, "a bitch, with other obscene words not thought necessary to be printed in the reported decision."[54] Following these

43. State v. Chaplinsky, 18 A.2d 754, 758 (N.H. 1941).
44. *Id.*
45. *Id.* at 311; Peters, *supra* note 12, at 35; Caine, *supra* note 5, at 448.
46. Chaplinsky v. New Hampshire, 315 U.S. 568, 569 (1942).
47. *Id.*
48. *Id.*
49. *Chaplinsky*, 18 A.2d at 758.
50. *Chaplinsky*, 315 U.S. at 569.
51. *Chaplinsky*, 18 A.2d at 758.
52. *Id.*
53. State v. Brown, 38 A. 731, 732 (N.H. 1895).
54. *Chaplinsky*, 18 A.2d at 758; *see* State v. McConnell, 47 A. 267 (N.H. 1900).

precedents, the New Hampshire Supreme Court explained why Chaplinsky could be convicted for the statements he gave to police: "It was not useful or proper comment for bringing truth to light. Its plain tendency was to further breach of order, and it was itself a breach of the peace."[55] Chaplinsky claimed before the New Hampshire Supreme Court that his conviction violated his right to the freedom of speech—as well as his freedom of religion and the freedom of the press—as protected by the Due Process Clause of the Fourteenth Amendment.[56] The New Hampshire Supreme Court specifically found no violation of Chaplinsky's constitutional rights, including his free speech rights, holding that "[w]e can see no relationship of such utterances to that freedom of speech which is so acutely desirable if free institutions are to be preserved."[57] This decision led Chaplinsky to appeal to the Supreme Court of the United States.[58]

III. EXAMINING THE SUPREME COURT OF THE UNITED STATES'S REASONING AND HOLDING IN *CHAPLINSKY V. NEW HAMPSHIRE*: WHY THE CASE WAS WRONG WHEN IT WAS DECIDED

A. Chaplinsky*'s Free Speech (and Other) Constitutional Claims*

The First Amendment commands, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech."[59] Writing for a unanimous Court in *Chaplinsky v. New Hampshire*, Justice Murphy began his legal analysis by affirming that the freedom of speech had been incorporated to apply to the states: "It is now clear that 'Freedom of speech and freedom of the press, which are protected by the First Amendment from infringement by Congress, are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action.'"[60] In fact, the Court had held since *Gitlow v. New York* (1925) that the freedom of speech was incorporated by the Fourteenth Amendment's Due Process Clause.[61]

Chaplinsky argued before the Supreme Court of the United States that his rights to the freedom of religion, the freedom of speech, and the freedom of the press were all violated, but the Court entertained only Chaplinsky's "attack on the basis of free speech."[62] According to Justice Murphy, there was no viable freedom of the press claim because "[t]he spoken, not the

55. *Chaplinsky*, 18 A.2d at 758.
56. Chaplinsky v. New Hampshire, 315 U.S. 568, 597 (1942).
57. *Chaplinsky*, 18 A.2d at 759.
58. *Chaplinsky*, 315 U.S. at 569.
59. U.S. CONST. amend. I.
60. *Chaplinsky*, 315 U.S. at 570–71 (quoting *Lovell v. Griffin*, 303 U.S. 444, 450 (1938)).
61. Gitlow v. New York, 268 U.S. 652, 666 (1925).
62. *Chaplinsky*, 315 U.S. at 571.

written, word is involved."[63] Granted, when making his statements to Marshal Bowering, Chaplinsky was not printing or distributing a news publication like Jay Near was in *Near v. Minnesota* (1931),[64] and according to the criminal complaint, Chaplinsky was not arrested or prosecuted for the distribution of handbills.[65] Furthermore, unlike radio transmissions or film newsreels of the time, Chaplinsky's spoken words were not being broadcast or recorded for wider news dissemination.[66] Nevertheless, during this same era, the Court was expanding its application of the freedom of the press to the spoken word in certain contexts.[67] Indeed, if the ultimate reason that Chaplinsky had been prosecuted stemmed from what he said and distributed on the street corner, Chaplinsky's press claim may have had some merit. The distribution of printed religious literature had been found just a few years earlier, in *Lovell v. Griffin* (1938) to be protected by the freedom of the press.[68] In that case, the Court proclaimed the following:

> The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.[69]

The *Lovell* decision had been upheld in *Schneider v. New Jersey* (1939),[70] and both of those cases represented the idea that the freedom of the press protected door-to-door canvassers and leafleting street preachers the same way it protected institutional media.[71] Thus, Chaplinsky could argue a potential free press claim if he could have shown that the arrest was pretextual for what he said to the passersby. However, without more evidence that Chaplinsky was truly prosecuted for this activity (as opposed to being prosecuted for what he said to Marshal Bowering), the Court was correct in denying a free press claim. Ultimately, it may not have made much difference

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63. *Id.*

64. Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 703–05 (1931).

65. State v. Chaplinsky, 18 A.2d 754, 757 (N.H. 1941) ("The complaint is that Chaplinsky, being in the street at Rochester, addressed to the City Marshal these words: 'You are a God damned racketeer' and 'a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists.'" *Id.* Chaplinsky's "arrest was definitely fixed only after he uttered the words charged." *Id.* at 758).

66. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 375–79 (1969) (exploring an early history of the government's regulation of broadcast media).

67. *See* United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948) ("[M]oving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment.").

68. *See* Lovell v. Griffin, 303 U.S. 444, 458, 453 (1938).

69. *Id.* at 452.

70. Schneider v. New Jersey, 308 U.S. 147, 160–61 (1939).

71. Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459, 510 (2012).

either way, as the Court had not found special protections for the media under the Free Press Clause greater than the public generally under the Free Speech Clause before *Chaplinsky*, nor has it done so in the years following.[72]

Justice Murphy also summarily rejected Chaplinsky's claim regarding the freedom of religion (a right which had been recently incorporated in *Cantwell v. Connecticut* (1940)),[73] finding that the Court "cannot conceive that cursing a public officer is the exercise of religion in any sense of the term."[74] If Chaplinsky had been prosecuted for his proselytizing about his religion to passersby on the street, that would have raised questions under the Free Exercise Clause, as it may have been government action "prohibiting the free exercise" of religion.[75] Indeed, in *Cantwell*, the Court decided as a freedom of religion case the constitutionality of the prosecution of Newton Cantwell, a Jehovah's Witness, for soliciting without a license.[76] According to the Court in *Cantwell*:

> [T]o condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution.[77]

Thus, if the arrest had been pretextual for proselytizing—in this case denouncing other religions and criticizing flag salutes as idol worship—then Chaplinsky would have had a clearer free exercise claim.[78] However, prosecuting Chaplinsky for the use of his words to the police—even though they included profanity ("God damned" or "Goddamned")[79]—was not touching upon his freedom of religion in this instance, as there is no evidence that he was punished for the religious beliefs he expressed, nor was he punished for participating in worship services or sacraments.[80] Thus, the

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72. *See* First Nat'l Bank v. Bellotti, 435 U.S. 765, 798 (Burger, C.J., concurring) ("The Court has not yet squarely resolved whether the Press Clause confers upon the 'institutional press' any freedom from government restraint not enjoyed by all others.").

73. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) ("The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.").

74. Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942).

75. U.S. CONST. amend. I; *see also* Emp. Div. v. Smith, 494 U.S. 872, 877 (1990) ("the 'exercise of religion'" protects "proselytizing").

76. *Cantwell*, 310 U.S. at 306–07.

77. *Id.* at 307.

78. Brett G. Scharffs, *The Autonomy of Church and State*, 2004 B.Y.U. L. REV. 1217, 1315–19 (2004).

79. *Infra* note 105 (defining profanity as an irreverent use of the name of God).

80. *See Smith*, 494 U.S. at 877 ("The government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma . . . the 'exercise of religion' often involves not only belief and profession

prosecution did not directly raise any noticeable free exercise issues in the same way it raised freedom of speech concerns. The Court was again correct in excluding this constitutional claim and deciding the case solely on the freedom of speech question.

B. Creating Categories of Unprotected Expression

Justice Murphy subsequently turned to Chaplinsky's free speech claim, and he began by noting that under the Constitution, "it is well understood that the right of free speech is not absolute at all times and under all circumstances."[81] This is certainly accurate today, as it was according to the Court's precedents in effect when *Chaplinsky* was decided.[82] However, Murphy's characterization of the freedom of speech was rather crabbed given the cases decided by the Court in the years leading up to *Chaplinsly*. Granted, Justice Holmes had famously established for the Court in the seminal decision *Schenck v. United States* (1919) that speech is protected unless "the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[83] Even more to the point, the Court held the following in *Gitlow*:

> It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom.[84]

The Court failed to fully apply *Schenck*'s promise of protecting expression in that case, and in *Gitlow*, upholding convictions for using political speech in both cases, showing that constitutional free speech protections were far from absolute. Nevertheless, this more deferential position toward government power that the Court held in the late 1910s and

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but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, . . . abstaining from certain foods or certain modes of transportation.") (internal citations omitted).

81. Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942).

82. *See generally* Schenck v. United States, 249 U.S. 47, 52 (1919); Stromberg v. California, 283 U.S. 359 (1931); *Cantwell*, 310 U.S. at 303 (explaining that the right of free speech is not an absolute right).

83. *Schenck*, 249 U.S. at 52 (1919); *see* Brandenburg v. Ohio, 395 U.S. 444 (1969) (describing in Subsection IV.D the standard that replaced the Clear and Present Danger Test for incitement).

84. Gitlow v. New York, 268 U.S. 652, 666 (1925).

in the 1920s had changed by the time of *Chaplinsky*.[85] Indeed, in *Stromberg v. California* (1931), the Court overturned a sedition conviction, finding a constitutional protection in the flying of a communist flag.[86] In *Herndon v. Lowry* (1937), the Court used *Schenck*'s Clear and Present Danger Test to overturn a syndicalism conviction,[87] reasoning that the "power of a state to abridge freedom of speech and of assembly is the exception rather than the rule."[88] The Court likewise applied the Clear and Present Danger Test to overturn convictions in *Carlson v. California* (1940)[89] and *Bridges v. California* (1941).[90] The Court went so far in *Bridges* to declare that the First Amendment "must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."[91] Therefore, Justice Murphy's admonition in *Chaplinsky*, where he begins with the implication that there is speech not protected by the First Amendment (as incorporated by the Fourteenth Amendment in this case) masked an important fact: It omits that the First Amendment, by its terms, emphasizes that the freedom of speech is generally protected when it declares that "Congress shall make no law . . . abridging the freedom of speech."[92] Thus, the default position under the Constitution is that the freedom of speech *is* protected, *not* that most speech is unprotected.[93]

Although the freedom of speech generally protects one's expressive rights, Justice Murphy declared in *Chaplinsky* that 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."[94] Although Justice Murphy explained in a footnote that "[t]he protection of the First Amendment, mirrored in the Fourteenth, is not limited to the Blackstonian idea that freedom of the press means only freedom from restraint prior to publication,"[95] he nevertheless recognized that there are several types of speech that are not shielded by the Constitution.[96] Justice Murphy then offered examples of these unprotected forms of expression:

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85. Eric T. Kasper & Troy A. Kozma, *Absolute Freedom of Opinion and Sentiment on All Subjects: John Stuart Mill's Enduring (and Ever-Growing) Influence on the Supreme Court's First Amendment Free Speech Jurisprudence*, 15 U. MASS. L. REV. 2, 18–22 (2020).

86. *Stromberg*, 283 U.S. at 359.

87. Herndon v. Lowry, 301 U.S. 242, 256 (1937).

88. *Id.* at 258.

89. Carlson v. California, 310 U.S. 106, 113 (1940).

90. Bridges v. California, 314 U.S. 252, 263 (1941).

91. *Id.*

92. U.S. CONST. amend. I.

93. Anne-Marie Beliveau, *Hate Speech Laws in the United States and the Council of Europe: The Fine Balance Between Protecting Individual Freedom of Expression Rights and Preventing the Rise of Extremism and Radicalization Through Social Media Sites*, 51 SUFFOLK U. L. REV. 565, 566 (2018).

94. Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

95. *Id.* at 572 n.3.

96. *Id.* at 571–72.

"These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words . . . ."[97]

Justice Murphy provided no citations to past cases which held that such categories of expression are not protected by the Constitution. Instead, he cited Zechariah Chafee's *Free Speech in the United States* as his only authority on this point.[98] In fact, Chafee noted that "the law . . . punishes a few classes of words like obscenity, profanity, and gross libels upon individuals."[99] What is missing from Chafee's list, however, is a specific reference to "fighting words." A LexisNexis search reveals that no prior Supreme Court case referred specifically to fighting words, meaning the Court was formally creating this category of unprotected speech for the first time in *Chaplinsky*. Thus, it was somewhat disingenuous for Justice Murphy to claim that "the prevention and punishment of" fighting words has "*never* been thought to raise any Constitutional problem,"[100] as the Court had never broached that topic previously. Granted, it was appropriate for Justice Murphy in *Chaplinsky* to note that in both *Cantwell* and *Thornhill v. Alabama* (1940)[101] the Court had reasoned that speech leading to a breach of the peace is unprotected expression.[102] However, in both of those cases the Court discussed activities that dealt with incitement to conduct illegal actions against others, *not* fighting words that would encourage the listener to attack the speaker.[103] Nevertheless, Justice Murphy's reference to fighting words made it appear that the Court had long held that this type of expression was outside of constitutional protection. That was simply not the case. Justice Murphy also identified other categories of speech that were previously found to be outside of the purview of the First Amendment, including obscenity[104]

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97. *Id.* at 572.

98. *Id.* at 572 n.4 (citing ZECHARIAH CHAFEE, FREE SPEECH IN THE UNITED STATES 149 (1941)).

99. ZECHARIAH CHAFEE, FREE SPEECH IN THE UNITED STATES 148 (1941).

100. *Chaplinsky*, 315 U.S. at 572 (emphasis added).

101. Thornhill v. Alabama, 310 U.S. 88 (1940).

102. *Chaplinsky*, 315 U.S. at 573–74.

103. *See* Cantwell v. Connecticut, 310 U.S. 296, 308 (1940) ("The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctioned incitement to riot or that religious liberty connoted the privilege to exhort others to physical attack upon those belonging to another sect."); *see also Thornhill*, 310 U.S. at 92, 106 (After Thornhill was convicted of labor picketing at a business, "with the intent or purpose of influencing others to adopt one of enumerated courses of conduct," the Court declared that "[t]he danger of breach of the peace or serious invasion of rights of property or privacy at the scene of a labor dispute is not sufficiently imminent in all cases to warrant the legislature in determining that such place is not appropriate for the range of activities outlawed by" the law at issue in the case.).

104. *See* Dunlop v. United States, 165 U.S. 486, 490, 504 (1897) (upholding a conviction for mailing a publication containing "obscene, lewd, lascivious, and indecent" matter); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 716 (1931) ("[T]he primary requirements of decency may be enforced against obscene publications.").

and libel.[105] Justice Murphy's referral to profanity as an unprotected category of expression is interesting. Although the Court had not decided a First Amendment case dealing directly with profane expression before *Chaplinsky*, earlier editions of *Black's Law Dictionary* defined "profanity" as follows: "Irreverence toward sacred things; particularly in an irreverence or blasphemous use of the name of God."[106] Thus, Chaplinsky's use of "God damned" might arguably have qualified as a form of profanity.[107] Putting aside the very significant First Amendment concerns with banning profane words,[108] the issue is moot regarding *Chaplinsky* because the Court ultimately classified his speech as fighting words instead.[109] And this declaration of a category of unprotected speech was a new development, standing against the general trend of the 1930s and early 1940s Court decisions, which protected increasingly more expression.[110]

C. Defining "Fighting Words" (and Why the Court Was Wrong to Create this Category of Unprotected Speech When It Decided Chaplinsky)

After declaring the different categories of speech that fall outside of constitutional protection, Justice Murphy next defined "fighting words." He characterized them as words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[111] This definition seems deceptively simple enough, but it lacks clarity. Justice Murphy offered two ideas of what constitutes fighting words: (1) words that by their very utterance inflict injury, and (2) words that tend to incite an immediate breach of the peace.[112] The fact that he used the word "or" here implies that fighting words which "inflict injury," but that do not incite an immediate breach of the peace are not protected expression.[113] The latter of these two examples drifts toward the Court's Clear and Present Danger Test, which the Court had used previous to *Chaplinsky* to deal with questions of incitement: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger

105. *See Near*, 283 U.S. at 715 ("[T]he state appropriately affords both public and private redress by its libel laws.").

106. *Profanity*, BLACK'S LAW DICTIONARY (4th ed. 1968).

107. *Chaplinsky*, 315 U.S. at 569.

108. *See* Cohen v. California, 403 U.S. 15, 26 ("[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process.").

109. *Chaplinsky*, 315 U.S. at 574.

110. Andrew P. Napolitano, *A Legal History of National Security Law and Individual Rights in the United States: The Unconstitutional Expansion of Executive Power*, 8 N.Y.U. J.L. & LIBERTY 396, 481 (2014) ("In the Depression Era, the freedom of speech was undergoing a renaissance. The Court was beginning to give due deference to the natural supremacy of the individual right, rather than to the political convenience of the state.").

111. *Chaplinsky*, 315 U.S. at 572.

112. *Id.*

113. Caine, *supra* note 5, at 471–72.

that they will bring about the substantive evils that Congress has a right to prevent."[114] Although fighting words are a category of speech separate from incitement, restrictions on the two forms of speech are ultimately aimed at the same problem: preventing words that spur on some sort of lawlessness, particularly violence.[115]

Words that "inflict injury," however, are something altogether different, and they do not, by definition, even seem to constitute fighting words, as the words themselves are injurious in a psychological sense, but they may not lead to a fight.[116] Thus, the *Chaplinsky* standard was overbroad, even when Justice Murphy wrote it in 1942. According to the Court in *Lovell v. City of Griffin* (1938), a regulation is overbroad under the First Amendment if "[t]here is thus no restriction in its application with respect to time or place,"[117] or if "[i]t is not limited to ways which might be regarded as inconsistent with the maintenance of public order[] or as involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets."[118] Assuming that fighting words incite an immediate breach of the peace, they would qualify under the restraints approved in *Lovell*; however, the *Chaplinsky* decision's admonition that words could be restricted if they "inflict injury" goes beyond the types of restrictions outlined in *Lovell*.[119] This raises concerns about overbreadth. How the Court has expanded what qualifies as unconstitutional overbreadth since *Chaplinsky* will be explored more in Part IV.

Justice Murphy again cited Chafee as authority on this point that fighting words may be banned because they will result in one of the two scenarios above.[120] However, as noted above, Chafee was referring to what he called "obscenity, profanity, and gross libels upon individuals" as language that may be criminalized "because the very utterance of such words is considered to inflict a present injury upon listeners, readers, or those defamed, or else to render highly probable an immediate breach of the peace."[121] Thus, Chafee never specifically identified fighting words as a category of speech that may be banned, but rather provided why obscene, profane, and libelous expression may be banned consistent with the First Amendment.[122] The Court therefore broke new ground in adding fighting words to this list of Chafee's words.

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114. Schenck v. United States, 249 U.S. 47, 52 (1919).
115. *See* Mannheimer, *supra* note 22, at 1527–29.
116. *See id.*; *Chaplinsky*, 315 U.S. at 572.
117. Lovell v. Griffin, 303 U.S. 444, 451 (1938).
118. *Id.*
119. *See id.*; *Chaplinsky*, 315 U.S. at 572.
120. *Chaplinsky*, 315 U.S. at 572 n.4 (citing CHAFEE, *supra* note 99, at 149).
121. CHAFEE, *supra* note 99, at 149.
122. *See id.*

The Court clearly can make new First Amendment law,[123] so the resulting question is: Should the Court have created this new category of unprotected speech?[124] Problems arise as Justice Murphy attempted to articulate more fully what fighting words are.[125] Quoting the New Hampshire Supreme Court, Justice Murphy went on to elucidate the following regarding a fighting words test: "The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight."[126] This raises significant questions about vagueness, which will be discussed in more detail with regard to more contemporary court cases in Part IV. For present purposes, it suffices to ask some relevant, difficult questions. Who constitutes a person of "common intelligence"? Assuming we can determine this, how is one to know which words will cause another person, much less an "average addressee," to fight? How will a speaker know ahead of time if an addressee is "average" or not? Is this creating a national standard of fighting words, or does the average addressee vary by community, region, and subculture? Indeed, these questions ultimately ask about the fruitlessness of attempting to set vague standards that restrict expression in a large, diverse, pluralistic society.[127]

By the time the Court handed down its *Chaplinsky* opinion, it had previously decided *Stromberg*, where the Court first articulated the notion of a law being void for vagueness under the First Amendment.[128] According to Chief Justice Hughes, writing for the Court in *Stromberg*, a "statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment."[129] The law that the Court found to be unconstitutionally vague in *Stromberg* prohibited the display of

> [A] red flag, banner or badge or any flag, badge, banner, or device of any color or form whatever . . . as a sign, symbol or emblem of opposition to organized government or as an invitation or stimulus to anarchistic action or as an aid to propaganda that is of a seditious character . . . .[130]

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123. *See* Gitlow v. New York, 268 U.S. 652, 667–68 (1925) (using the Bad Tendency Test, as opposed to the Clear and Present Danger Test articulated in Schenck v. United States, 249 U.S. 47, 52 (1919)). For a more contemporary example, see Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31 et al., 138 S. Ct. 2448, 2478 (2018), which overruled Abood v. Detroit Bd. of Ed., 431 U.S. 209 (1977).

124. *See Chaplinsky*, 315 U.S. at 572.

125. *See id.*

126. *Id.* at 573.

127. *See* Justin Kirk Houser, *Is Hate Speech Becoming the New Blasphemy? Lessons from an American Constitutional Dialectic*, 114 PENN ST. L. REV. 571, 615–18 (2009).

128. Stromberg v. California, 283 U.S. 359, 369 (1931).

129. *Id.* at 369–70.

130. *Id.* at 361 (quoting CAL. PENAL CODE § 403a, *repealed by* Stats. 1933, ch. 975, p. 2543, §601).

If a law was too vague for prohibiting symbols "of opposition to organized government," then a standard prohibiting persons "of common intelligence" from uttering words that would be "likely to cause an average addressee to fight" is equally ill-defined, if not more so.[131]

In trying to provide more clarity, Justice Murphy explained that "[t]he English language has a number of words and expressions which by general consent are 'fighting words' when said without a disarming smile. . . . Such words, as ordinary men know, are likely to cause a fight."[132] This attempt to clarify the meaning of fighting words only creates more problems though. The use of the word "consent" raises problems about *who* actually gave consent for certain words to be considered unprotected because they are likely to cause a fight. What if one wishes to use such words and another does not consent to a fight? Are there other types of non-verbal communication, besides a "disarming smile," that one can use to note that one is not engaging in fighting words, such as a wink? What about the making of an "OK" sign with one's fingers (a symbol which traditionally indicated that "all is well," but in recent years has been used by some as a hate symbol)?[133] The standard here by Justice Murphy also changes from a person of "common intelligence" to one of "ordinary men"; however, are these two categories always coterminous?[134] In other words, could there be someone who is "ordinary" but who is of below-average or above-average intelligence? Finally, this clarification by Justice Murphy raises another question: Is this entire standard meant simply for men, and what would have been understood at the time to anger men enough to fight, because Justice Murphy repeatedly refers to men only? Indeed, at no point in his *Chaplinsky* opinion does Justice Murphy refer to "women" or "woman."[135] If the language that Justice Murphy had in mind for fighting words had been said in the early 1940s to a woman, would Justice Murphy have found it to be a constitutionally protected expression? It is unclear if Justice Murphy meant this, but at the very least the standard he offered approaches these issues with an air of toxic masculinity; it implies men have a "need to aggressively compete and dominate others" if they are challenged with so-called fighting words.[136] While such an approach was problematic in 1942, as will be discussed below, it is even more problematic today.

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131. *Id.*; *Chaplinsky*, 315 U.S. at 573.

132. *Chaplinsky*, 315 U.S. at 573.

133. Bobby Allyn, *The 'OK' Hand Gesture Is Now Listed As A Symbol Of Hate*, NPR (Sept. 26, 2019, 4:27 PM), https://www.npr.org/2019/09/26/764728163/the-ok-hand-gesture-is-now-listed-as-a-symbol-of-hate.

134. *Chaplinsky*, 315 U.S. at 573.

135. *See generally id.*

136. Angela P. Harris, *Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation*, 37 WASH. U. J.L. & POL'Y 13, 16 n.8 (2011) (quoting Terry A. Kupers, *Toxic Masculinity as a Barrier to Mental Health Treatment in Prison*, 61 J. CLINICAL PSYCH. 713, 713 (2005)).

Later in the *Chaplinsky* opinion, Justice Murphy noted that the types of words a constitutional statute could prohibit would not only be "classical fighting words,"[137] but also "words in current use less 'classical' but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats."[138] This addition by Justice Murphy delineated that what constitutes fighting words may change over time as speech evolves.[139] Just like the OK sign, discussed above, has been understood by many to take on a new meaning in recent years, spoken words can take on new meanings as well.[140] For instance, in certain times and places historically, the words "bugger" or "yankee" would have been considered quite offensive.[141] Clearly, Justice Murphy understood this problem: If there are "classical" and "less 'classical'" fighting words, it means that more of what he defined as fighting words had been added over time by 1942.[142] However, in another display showing the lack of clarity with this standard, the Court fails to offer any actual examples of either the classic or newer fighting words. No comprehensive list of fighting words has ever been produced by the Court.[143] Besides the ones actually used by Chaplinsky—"God damned racketeer" and "damned Fascist,"—the *Chaplinsky* Court gave us no other indication which words fell into this class of fighting words.[144] The implication by Justice Murphy is that more fighting words can be added to this non-existent list over time. One lingering question remains: Can any words ever be removed? Justice Murphy, in this last sentence, also introduced that "threats" are not protected by the First Amendment. As we will see in Part IV below, that category of unprotected speech is a much more sensible one to maintain today.

Justice Murphy explained in further detail that since fighting words are designed to provoke a fight, they receive no constitutional protection.[145] In doing so, he offered what might be one final clue in trying to define fighting words: "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."[146] There is a lack of clarity, though, in Justice Murphy's explanation. He did not deny that fighting words are *not* a

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137. *Chaplinsky*, 315 U.S. at 573 (quoting State v. Chaplinsky, 18 A.2d 754, 762 (N.H. 1941)).

138. *Id*.

139. Linda Friedlieb, *The Epitome of an Insult: A Constitutional Approach to Designated Fighting Words*, 72 U. CHI. L. REV. 385, 411 (2005).

140. *See* Allyn, *supra* note 133 (discussing how the "OK" sign has become a hate symbol).

141. MELISSA MOHR, HOLY SHIT: A BRIEF HISTORY OF SWEARING 213–15, 224 (2013) (emphasis omitted).

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

143. Chidiebere T. Madu, *Killer Cartoons: Islamophobia, Depictions of the Prophet Muhammad, and the Possible Limitations of Free Speech*, 14 FIRST AMEND. L. REV. 487, 503 (2016).

144. *Chaplinsky*, 18 A.2d at 757.

145. *Chaplinsky*, 315 U.S. at 572.

146. *Id.*

part of the exposition of ideas, but he declared for the Court that they were not an *essential* part of the exposition of ideas.[147] This raises perhaps the most significant concern regarding the meaning of the freedom of speech: Who is to judge if the words in question are essential to the exposition of ideas? More to the point, if these words are a step to truth, why are they not protected? Justice Murphy cites the competing values of "order and morality," but the assumption beginning with the Court's *Schenck* opinion is that true speech *will* almost always receive protection. Indeed, in that case, the Court famously offered the (misguided and misapplied[148]) analogy that "*falsely* shouting fire in a theatre and causing a panic" is not protected by the First Amendment.[149] Although he was later writing in dissent, Justice Holmes (the author of the Court's *Schenck* opinion) introduced more clarity into constitutional law in *Abrams v. United States* (1919) when he stated the following: "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market."[150] The majority of the Court adopted this approach in 1940 in *Thornhill*, where it positively discussed under the First Amendment the need to "test the merits of ideas by competition for acceptance in the market of public opinion."[151] Granted, the Court in *Thornhill* noted that restrictions on the marketplace of ideas are justified if there is a "clear danger of substantive evils," which could include a breach of the peace.[152] However, in *Chaplinsky*, the Court observed that a "social interest in order and morality" could outweigh the value of speech, meaning that a search for truth could be limited if the truth being spoken is against either order (which includes much more than breaches of the peace) or morality.[153] The notion that ideas should be competing against each other to best reveal the truth—and that true ideas are generally protected by the freedom of speech—was a well understood reason to protect the freedom of expression by the time Justice Murphy penned his words in *Chaplinsky*.[154]

Finally, in furtherance of his explanation, Justice Murphy quoted *Cantwell*, writing that "[r]esort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."[155] As much as the Court was citing to a relatively

147. *Id.*

148. For a discussion of the problems of using the "falsely shouting fire in a theatre" analogy to restrict expression, see Ronald D. Rotunda, *The Right to Shout Fire in a Crowded Theatre: Hateful Speech and the First Amendment*, 22 CHAP. L. REV. 319, 337–40 (2019).

149. Schenck v. United States, 249 U.S. 47, 52 (1919) (emphasis added).

150. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

151. Thornhill v. Alabama, 310 U.S. 88, 105 (1940).

152. *Id.* at 104–05.

153. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

154. *See* Karl S. Coplan, *Climate Change, Political Truth, and the Marketplace of Ideas*, 2012 UTAH L. REV. 545, 548–52 (2012).

155. *Chaplinsky*, 315 U.S. at 572 (quoting Cantwell v. Connecticut, 310 U.S. 296, 309–10 (1940)).

recent decision as precedent on this point, as will be explored in Part IV, decisions since *Cantwell* and *Chaplinsky* raise significant concerns with this approach. In particular, using an offensive word like an epithet (if it does not rise to the level of inciting imminent lawless action or constituting a true threat) fails to be devoid of constitutional protection in the current day.[156]

D. The Constitutionality of the New Hampshire Statute on Its Face

All told, the Court's unclear and overbroad description of fighting words in *Chaplinsky* left far more questions than it provided answers. However, if we assume for the moment that the Constitution in 1942 left unprotected a category of speech that are fighting words, did the Court in *Chaplinsky* do well to apply that standard to the New Hampshire statute in question?

Turning to New Hampshire's statute, it contained two provisions. As described above, the first part prohibited "address[ing] any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place" or "call[ing] him by any offensive or derisive name."[157] The second provision banned "mak[ing] any noise or exclamation" in the "presence and hearing" of "any other person who is lawfully in any street or other public place" with "intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation."[158] Chaplinsky was not charged with making any noise or exclamation; rather, he was charged with violating the first part of the statute regarding the use of an "offensive, derisive or annoying word" or calling someone by "any offensive or derisive name."[159] The Supreme Court of the United States deferred to the New Hampshire Supreme Court's interpretation of the statute which found that these "two provisions are distinct" and severable.[160] Thus, regardless of whether the second provision was constitutional, the Court interpreted only the first section.[161]

Following the New Hampshire Supreme Court, Justice Murphy wrote for the Supreme Court of the United States that "the statute's purpose was to preserve the public peace, no words being 'forbidden except such as have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed.'"[162] Justice Murphy went on to quote the New Hampshire Supreme Court to the effect that "[d]erisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite

156. *See infra* Part IV (discussing the evolution of the Fighting Words Doctrine since *Chaplinsky*).
157. *Chaplinsky*, 315 U.S. at 569 (quoting N.H. Pub. L. ch. 378, § 2, no longer in force).
158. *Id.*
159. *Id.* at 572.
160. *Id.* (quoting State v. Chaplinsky, 18 A.2d 754, 757 (N.H. 1941)).
161. *Id.*
162. *Id.* at 573 (quoting *Chaplinsky*, 18 A.2d at 758).

the addressee to a breach of the peace."[163] Accordingly, Justice Murphy held the following with regard to the New Hampshire statute: "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 constitute a breach of the peace by the speaker."[164]

The problem with both Justice Murphy's reading for the Supreme Court of the United States and the New Hampshire Supreme Court's reading of the statute is that it plainly says otherwise. There was no statutory requirement that prosecution under the law was limited to offensive, derisive, or annoying words or names said with a plain tendency of exciting the addressee to engage in a breach of the peace. Indeed, according to the statute, all that was required was that one "address[ed] any offensive, derisive or annoying word" to another person or called someone by "any offensive or derisive name."[165] The statute contained no qualifier that such words had to be used in a way that threatened a breach of the peace. Thus, even speech that offends people other than the addressee could have been punished under the statute as it was worded, creating an overbreadth problem.[166]

Nevertheless, based on this interpretation of the New Hampshire statute, Justice Murphy found that the Court was "unable to say that the limited scope of the statute as thus construed contravenes the constitutional right of free expression."[167] Instead, he declared that the statute was "narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace."[168] Although Chaplinsky had argued that the statute was unconstitutionally vague, Justice Murphy wrote that this law was specific enough.[169]

Justice Murphy's deference to the New Hampshire Supreme Court notwithstanding, a plain reading of the statute shows that it had constitutional defects according to the Supreme Court of the United States's existing precedent in 1942.[170] Two relevant cases that Justice Murphy referenced in *Chaplinsky* were *Fox v. Washington* (1915) and *Lanzetta v. New Jersey* (1939).[171] In *Fox*, the Court upheld the following Washington statute:

> Every person who shall willfully [*sic*] print, publish, edit, issue, or knowingly circulate, sell, distribute or display any book, paper, document,

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163. *Id.* (quoting *Chaplinsky*, 18 A.2d at 762).
164. *Id.* (quoting *Chaplinsky*, 18 A.2d at 762).
165. *Id.* at 569.
166. Caine, *supra* note 5, at 464.
167. *Chaplinsky*, 315 U.S. at 573.
168. *Id.*
169. *Id.*
170. *Id.* at 572; *see* Fox v. Washington, 236 U.S. 273, 277 (1915); Lanzetta v. New Jersey, 306 U.S. 451, 457–58 (1939).
171. *Chaplinsky*, 315 U.S. at 574 n.8.

> or written or printed matter, in any form, advocating, encouraging or inciting, or having a tendency to encourage or incite the commission of any crime, breach of the peace, or act of violence, or which shall tend to encourage or advocate disrespect for law or for any court or courts of justice, shall be guilty of a gross misdemeanor.[172]

The Court in *Fox* said this statute was "confined to encouraging an actual breach of law. Therefore[,] the argument that this act is both an unjustifiable restriction of liberty and too vague for a criminal law must fail."[173] In *Chaplinsky*, Justice Murphy relied upon *Fox* to find that a "statute punishing verbal acts, carefully drawn so as not unduly to impair liberty of expression, is not too vague for a criminal law."[174] However, the relevant statute in *Fox* placed restrictions on speech *only* if it would specifically lead, or tend to lead, to incitement, a breach of the peace, or similar scenarios.[175] No such qualifier was written into the New Hampshire statute used to prosecute Chaplinsky.

As for *Lanzetta*, that case dealt with a New Jersey law that stated:

> Any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime, in this or in any other State, is declared to be a gangster.[176]

In striking down this statute as unconstitutionally vague, the *Lanzetta* Court declared that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."[177] The Court in *Lanzetta* found a defect in the statute because it only defined a gang as a group "consisting of two or more persons" when no other state law defined the word.[178] Even though *Lanzetta* was not a free speech case, in a footnote in *Chaplinsky*, Justice Murphy distinguished the law in *Lanzetta* from the New Hampshire law in *Chaplinsky* because the New Hampshire Supreme Court had previously interpreted that law to apply only if it involved provocation to violence.[179] In arrogant fashion, Justice Murphy

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172. *Fox*, 236 U.S. at 275–76.

173. *Id.* at 277.

174. *Chaplinsky*, 315 U.S. at 574.

175. The facts of *Fox* suggest, though, that there was no actual or threat of incitement, as the articles that led to criminal prosecutions in *Fox* were advocating for a boycott of businesses owned by people who had notified law enforcement about nude sunbathing activity. G. Edward White, *Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension*, 80 CALIF. L. REV. 391, 402 (1992).

176. Lanzetta v. New Jersey, 306 U.S. 451, 452–53 (1939).

177. *Id.* at 453 (quoting Connally v. Gen. Const. Co., 269 U.S. 385, 391 (1926)).

178. *Id.* at 453–54.

179. *Chaplinsky*, 315 U.S. at 574 n.8.

declared that, unlike Lanzetta, Chaplinsky "need not therefore have been a prophet to understand what the statute condemned."[180]

Justice Murphy's distinguishing of *Lanzetta* is less than convincing. In some ways, the New Jersey statute in *Lanzetta* was actually better defined than the New Hampshire statute in *Chaplinsky*. The *Lanzetta* statute gave a numerical definition to how many persons needed to be in a gang. The statute from *Chaplinsky*, however, simply prohibited the use of offensive, derisive, or annoying words or names to other persons without defining those terms. All told, both *Chaplinsky* and *Lanzetta* dealt with statutes that were too vague to meet constitutional requirements.[181] Thus, it was rather disingenuous for Justice Murphy to declare that Chaplinsky did not need to be a "prophet" to know what the law prohibited. For this rather colorful characterization, Justice Murphy cited the fact that the New Hampshire Supreme Court had interpreted this statute in a limiting way in *State v. Brown*.[182] Granted, American law, especially in 1942, had long held true to the maxim that "ignorance of the law does not excuse."[183] However, before the Justices had decided *Chaplinsky*, the Court had begun carving out exceptions to that general rule.[184] Even if the rule should have been applied to *Chaplinsky*, Justice Murphy's tone that one does not have to be a "prophet" was rather dismissive, given the facts of the case. Indeed, the *Brown* case was decided in 1894, forty-six years before Chaplinsky took to the Rochester street on that fateful day and before Chaplinsky was even born; Chaplinsky had also just moved to the state the year prior to when the material events in the case occurred.[185] Thus, it is difficult to believe that Chaplinsky was aware of this one, rather obscure, state appellate court precedent.

E. The Application of the Fighting Words Doctrine to Chaplinsky's Speech

The above subsections notwithstanding, if we assume for the moment that fighting words are a category of expression that may be prohibited under the First Amendment, if we assume that the Court's definition of fighting words announced in 1942 was not vague or overbroad, and if we assume that the relevant New Hampshire statute was constitutional as it was written, there is still the question of the application of that statute to Walter Chaplinsky. The final task that Justice Murphy undertook for the Court in the case was to

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180. *Id.*

181. *See* Jonathan A. Weiss, *A Road Not Taken*, 26 SETON HALL LEGIS. J. 415, 426–29 (2002).

182. *Chaplinsky*, 315 U.S. at 574 n.8.

183. Sharon L. Davies, *The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance*, 48 DUKE L.J. 341, 342–43 (1998).

184. *See* United States v. Murdock, 290 U.S. 389, 396 (1933) (interpreting a requirement that one acted "willfully" as an indication that "Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability . . . should become a criminal by his mere failure to measure up to the prescribed standard of conduct").

185. *See Chaplinsky*, 315 U.S. at 568.

determine if Chaplinsky's prosecution was constitutional.[186] In brief fashion, Justice Murphy found that the Court could not say that "the application of the statute to the facts disclosed by the record substantially or unreasonably impinges upon the privilege of free speech."[187] Without explanation, Justice Murphy simply concluded the following: "Argument is unnecessary to demonstrate that the appellations 'damned racketeer' and 'damned Fascist' are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace."[188]

Justice Murphy's, pithy account notwithstanding, argument *was* necessary to prove that Chaplinsky's prosecution was constitutional. Chaplinsky's speech to Bowering also had a larger political goal, in that he was remarking on the entire city government. Recall that in addition to calling Bowering "a God damned racketeer" and "a damned Fascist," Chaplinsky went on to claim that "the whole government of Rochester are Fascists or agents of Fascists."[189] In *Schneider v. State* (1939), the Court overturned restrictions on public handbill distribution under the guise that "the streets are natural and proper places for the dissemination of information and opinion."[190] And in *Hague v. Committee for Industrial Organization* (1939), the Court reasoned that "streets and parks . . . have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[191] If Chaplinsky was trying to make a larger political point about the tactics of the city government and his disdain for them, then he was engaging in the dissemination of opinion and the discussion of public questions in what eventually came to be known as a traditional public forum, where discrimination on the basis of viewpoint requires at least strict scrutiny.[192] *Schneider* and *Hague* suggest that his speech on these matters should have been protected in this context in 1942.[193]

If we accept for the sake of argument that Chaplinsky's expression was not a speech on public matters protected by case law existing in 1942, there remain concerns with finding his speech to be fighting words according to the definition given by the Court in the case. No breach of the peace occurred after Chaplinsky said those now infamous words, undercutting the assertion that what he said should have qualified as fighting words. The use of the words "God damned," "damned," and "Fascists" raises questions as well, as those hardly seem to be the most serious words one could use to cause one to

186. *Id.*
187. *Id.* at 574.
188. *Id.*
189. State v. Chaplinsky, 18 A.2d 754, 757 (N.H. 1941).
190. Schneider v. New Jersey, 308 U.S. 147, 163 (1939).
191. Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939).
192. Barbara S. Gaal, *A Unitary Approach to Claims of First Amendment Access to Publicly Owned Property*, 35 STAN. L. REV. 121, 125 (1982).
193. *Id.* at 125 & n.28.

fight,[194] even when the country was fighting fascist governments during World War II. Furthermore, Justice Murphy ultimately may have made a mistake in capitalizing the word "Fascists" in the Court's opinion, as it was likely that Chaplinsky was referring hyperbolically to "fascist" government officials taking oppressive action, and *not* identifying Bowering or other police as being in a league with the Fascist Party of Italy or the German Nazi Party.[195] Moreover, Chaplinsky was effectively in police custody at the time according to contemporary standards, in that he clearly had been deprived of his freedom in a significant way.[196] If he was being held against his will, it raises questions about his ability to instigate a true fight with his words.

Finally, if we apply the Court's fighting words test by asking what would cause an average addressee to fight, we need to ask why Marshal Bowering, or any other police officer in Chaplinsky's presence, would be categorized as an "average addressee."[197] Police officers must, as a part of their employment, deal with more difficult situations, persons who are angry and distraught, and a type of language that goes well beyond what the "average" person could be expected to endure.[198] As explained years later by Justice Powell, "a properly trained officer may reasonably be expected to 'exercise a higher degree of restraint' than the average citizen, and thus be less likely to respond belligerently to 'fighting words.'"[199] Thus, the language used by Chaplinsky was probably not even a form of fighting words when he uttered them to a police officer, casting more doubt on the Court's decision in the case.

IV. THE EVOLUTION OF FIRST AMENDMENT JURISPRUDENCE SINCE *CHAPLINSKY* HAS RAISED SIGNIFICANT CONCERNS ABOUT THE COHERENCE OF THE FIGHTING WORDS DOCTRINE

Based on the case law available in 1942, the fighting words standard announced by the Court in *Chaplinsky* was questionable at best. Indeed, there were several relevant constitutional law cases decided prior to *Chaplinsky* that lead to the conclusion that the Court greatly mismanaged the case and ultimately should have decided it differently at the time. Beyond that problem, however, one can examine the relevant body of case law that has

194. See, for comparison, the words that the Supreme Court of the United States found to be unprotected when broadcast over the radio in *Fed. Commc'ns Comm'n v. Pacifica Found.*, 438 U.S. 726, 751 (1978): "[S]hit, piss, fuck, cunt, cocksucker, motherfucker, and tits." See also the argument that racial and religious epithets constitute "a slap in the face" in ways that Chaplinsky's speech was not. Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 452 (1990).

195. Caine, *supra* note 5, at 446 n.12.

196. *See* Orozco v. Texas, 394 U.S. 324, 327 (1969).

197. Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942).

198. *See* Lewis v. New Orleans, 415 U.S. 130, 135 (1974) (Powell, J., concurring).

199. *Id.* (citation omitted).

developed since *Chaplinsky*. Doing this reveals a simple truth: The Supreme Court of the United States's current First Amendment jurisprudence accomplishes its necessary goals of preventing violence and protecting social order without needing to restrict so-called fighting words. Put another way, if the Court were first hearing *Chaplinsky* today, it would find that the relevant New Hampshire statute violated the Free Speech Clause, and that Chaplinsky's speech was constitutionally protected.

A. The Fighting Words Doctrine Has Been Limited Beyond Recognition by Developments in Vagueness & Overbreadth Doctrine

Since the *Chaplinsky* decision, the Court has expanded its application of vagueness and overbreadth.[200] Doing so has made applying the Fighting Words Doctrine untenable. For instance, only a few years after *Chaplinsky*, in *Winters v. New York* (1948), the Court struck down as too vague a law that prohibited the publication or distribution of publications that were "principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime."[201] According to the *Winters* Court, when vagueness concerns are called into question, "courts must do their best to determine whether or not the vagueness is of such a character 'that men of common intelligence must necessarily guess at its meaning.'"[202] Furthermore, that Court explained that "[w]here a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained."[203] In *Winters*, the Court found that because the statute in question was written in such broad language, it did "not limit punishment to the indecent and obscene, as formerly understood," thus raising overbreadth concerns as well.[204] The law at issue in *Chaplinsky* had similar defects to the law at issue in *Winters*. Just as the law in *Winters* was not limited to the obscene, in *Chaplinsky* the prohibition on using any "offensive, derisive, or annoying word to any other person" was not limited even to what the Court characterized as fighting words.[205] Beginning with *Winters*, the Court started using more scrutiny in judging the vagueness of statutes in First Amendment cases.[206] As the Court noted in *Grayned v. City of Rockford* (1972), "where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms', it 'operates to inhibit the exercise of

200. *See* Stuart Buck & Mark L. Rienzi, *Federal Courts, Overbreadth, and Vagueness: Guiding Principles for Constitutional Challenges to Uninterpreted State Statutes*, 2002 UTAH L. REV. 381, 384–90 (2002).

201. Winters v. New York, 333 U.S. 507, 508 (1948).

202. *Id.* at 518 (citation omitted).

203. *Id.* at 520 (citation omitted).

204. *Id.* at 519.

205. *Supra* note 46 and accompanying text (quoting the prohibition in New Hampshire).

206. Buck & Rienzi, *supra* note 200, at 389–90 (discussing the difference of application by the Court over time).

[those] freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."[207]

Gooding v. Wilson (1972) demonstrates similar problems with vagueness and overbreadth for statutes like the one at issue in *Chaplinsky*.[208] It also shows how these concerns began to chip away at the Fighting Words Doctrine thirty years after its establishment. Johnny Wilson was taking part in a Vietnam War protest at a U.S. Army building.[209] When Army inductees arrived at the building, Wilson and other demonstrators blocked their access, which led to police officers attempting to remove them from the entrance.[210] While a police officer was trying to reestablish access to the doorway, Wilson said to the officer, "White son of a bitch, I'll kill you" and "You son of a bitch, I'll choke you to death."[211] Wilson proceeded to tell another officer, "You son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces."[212] Wilson was convicted under a Georgia statute that prohibited "without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace."[213] Although the *Gooding* Court affirmed *Chaplinsky* and the Fighting Words Doctrine as good law, the Court struck down the Georgia law because a "statute must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression."[214] The Court in *Gooding* found that the language prohibited—opprobrious or abusive language—went beyond fighting words:

> The dictionary definitions of "opprobrious" and "abusive" give them greater reach than "fighting" words. *Webster's Third New International Dictionary* (1961) defined "opprobrious" as "conveying or intended to convey disgrace," and "abusive" as including "harsh insulting language." Georgia appellate decisions have construed § 26[-]6303 to apply to utterances that, although within these definitions, are not "fighting" words as *Chaplinsky* defines them.[215]

Finally, the *Gooding* Court found that the way the Georgia Supreme Court interpreted the phrase "breach of the peace" included "words offensive to

207. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) (internal quotations omitted) (quoting Cramp v. Bd. of Pub. Instruction, 368 U.S. 278, 287 (1961), then Baggett v. Bullitt, 377 U.S. 360, 372 (1964)).

208. *See* Gooding v. Wilson, 405 U.S. 518, 522 (1972).

209. *Id.* at 519 n.1.

210. *Id.*

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

212. *Id.* (Blackmun, J., dissenting).

213. *Id.* at 519.

214. *Id.* at 522–23.

215. *Id.* at 525 (emphasis added).

some who hear them, and so sweeps too broadly."[216] The Court in *Gooding* drew this conclusion even if Wilson's actual language could be constitutionally prohibited under a properly narrowed law: "It matters not that the words appellee used might have been constitutionally prohibited under a narrowly and precisely drawn statute."[217] This was true, according to the Court, because of the threat of a chilling effect with a vague and overbroad statute: "[P]ersons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression."[218]

Comparing *Chaplinsky* to *Gooding* raises questions about the continued validity of the *Chaplinsky* decision. The language used by Chaplinsky to law enforcement was clearly of a less threatening nature than what Wilson uttered to police. Indeed, Wilson's speech appeared to better fit the definition of fighting words described in *Chaplinsky* than what Chaplinsky said.[219] As for the New Hampshire statute at issue in *Chaplinsky*, it prohibited use of offensive, derisive, and annoying words and names.[220] As the Court noted in *Gooding*, offensive language is too broad of a category to be prohibited under the First Amendment. As for "derisive," the noun relative to this adjective, "derision," is defined by the dictionary as "the use of ridicule or scorn to show contempt."[221] "Annoy" is defined as "to disturb or irritate especially by repeated acts" and "to harass especially by quick brief attacks."[222] These terms bear great resemblance to the "opprobrious" and "abusive" language found unconstitutionally overbroad in *Gooding*. Although the Georgia Supreme Court failed to offer a limiting interpretation on its statute the way the New Hampshire Supreme Court did in *Chaplinsky*,[223] the Georgia law specifically required the speech to cause a breach of the peace for it to be criminal; as noted above, the New Hampshire statute had no such requirement. At the very least, the Georgia statutory language should have placed it on par with the New Hampshire Supreme Court's ruling as interpreted by the Supreme Court of the United States, thus leading to the conclusion that the same outcome was warranted in both *Chaplinsky* and

216. *Id.* at 527.

217. *Id.* at 520.

218. *Id.* at 521.

219. Kevin Francis O'Neill, *A First Amendment Compass: Navigating the Speech Clause with a Fire-Step Analytical Framework*, 29 SW. U. L. REV. 223, 280 (2000).

220. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 569 (1942).

221. *Derision*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/derision (last visited May 14, 2021) (emphasis omitted).

222. *Annoy*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/annoy (last visited May 14, 2021).

223. *Gooding*, 405 U.S. at 524.

Gooding.[224] Instead, the *Gooding* Court found the relevant law to be unconstitutional without overruling *Chaplinsky*.[225]

Lewis v. City of New Orleans (1974) saw the Court likewise declare that a relevant statute was unconstitutionally vague and overbroad.[226] During a traffic stop, the motorist who was detained by a police officer referred to him as "you god damn m[other]f[ucking] police" and said she would "see" the police superintendent "about this."[227] Lewis was convicted of violating the following city ordinance: "It shall be unlawful and a breach of the peace for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty."[228] Following their decision in *Gooding* two years earlier, the Court in *Lewis* found the New Orleans ordinance to be vague and overbroad, as there was no "meaningful attempt to limit or properly define" any of the terms in the state law.[229] According to the *Lewis* Court, the "speech, although vulgar or offensive[,] . . . is protected by the First and Fourteenth Amendments."[230] While the Court in *Lewis* again upheld *Chaplinsky* and the Fighting Words Doctrine, it struck down a statute that was similar in language to the one in *Chaplinsky*, and it found constitutional protection in language that was similar in tone—and offered to a police officer—just like in *Chaplinsky*.[231] *Lewis* is another case where the Court could have bolstered its Fighting Words Doctrine case law, but instead again chose to move toward protecting more expression.[232]

The notion that unkind expression directed at law enforcement officers, like Marshal Bowering, receives significant First Amendment protection was confirmed in *Houston v. Hill* (1987), where the Court struck down as overbroad an ordinance that banned "willfully or intentionally interrupt[ing] a city policeman . . . by verbal challenge during an investigation."[233] The case arose when Hill noticed a friend being spoken to by two police officers, and Hill shouted to one of the officers, named Kelley, "Why don't you pick on somebody your own size?"[234] When Officer Kelley asked if Hill was attempting to interrupt him in the performance of his duties, Hill responded, "Yes, why don't you pick on somebody my size?"[235] As described by the Court in *Hill*, the ordinance was overbroad because it "criminalize[d] a

224. Caine, *supra* note 5, at 461–63.
225. The Court in *Gooding* favorably cited *Chaplinsky* several times. *Gooding*, 405 U.S. at 522–25, 528.
226. Lewis v. City of New Orleans, 415 U.S. 130, 134 (1974).
227. *Id.* at 138 (Blackmun, J., dissenting).
228. *Id.* at 132.
229. *Id.* at 133.
230. *Id.* at 134.
231. *Id.* at 132–33.
232. O'Neill, *supra* note 219, at 256.
233. City of Houston v. Hill, 482 U.S. 451, 454 (1987).
234. *Id.* at 453–54.
235. *Id.* at 454.

substantial amount of constitutionally protected speech, and accord[ed] the police unconstitutional discretion in enforcement."[236] Instead, the *Hill* Court reasoned that "the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers."[237] Put even more directly, the Court proclaimed that "[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state."[238]

Although the Court in *Hill* again declined to overrule *Chaplinsky*, a comparison of the cases—like a comparison of *Gooding* and *Lewis* to *Chaplinsky*—is striking.[239] Hill's language, where he was shouting at Officer Kelley to "pick on" him, implies more of an intent to start a fight than the name-calling Chaplinsky engaged in against Marshal Bowering. Hill's assertiveness was done while he was walking freely, indicating that his ability to engage in a fight with Officer Kelley was greater than Chaplinsky's assertiveness, as Chaplinsky was already in Marshal Bowering's custody. *Hill* is yet another case that demonstrates the Court's willingness to use vagueness or overbreadth grounds to overturn a law aimed at prohibiting fighting words.[240]

Similarly, *Texas v. Johnson* (1989) saw the Court strike down a law that prohibited flag desecration.[241] In doing so, it overturned the conviction of Gregory Lee Johnson for burning an American flag as part of a political protest outside of the 1984 Republican National Convention.[242] Texas justified its flag desecration law in part because it claimed that it furthered the state interest of preventing breaches of the peace,[243] the same goal at issue in *Chaplinsky*.[244] Writing for the Court, Justice William Brennan found that although the law was purportedly aimed at preventing breaches of the peace, "no disturbance of the peace actually occurred or threatened to occur because of Johnson's burning of the flag."[245] He further explained for the Court that "we have not permitted the government to assume that every expression of a provocative idea will incite a riot, but have instead required careful consideration of the actual circumstances surrounding such expression."[246] As in past breach of the peace cases, Justice Brennan cited *Chaplinsky* and spoke favorably of the Fighting Words Doctrine, declaring that "[n]o

236. *Id.* at 466.
237. *Id.* at 461.
238. *Id.* at 462–63.
239. *Id.* at 463 n.12.
240. R. Randall Kelso, *The Structure of Modern Free Speech Doctrine: Strict Scrutiny, Intermediate Review, and "Reasonableness" Balancing*, 8 ELON L. REV. 291, 342 (2016).
241. Texas v. Johnson, 491 U.S. 397, 420 (1989).
242. *Id.* at 399.
243. *Id.* at 400.
244. Chaplinsky v. New Hampshire, 315 U.S. 568, 572–74 (1942).
245. *Johnson*, 491 U.S. at 408.
246. *Id.* at 409.

reasonable onlooker would have regarded Johnson's generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange fisticuffs."[247]

Johnson was another case where the Court gave lip service to *Chaplinsky*, refusing to overrule it but simultaneously finding it inapplicable. Chief Justice Rehnquist noted this in his dissent, where he approvingly discussed *Chaplinsky* at length and asserted his view that, reminiscent of the *Chaplinsky* Court's reasoning and language, "the public burning of the American flag by Johnson was no essential part of any exposition of ideas, and at the same time it had a tendency to incite a breach of the peace."[248] Chief Justice Rehnquist cited the fact that several state supreme courts had "upheld state statutes prohibiting the public burning of the flag on the grounds that it is so inherently inflammatory that it may cause a breach of public order."[249] Chief Justice Rehnquist's line of argument reflects a position that sought to uphold and employ the Fighting Words Doctrine.[250] Justice Brennan's opinion of the Court indicates that saying words or engaging in symbolic speech that may *tend* to cause a breach is constitutionally protected, because the Court refused to uphold Johnson's conviction for inflammatory speech when no breach of the peace actually occurred.[251] Such an analysis by the majority effectively tears out a key part of *Chaplinsky*'s analysis—that fighting words include those which "*tend* to incite an immediate breach of the peace"—if the measure is whether an *actual* breach of the peace occurred or is truly threatened.[252] This is especially true if states with flag desecration statutes had made findings that such breaches are likely. In this way, the Court's opinion in *Johnson* implies that the language of the fighting words test itself may be overbroad. Although Chief Justice Rehnquist was wrong to stand by *Chaplinsky* as a precedent, he was correct to see that the Court in *Johnson* was not truly adhering to it.[253] After all, if we follow the logic of the majority in *Johnson*, there was no realistic threat that Chaplinsky was going to provoke a riot based on his use of language and that he was effectively already in police custody.

The Supreme Court of the United States's jurisprudence on First Amendment overbreadth and vagueness—and the ultimate concern with the chilling effect that these types of laws can have—continues in more recent years. [254] In *Reno v. ACLU* (1997), the Court noted that "[t]he vagueness

247. *Id.*

248. *Id.* at 430–32 (Rehnquist, C.J., dissenting).

249. *Id.* at 431 (Rehnquist, C.J., dissenting).

250. D. Wes Sullenger, *Burning the Flag: A Conservative Defense of Radical Speech and Why It Matters Now*, 43 BRANDEIS L.J. 597, 661 (2005).

251. *Johnson*, 491 U.S. at 420.

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

253. *See* Jerome O'Callaghan, *Pornography and Group Libel: How To Solve the* Hudnut *Problem*, 27 NEW ENG. L. REV. 363, 369 n.43 (1992).

254. Richard H. Fallon Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 855 (1991).

of . . . a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech."[255] According to *United States v. Williams* (2008), "[a] statute is facially invalid if it prohibits a substantial amount of protected speech . . . the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas."[256] Likewise, in *United States v. Stevens* (2010), the Court reasoned that "[i]n the First Amendment context, a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep."[257] With regard specifically to vagueness, in *FCC v. Fox Television Stations, Inc.* (2012) the Court explained that:

> The void for vagueness doctrine addresses at least two connected but discrete due process concerns: Regulated parties should know what is required of them so they may act accordingly; and precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.[258]

These First Amendment cases over the last quarter century demonstrate a narrowing of *Chaplinsky* on overbreadth and vagueness grounds that has been characterized as "near-absolutist" on these questions.[259]

In sum, a litany of Supreme Court precedents since *Chaplinsky* leads to the conclusion that the law at issue in the case was too vague and overbroad according to contemporary First Amendment standards. Given the similarity of the New Hampshire law to those that the Court has repeatedly struck down since *Chaplinsky*, it is difficult to see how these general prohibitions on fighting words could ever be construed to be constitutional by the contemporary Court. However, that prospect raises an important question: Could a state or local government write a more specific law that is truly limited to fighting words and have it upheld as constitutional? The answer, revealed in the next section, appears to be no.

B. The Fighting Words Doctrine Faces Viewpoint and Content Discrimination Problems

The Supreme Court of the United States has long held that viewpoint discrimination and content discrimination pose significant risks to the

255. Reno v. ACLU, 521 U.S. 844, 871–72 (1997).
256. United States v. Williams, 553 U.S. 285, 292 (2008).
257. United States v. Stevens, 559 U.S. 460, 473 (2010) (internal quotation omitted).
258. FCC v. Fox Television Stations, Inc., 567 U.S. 239, 253 (2012).
259. Ronald K.L. Collin, *Exceptional Freedom—The Roberts Court, the First Amendment, and the New Absolutism*, 76 ALB. L. REV. 409, 428 (2013).

freedom of expression and are generally disfavored.[260] In *Police Department of Chicago v. Mosley* (1972), the Court ruled that, under the First Amendment, the "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities."[261] Similarly, in *Regan v. Time, Inc.* (1984), the Court held that "[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment."[262] In *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board* (1991), the Court declared that "the government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace."[263] According to the Court in *Rosenberger v. Rectors & Visitors of the University of Virginia* (1995), although content discrimination may raise constitutional problems, "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant."[264] More recently, in *Matal v. Tam* (2017), the Court ruled that in a limited public forum (and, by extension, in a traditional public forum as well),[265] "what we have termed 'viewpoint discrimination' is forbidden."[266]

The Court's rulings on content discrimination can be understood in more depth by examining how the Justices ruled in *Boos v. Barry* (1988), where the Court examined a law that banned the display of signs within five hundred feet of a foreign embassy in Washington, D.C. if the sign brought a foreign government into "public odium" or "public disrepute."[267] In striking down this provision, the Court ruled that "a content-based restriction on political speech in a public forum . . . must be subjected to the most exacting scrutiny," requiring the government "to show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'"[268] As will be explained in more detail below, even expression outside of First Amendment protection—including fighting words—cannot be prohibited or punished in a way that discriminates on content.[269] This

260. *See* Kent Greenfield, *Trademarks, Hate Speech, and Solving a Puzzle of Viewpoint Bias*, 2019 SUP. CT. REV. 183, 183–84 (2019).

261. Police Dep't of Chi. v. Mosley, 408 U.S. 92, 96 (1972).

262. Regan v. Time, Inc., 468 U.S. 641, 648–49 (1984).

263. Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991).

264. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).

265. Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 46 (1983) (explaining that when the government chooses to open a limited public forum, "it is bound by the same standards as apply in a traditional public forum").

266. Matal v. Tam, 137 S. Ct. 1744, 1763 (2017).

267. Boos v. Barry, 485 U.S. 312, 315 (1988).

268. *Id.* at 321 (quoting *Perry Educ. Ass'n*, 460 U.S. at 45).

269. Edward J. Eberle, *Hate Speech, Offensive Speech, and Public Discourse in America*, 29 WAKE FOREST L. REV. 1135, 1138 (1994).

development in recent decades causes one to pause regarding the upholding of Chaplinsky's conviction, as his speech was arguably targeted because it touched on matters of public affairs and the conduct of the police.

More to the point, the Court has found that going beyond content discrimination to viewpoint discrimination typically creates insurmountable constitutional defects, as viewpoint discrimination is an even more disfavored form of content discrimination.[270] Indeed, viewpoint discrimination either requires strict scrutiny or is invalid *per se*.[271] *Texas v. Johnson* is one of two instructive cases on this point. Recall that this was ultimately a fighting words case, with the state aiming to prevent a breach of the peace by prohibiting the expression in question.[272] However, in doing so, Texas had narrowed its statute to a particular viewpoint: burning the flag in a way that expressed "dissatisfaction with the policies of this country."[273] The Court discerned that burning the flag while expressing another viewpoint would have been protected, as "federal law designates burning as the preferred means of disposing of a flag 'when it is in such condition that it is no longer a fitting emblem for display.'"[274] Texas admitted in its brief for the Court that it had "no quarrel with this means of disposal."[275] Thus, if Johnson "had burned the flag as a means of disposing of it because it was dirty or torn, he would not have been convicted of flag desecration."[276] If a law provides protection for an expressive act undertaken when communicating one view, but that law punishes the same expressive act when conveying another view, it is a quintessential example of viewpoint discrimination.[277] That the state cannot prohibit expressive conduct it believes will tend to breach the peace when articulating one viewpoint leads to a significant problem for continuing adherence to *Chaplinsky*, as it means that if the state prohibits too *little* expression when it comes to fighting words, it is violating the First Amendment.[278]

R.A.V. v. City of St. Paul (1992) leaves no doubt that this is the understanding the modern Court has regarding viewpoint/content discrimination and fighting words.[279] The case involved a group of teenagers who fashioned a cross out of legs from a wooden chair.[280] They then placed

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270. *Id.* at 1143.

271. Joshua D. Rosenberg & Joshua P. Davis, *From Four Part Tests to First Principles: Putting Free Speech Jurisprudence into Perspective*, 86 ST. JOHN'S L. REV. 833, 4842 (2012).

272. Texas v. Johnson, 491 U.S. 397, 411 (1989).

273. *Id.*

274. *Id.* (quoting 36 U.S.C. § 176(k)).

275. *Id.*

276. *Id.*

277. Nicole B. Casarez, *Public Forums, Selective Subsidies, and Shifting Standards of Viewpoint Discrimination*, 64 ALB. L. REV. 501, 510 (2000).

278. CHEMERINSKY & GILLMAN, *supra* note 6, at 95.

279. *See* R.A.V. v. St. Paul, 505 U.S. 377, 379 (1992).

280. *Id.* at 379.

the cross in the yard of an African American family and burned it.[281] R.A.V. (a juvenile) was charged with violating the St. Paul Bias-Motivated Crime Ordinance, which stated the following:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.[282]

The Court found the ordinance to be imposing an unconstitutional form of viewpoint discrimination.[283] Writing for the Court, Justice Scalia declared that, according to the ordinance, "[d]isplays containing some words—odious racial epithets, for example—would be prohibited to proponents of all views."[284] However, Justice Scalia went on to reason that under the ordinance, the following was also true:

> But "fighting words" that do not themselves invoke race, color, creed, religion, or gender—aspersions upon a person's mother, for example—would seemingly be usable *ad libitum* in the placards of those arguing *in favor* of racial, color, etc., tolerance and equality, but could not be used by those speakers' opponents. One could hold up a sign saying, for example, that all "anti-Catholic bigots" are misbegotten; but not that all "papists" are, for that would insult and provoke violence "on the basis of religion."[285]

According to Justice Scalia, this one-sidedness constitutes unconstitutional viewpoint discrimination: "St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules."[286]

Justice Scalia specifically explained in *R.A.V.* that viewpoint discrimination is unconstitutional even for fighting words, which themselves, according to precedents that date back to *Chaplinsky*, receive no constitutional protection. As Justice Scalia put it, "the exclusion of 'fighting words' from the scope of the First Amendment simply means that, for purposes of that Amendment, the unprotected features of the words are, despite their verbal character, essentially a 'nonspeech' element of communication."[287] Thus, according to the Court, even with fighting words, "[t]he government may not regulate use based on hostility—or favoritism—

281. *Id.*
282. *Id.* at 380.
283. *Id.* at 391.
284. *Id.*
285. *Id.* at 391–92.
286. *Id.* at 392.
287. *Id.* at 386.

towards the underlying message expressed."[288] Although Justice Byron White's concurrence in *R.A.V.* employed a much more straightforward overbreadth analysis to find the law unconstitutional, the opinion of the Court made clear that a law targeting the views of just some fighting words but not others was unconstitutional.[289] This was true even though the only forms of fighting words being banned were some of the most prejudicial and vile.[290]

More broadly, Justice Scalia confirmed for the Court in *R.A.V.* that content discrimination was unconstitutional with fighting words. As a general proposition, he declared for the Court that "[c]ontent-based regulations are presumptively invalid."[291] As Justice Scalia explained, it "is not true that 'fighting words' have at most a '*de minimis*' expressive content . . . sometimes they are quite expressive indeed. We have not said that they constitute '*no* part of the expression of ideas,' but only that they constitute 'no *essential* part of any exposition of ideas.'"[292] Although this statement somewhat confusingly seems to at least partially contradict what Scalia stated elsewhere in *R.A.V.*—that fighting words are excluded from the scope of the First Amendment[293]—it is also a direct recognition of what the Court's precedents have been hinting at for decades: there is some First Amendment value in fighting words.[294] Accordingly, for Scalia, "the First Amendment imposes . . . a 'content discrimination' limitation upon a State's prohibition of proscribable speech."[295] Putting aside the problem of determining in what way fighting words receive protection when they are no "essential" part of the exposition of ideas (which was the reason the Court declined to give them constitutional protection in *Chaplinsky*), what is clear from *R.A.V.* is that both content and viewpoint discrimination is forbidden even for speech deemed unprotected, such as fighting words.[296]

Returning to Chaplinsky, it is likely that the speech he used—and the viewpoints he expressed—were at issue in the case, and it was his viewpoint that led to his prosecution. Consider again the language he used, calling Marshal Bowering "a God damned racketeer" and "a damned Fascist."[297] *R.A.V.*'s reasoning is in line with Court precedent that offensive expression aimed at law enforcement, by itself, is not adequate to sustain a criminal conviction under the First Amendment.[298] Consider, for instance, someone

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288. *Id.*
289. *Id.* at 411–14 (White, J., concurring).
290. Casarez, *supra* note 277, at 520.
291. *R.A.V.*, 505 U.S. at 382.
292. *Id.* at 384–85.
293. *Id.* at 386.
294. Mannheimer, *The Fighting Words Doctrine*, *supra* note 22, at 1548.
295. *R.A.V.*, 505 U.S. at 387.
296. Casarez, *supra* note 277, at 520 (discussing the implications of content and viewpoint discrimination).
297. State v. Chaplinsky, 18 A.2d 754, 758 (N.H. 1941).
298. Ira P. Robbins, *Digitus Impudicus: The Middle Finger and the Law*, 41 U.C. DAVIS L. REV. 1403, 1453 (2008).

displaying a middle finger to a law enforcement officer; although the First Amendment protection for this expressive conduct has never been explicitly decided by the Supreme Court of the United States, that expression has generally been ruled to be constitutionally protected in lower court decisions.[299] To the Court's reasoning in *R.A.V.*, if Chaplinsky had uttered the same words (God damned and Fascist) but was doing so while referring to someone *other* than the police who were escorting him, it is difficult to believe that he would have been charged with violating the relevant statute. If Chaplinsky had expressed the same level of anger while calling Marshal Bowering something positive, such as a "pious patriot," it is equally likely that he would not have been prosecuted. And to the reasoning in *Johnson*, given that Chaplinsky expressed an anti-government message (referring in the same statement to "the whole government of Rochester" as "Fascists or agents of Fascists"), it was his viewpoint about government affairs that was at issue as well.[300] Thus, one can easily argue that Chaplinsky was prosecuted precisely because of the content of his speech and the views he expressed, particularly when the likelihood that police officers should have been expected to respond with violence would have been very low.

This analysis of viewpoint discrimination goes to the heart of the problem with the Fighting Words Doctrine. If the same tone, inflection, and volume of language constitutes fighting words when expressing one viewpoint—but they are *not* fighting words when expressing another viewpoint—that is a violation of the First Amendment according to *R.A.V.*, regardless of whether it is written into the statute or that is how the statute is applied.[301] But the views being expressed are precisely what fighting words do: they express some offensive, negative thought against the person who is the hearer.

This intersection of vagueness/overbreadth and viewpoint/content discrimination creates what Erwin Chemerinsky and Howard Gillman have referred to as a "Catch-22" in First Amendment law.[302] As they explain it, the Court strikes down general restrictions on fighting words because they are too vague and overbroad; at the same time, the Court strikes down laws that are more specific, narrower prescriptions on just some types of fighting words as impermissible content discrimination or viewpoint discrimination.[303] In this way, laws prohibiting fighting words are found unconstitutional because they prohibit *too much* expressive activity, but they are also found unconstitutional because they do *not* prohibit *enough* expressive activity![304] The Court has been unable to find a fighting words law

299. *See id.* at 1452–53.
300. *Chaplinsky*, 18 A.2d at 757.
301. R.A.V. v. St. Paul, 505 U.S. 377, 387 (1992).
302. CHEMERINSKY & GILLMAN, *supra* note 6, at 95.
303. *Id.*
304. *Id.*

that perfectly hits this Goldilocks target by prohibiting just the right amount of expression to be constitutional since it announced that fighting words were not protected in *Chaplinsky*. Part of the reason for this, as the next subsection reveals, is that much of the expression that was once considered to be fighting words is now protected as offensive speech.

C. The Court Has Found Protection for Offensive Speech (Including Profanity and Epithets), Thus Imploding the Fighting Words Doctrine

As much as the Catch-22 problem exists for fighting words with regard to finding the constitutional "sweet spot" between vagueness/overbreadth and viewpoint/content discrimination, a larger problem looms: since *Chaplinsky*, the Court has continually expanded protection for offensive speech. In the examples that follow, where the Court has found that the First Amendment protects the speech used, it could easily be categorized as the "offensive, derisive, or annoying" language prohibited by New Hampshire's statute that was upheld in *Chaplinsky*.[305] More to the point, one can easily argue that the words used by Chaplinsky pale in comparison to what was found to be protected speech in most of the cases that follow. Although there were a pair of non-fighting words cases in the early 1950s where the Court upheld restrictions on offensive speech due to the possibility that it could lead to a breach of the peace, the incredible weight of case law since that time has been on ever-expanding protections for this type of expression.[306] Indeed, just two years after the *Chaplinsky* Court discussed the need for speakers to be measured, lest they goad a listener into a fight, the Court in *Baumgartner v. United States* (1944) boldly declared that "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."[307]

The Court's trend toward protecting offensive expression began in earnest with *Terminiello v. Chicago* (1949), where Father Arthur Terminiello gave a speech to over 800 people in an auditorium, with more than 1,000 people gathered outside to protest.[308] According to the Court's description of Terminiello's speech, a "cordon of policemen was assigned to the meeting" because the "crowd outside was angry and turbulent," due to the fact that Terminiello "in his speech condemned the conduct of the crowd outside and vigorously, if not viciously, criticized various political and racial groups

305. *Chaplinsky*, 18 A.2d at 757.

306. *See* Feiner v. New York, 340 U.S. 315 (1951) (upholding a conviction of a man speaking in favor of racial equality while also engaging in comments disparaging of public officials and using rhetoric that urged audience members to rise up against those oppressing them); Beauharnais v. Illinois, 343 U.S. 250 (1952) (upholding an ordinance prohibiting group libel).

307. Baumgartner v. United States, 322 U.S. 665, 674 (1944).

308. Terminiello v. Chicago, 337 U.S. 1, 3 (1949).

whose activities he denounced as inimical to the nation's welfare."[309] Terminiello was convicted of disorderly conduct for a "breach of the peace."[310] The Court in *Terminiello* ultimately did not reach the question of whether Terminiello used fighting words because the Court found the jury instructions—which included a "breach of the peace" to include speech that "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance"—to be unconstitutional.[311] Again discovering an overbreadth problem, Justice Douglas wrote for the *Terminiello* Court that "a function of free speech under our system of government is to invite dispute."[312] He went on to explain for the Court that speech "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."[313] This approach to begin protecting speech that causes unrest, dissatisfaction, and even anger questions *Chaplinsky*'s notion that words that "inflict injury" are not constitutionally protected.[314] Indeed, in his *Terminiello* dissent, Justice Jackson commented how the language used by Chaplinsky was "mild in comparison to the epithets 'slimy scum,' 'snakes,' 'bedbugs,' and the like, which Terminiello hurled at an already inflamed mob of his adversaries."[315] Thus, less than a decade after *Chaplinsky*, language with a much greater threat of causing an actual breach of the peace, and that was much more injurious to those hearing it, was held to be protected expression by the Court.

The protection of offensive speech grew with *Street v. New York* (1969), where the Court overturned the conviction of Sidney Street for burning the American flag and speaking contemptuously about the flag.[316] After hearing a radio news broadcast announcing that civil rights activist James Meredith had been shot, Street took his American flag to a street corner and lit it on fire.[317] When a police officer arrived to find the burning flag, he overheard Street saying to other persons present that "[w]e don't need no damn flag."[318] When the officer then asked Street if he burned the flag, Street responded to the officer in the following way: "Yes; that is my flag; I burned it. If they let that happen to Meredith we don't need an American flag."[319] According to the Court, prosecuting Street for his expressive conduct and/or his words violated the First Amendment because "[i]t is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely

309. *Id.*
310. *Id.* at 2–3.
311. *Id.* at 4.
312. *Id.*
313. *Id.*
314. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).
315. *Terminiello*, 337 U.S. at 26 (Jackson, J., dissenting).
316. Street v. New York, 394 U.S. 576, 594 (1969).
317. *Id.* at 578.
318. *Id.* at 578–79.
319. *Id.* at 579.

because the ideas are themselves offensive to some of their hearers."[320] Thus, Street used some of the same words as Chaplinsky ("damn"), he said them in an aggressive manner to a police officer while he was *not* in custody (something that would have made him more of a danger than Chaplinsky, who was in police custody), and he combined this with the very controversial conduct of burning the American flag.[321] Nevertheless, his offensive speech was deemed to be protected by the First Amendment.[322] It was another case where the Court failed to sustain a conviction for using what were arguably fighting words according to *Chaplinsky*.[323]

The Court truly cemented offensive speech into the realm of protected expression in *Cohen v. California* (1971), a case that overturned the conviction of Paul Cohen for violating a California law that prohibited "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct."[324] Cohen's conviction was the result of him wearing a jacket bearing the words "Fuck the Draft" in large letters while in the Los Angeles County Courthouse.[325] In reversing Cohen's conviction, the Court distinguished the case from *Chaplinsky*, in that Cohen's use of the word "fuck" was not "directed to the person of the hearer."[326] According to the Court in *Cohen*, "[n]o individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult."[327] As much as Justice Harlan was struggling when writing for the Court to note how this case was different from *Chaplinsky*, the fact remains that Cohen's words were plainly visible to many more people—including parents present with children—than those who had heard Chaplinsky's invectives.[328] Even more to the point, after distinguishing the facts of *Cohen* from *Chaplinsky*, the Court in *Cohen* called into question *Chaplinsky's* idea that it is constitutional to ban certain words because of the ideas they express. According to Justice Harlan in *Cohen*, "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views."[329] Justice Harlan went on to challenge *Chaplinsky's* idea that there

320. *Id.* at 592. "[W]e find this record insufficient to eliminate the possibility either that appellant's words were the sole basis of his conviction or that appellant was convicted for both his words and his deed." *Id.* at 590.

321. *Id.* at 578–79.

322. *Id.* at 593–94.

323. *See* Robert M. O'Neil, *Hate Speech, Fighting Words, and Beyond – Why American Law Is Unique*, 76 ALB. L. REV. 467, 476–77 (2012).

324. Cohen v. California, 403 U.S. 15, 16 (1971).

325. *Id.*

326. *Id.* at 16, 20 (quoting Cantwell v. Connecticut, 310 U.S. 296, 309 (1940)).

327. *Id.*

328. *Id.* at 16.

329. *Id.* at 26.

can be fighting words that mean the same thing to all persons across the country, arguing that "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."[330] Finally, Justice Harlan, in *Cohen*, emphasized the importance of protecting all words because of the emotional impact of language: "[M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force."[331] The notion of words being protected because of their emotional impact goes directly against the idea of fighting words, which are supposed to have such emotional effect that they cause the listener to engage in violence. After all, anger is an emotion. Put in these terms, Justice Harlan's opinion in *Cohen* makes the Fighting Words Doctrine seem, at the very least, shortsighted.[332]

Three offensive speech cases the following year continued to destroy the coherence of the Fighting Words Doctrine. Recall the facts from *Gooding*, where the defendant's conviction was overturned even after he used language toward police officers that was extremely aggressive: "White son of a bitch, I'll kill you"; "You son of a bitch, I'll choke you to death"; and "You son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces."[333] These words were, as described by the Court, "vulgar or offensive," but they were still protected by the First Amendment.[334] Similarly, in *Rosenfeld v. New Jersey* (1972), the Court vacated the conviction of a man who was found guilty of violating a statute that prohibited speech, including when one "utters loud and offensive or profane and indecent language in any public street or other public place."[335] Rosenfeld's speech consisted of using the word "motherfucker" four different times at a public school board meeting that was attended by over 150 people, including approximately forty children.[336] There was no record of any children present when Chaplinsky uttered his now infamous phrases to Marshal Bowering. In *Brown v. Oklahoma* (1971), the court vacated a conviction under a state law prohibiting "any obscene or lascivious language or word in any public place, or in the presence of females."[337] The language for which Brown was convicted occurred when he addressed a large group

330. *Id.* at 25.

331. *Id.* at 26.

332. John F. Wirenius, *The Road Not Taken: The Curse of* Chaplinsky, 24 CAP. U. L. REV. 331, 358 (1995).

333. Gooding v. Wilson, 405 U.S. 518, 534 (1972) (Blackmun, J., dissenting).

334. *Id.* at 520.

335. Rosenfeld v. New Jersey, 408 U.S. 901, 910 (1972) (Rehnquist, J., dissenting).

336. *Id.*

337. Brown v. State, 492 P.2d 1106, 1107 (Okla. Crim. App. 1971), *vacated*, 408 U.S. 914 (1972); *see also* OKLA. STAT. tit. 21, § 906.

of people at the University of Tulsa chapel and called some police officers "mother-fucking fascist pig cops," and referred to one Tulsa police officer as a "'black mother-fucking pig.'"[338] All three of these cases involved the use of offensive speech, with *Gooding* and *Brown* specifically addressing particular police officers with language quite similar to that used by Chaplinsky. *Gooding* and *Brown* also involved the use of words that are clearly the types of "epithets or personal abuse" that *Chaplinsky* said could be constitutionally banned; they also seem to be much more serious and aggressive than "God damned racketeer" and "damned Fascist."[339] But unlike *Chaplinsky*, none of these convictions were sustained. All combined, *Gooding*, *Rosenfeld*, and *Brown* provided protection to speech that was directly insulting and shocking.[340]

Two years later, as noted above, the Court found similar offensive language directed at a particular police officer in *Lewis* to be constitutionally protected. Indeed, in that case, Lewis referred to the officer as a member of "[the] god damn [motherfucking] police."[341] The Court held that the First Amendment shielded the "vulgar or offensive" speech.[342] By the late 1980s, the Court in *Boos* explained that "[a]s a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide 'adequate "breathing space" to the freedoms protected by the First Amendment.'"[343] When declaring Johnson's conviction unconstitutional in *Texas v. Johnson*, the Court boldly stated the following about the protection of offensive speech: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[344] The *R.A.V.* Court affirmed that it is unconstitutional to target highly offensive racial epithets for punishment.[345]

The Court's strong protection of offensive speech has only broadened in the twenty-first century. *Snyder v. Phelps* (2011) overturned a jury verdict of damages for intentional infliction of emotional distress when the speech at

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338. *Brown*, 492 P.2d at 1107.

339. Chaplinsky v. New Hampshire, 315 U.S. 568, 569, 572 (1942) (quoting Cantwell v. Connecticut, 310 U.S. 269, 309–10 (1940)).

340. Mannheimer, *supra* note 22, at 1546–47 (discussing relevant First Amendment Supreme Court decisions).

341. Lewis v. City of New Orleans, 415 U.S. 130, 138 (1974) (Blackmun, J., dissenting).

342. *Id.* at 134.

343. Boos v. Barry, 485 U.S. 312, 322 (1988) (quoting Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 56 (1988)).

344. Texas v. Johnson, 491 U.S. 397, 414 (1989).

345. R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 391 (1992) (holding an ordinance was unconstitutional, in part, because under it, "[d]isplays containing some words—odious racial epithets, for example—would be prohibited to proponents of all views," even though "'fighting words' that do not themselves invoke race . . . would seemingly be usable *ad libitum* in the placards of those arguing *in favor* of racial, color, etc., tolerance and equality, but could not be used by those speakers' opponents").

issue was deemed to be on matters of public concern.[346] The case involved a lawsuit against Fred Phelps and other members of his Westboro Baptist Church after they picketed the funeral of Marine Lance Corporal Matthew Snyder, who was killed in action in Iraq.[347] According to the Court, the signs outside of Snyder's funeral stated the following: "'God Hates the USA/Thank God for 9/11,' 'America is Doomed,' 'Don't Pray for the USA,' 'Thank God for IEDs,' 'Thank God for Dead Soldiers,' 'Pope in Hell,' 'Priests Rape Boys,' 'God Hates Fags,' 'You're Going to Hell,' and 'God Hates You.'"[348] Although when driving to the funeral Snyder's father could only see the tops of these signs (and hence could not read them), he was able to read them while watching coverage of the protest later that evening during a local television station's news broadcast.[349] This led to Snyder's father filing a lawsuit against Phelps.[350] In holding that Phelps's speech was protected expression, Chief Justice John Roberts wrote for the Court that "[w]hile these messages may fall short of refined social or political commentary, the issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy—are matters of public import."[351] According to Chief Justice Roberts, "[s]uch speech cannot be restricted simply because it is upsetting or arouses contempt."[352] It was also protected expression, even though its messages were "certainly hurtful and its contribution to public discourse may be negligible."[353] In closing the Court's opinion, Chief Justice Roberts concluded as follows:

> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.[354]

Reading the Court's opinion in *Snyder* makes one consider how this same analysis, if it had been used in *Chaplinsky*, would have resulted in a different outcome in the earlier case. Recall again the statute upheld in *Chaplinsky*, which prohibited using "any offensive, derisive or annoying words to any other person lawfully in any street" or calling someone "by any

346. Snyder v. Phelps, 562 U.S. 443, 458–59 (2011).
347. *Id.* at 448.
348. *Id.* Although key letters were removed from one word above, the sign displayed at the funeral fully wrote out the homophobic slur.
349. *Id.* at 449.
350. *Id.*
351. *Id.* at 454.
352. *Id.* at 458.
353. *Id.* at 460.
354. *Id.* at 460–61.

offensive or derisive name."[355] Such a statute could not possibly be sustained by the *Snyder* Court. The signs in *Snyder* used language that was significantly more inflammatory than what was said by Chaplinsky. If Phelps's words were on matters of public concern, so were Chaplinsky's words, as he was focused on the performance of police officers and other local government officials. Finally, Chaplinsky's words cannot be said to be more hurtful than the anti-LGBTQ, anti-clergy, and damning messages directed at readers of those signs. Clearly, Phelps's words were hateful epithets and were more offensive than Chaplinsky's words. Just as Phelps's speech was protected by the First Amendment, the same should now be the case with Chaplinsky's expression.

For one other recent example of the Court's protection of offensive speech, one can examine *Matal v. Tam*. Simon Tam and his bandmates, all of whom are Asian Americans, wanted to register a federal trademark of their band's name: "The Slants."[356] The Patent and Trademark Office denied the application on the grounds that the term—which is derogatory to persons of Asian heritage[357]—violated federal law prohibiting trademark registration when it will "'disparage . . . or bring . . . into contemp[t] or disrepute' any 'persons, living or dead.'"[358] In finding that federal law to be unconstitutional, the Court held that "[s]peech may not be banned on the ground that it expresses ideas that offend."[359] Writing for the Court, Justice Alito affirmed in no uncertain terms that under the First Amendment viewpoint discrimination is forbidden, and offensive speech is protected, when he declared the following: "Giving offense is a viewpoint."[360]

These more contemporary cases can perhaps best be summed up in the Court's decision in *McCutcheon v. FEC* (2014), where the majority reasoned that what "may at times seem repugnant to some" includes speech that "the First Amendment vigorously protects," including "funeral protests, and Nazi parades—despite the profound offense such spectacles cause."[361] Even though such expression could easily have fallen into what the Court considered fighting words when *Chaplinsky* was decided, a long line of cases shows that the Court no longer relies on *Chaplinsky*'s assumption—based on notions of toxic masculinity—that the expected and even proper response to offensive speech is violence. Instead of responding with anger, rage, and violence—as the Court expected in *Chaplinsky*—the modern Court has noted in a variety of First Amendment contexts that the generally more appropriate response would be counter-speech.[362] If that is not a safe or desired outcome,

355. Chaplinsky v. New Hampshire, 315 U.S. 568, 569 (1942).
356. Matal v. Tam, 137 S. Ct. 1744, 1751 (2017).
357. *Id.*
358. *Id.* at 1747 (alterations in original)(quoting 15 U.S.C. § 1052(a)).
359. *Id.* at 1751.
360. *Id.* at 1763.
361. McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 191 (2014).
362. United States v. Alvarez, 567 U.S. 709, 726 (2012).

the listener or watcher has another, perhaps more powerful option. As expressed by the Court in *Cohen*, if vituperative language is used, one can "effectively avoid further bombardment of their sensibilities simply by averting their eyes" or ears, including by leaving.[363]

D. The Imminent Lawless Action Test & Bans on True Threats Accomplish the Goals the Fighting Words Doctrine Was Designed to Achieve

Overruling *Chaplinsky* and abandoning the Fighting Words Doctrine would not mean permitting any and all expression that would directly lead to violence, property damage, or other types of lawlessness that are not protected by the First Amendment.[364] Instead, there are two other categories of expression already in existence that work to prevent violence, property damage, and bona fide threats of violence or property damage. These two categories do not carry the extensive problems that the Fighting Words Doctrine does. These two categories that may be constitutionally prohibited include speech that will lead to imminent lawless action and speech that constitutes intimidation or true threats.[365] For these categories, the speaker is offering expression that either engages likeminded followers to break the law, or the speaker is working to intimidate the listener;[366] both of these scenarios jeopardize a breach of the peace. They are both fundamentally different from fighting words, which allow the potentially violent reaction of a listener to veto the expression rights of the speaker.[367]

The Court has firmly held since *Brandenburg v. Ohio* (1969) that:

> [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.[368]

Under this standard, the Court struck down the prosecution of a speaker leading a Ku Klux Klan rally because the prosecution was for advocacy of racist and anti-Semitic ideas, not incitement to unlawful action that was imminent.[369] The imminent lawless action test is much clearer than the fighting words test, in that no magic words need to be conjured or imagined.

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363. Cohen v. California, 403 U.S. 15, 21 (1971).

364. *See* Michael P. Seng, *Hate Speech and Enforcement of the Fair Housing Laws*, 29 J. MARSHALL L. REV. 409, 429 (1996) (showing examples of violence and property damage *not* protected by the First Amendment).

365. *See* Jennifer Elrod, *Expressive Activity, True Threats, and the First Amendment*, 36 CONN. L. REV. 541, 547 (2004).

366. *Id*.

367. *See id*. at 564–77.

368. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

369. *Id.* at 448–49.

Instead, for speech to be beyond constitutional protection, a speaker would need to advocate illegal action, use speech that incites lawlessness imminently, and use speech that would be likely to produce that action in the immediate future.[370]

This point about *imminent* lawless action was clarified in *Hess v. Indiana* (1973), in which the Court overturned the conviction of Gregory Hess for speech he used while leading an anti-war demonstration at Indiana University.[371] As police were clearing the approximately 150 demonstrators who were blocking traffic, Hess either stated to the sheriff: "We'll take the fucking street later" or "We'll take the fucking street again."[372] The Court held that this speech, "[a]t best, . . . could be taken as counsel for present moderation; at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time. This is not sufficient to permit the State to punish Hess' speech."[373] In this way, only speech that intends and will lead directly and immediately to lawlessness is prohibited,[374] and the advocacy of all other ideas—including advocacy of illegality—is protected expression.[375]

A second category of expression that may be banned to promote peace and order are expressions that can be classified as true threats. *Virginia v. Black* (2003) explores how this test is also much more definite than the Fighting Words Doctrine.[376] In *Black*, the Court struck down a statute that declared any "burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons."[377] Although the Court found that often a burning cross is used to intimidate, sometimes it is done to make a political statement—and at times it may be done as part of a larger effort to actually promote tolerance and racial equality (such as in the filming of a movie like *Mississippi Burning*).[378] To distinguish protected expression from true threats, the Court laid out the following standard in *Black*: "'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[379] According to the Court, a "speaker need not actually intend to carry out the threat."[380] Instead, "a prohibition on true threats 'protects individuals from the fear of violence' and

370. Elrod, *supra* note 367, at 565 (discussing requirements for speech to be beyond First Amendment protection).

371. Hess v. Indiana, 414 U.S. 105, 105–06 (1973).

372. *Id.* at 107.

373. *Id.* at 108.

374. John P. Cronan, *The Next Challenge for the First Amendment: The Framework for an Internet Incitement Standard*, 51 CATH. U. L. REV. 425, 440 (2002).

375. *Id.*; *see also* NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (further explaining legal restraints on First Amendment protections).

376. Virginia v. Black, 538 U.S. 343, 347–48 (2003).

377. *Id*.

378. *Id.* at 365–66.

379. *Id.* at 359.

380. *Id.* at 360.

'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur.'"[381] Finally, the Court made clear in *Black* that "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death."[382] This standard prevents violence, but it does so without trying to discern what will make an average addressee angry; instead, it prevents threats of violence from the speaker without asking the speaker to know what will cause a listener to want to fight. Put another way, *Black*'s true threat test prohibits a speaker from making a specific threat of serious violence against another person.[383]

Like imminent lawless action in *Brandenburg*, true threats are limited in scope as well. As explained in *Gooding*, a statement to a police officer that "I'll kill you" and "I'll cut you all to pieces," was *not* a true threat.[384] Although not explained by the Court, one can read this as an idle threat uttered by an unarmed civilian who was speaking to police officers securing the area. Similarly, in *Watts v. United States* (1969), the Court overturned the conviction of an eighteen-year-old whom an Army Counter Intelligence Corps investigator overheard say that he would refuse to submit to the military draft and instead would take aim at President Lyndon Johnson: "I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L. B. J."[385] In remarking that a law prohibiting a true threat against the President is constitutional, the Court found that "[w]e do not believe that the kind of political hyperbole indulged in by petitioner fits within that statutory term."[386] Instead, the Court declared that the "language of the political arena . . . is often vituperative, abusive, and inexact."[387]

Thus, *Brandenburg*'s imminent lawless action test and *Black*'s true threats standard better achieve the goals of *Chaplinsky* while not trampling on constitutionally-protected expression. Of course, outside of a traditional public forum, there are additional forms of expression—including epithets, insults, harassment, and offensive speech—that may be restricted in various institutional settings. This includes, for instance, "when public employees make statements pursuant to their official duties,"[388] or speech by students that is materially and substantially disruptive of the educational environment

381. *Id.* (quoting R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 388 (1992)).
382. *Id*. (alteration in original).
383. Elrod, *supra* note 367 (clarifying what the court's decision in *Virginia v. Black* means).
384. Gooding v. Wilson, 405 U.S. 518, 534 (Blackmun, J., dissenting).
385. Watts v. United States, 394 U.S. 705, 706 (1969).
386. *Id.* at 708.
387. *Id.*
388. Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).

at public K–12 schools[389] and in public colleges and universities.[390] The role of these institutions in improving civil dialogue will be revisited in Part VII.

V. THE FIGHTING WORDS DOCTRINE CREATES SPECIAL RISKS OF BEING APPLIED IN A DISCRIMINATORY MANNER, ESPECIALLY WITH REGARD TO RACE

In addition to threats of viewpoint discrimination that may result from enforcing the Fighting Words Doctrine, continuing to ban this category of expression risks it being applied in a manner that discriminates against classes of people, regardless of any underlying message of the speaker. Since the definition of fighting words is so vague, it presents a special danger of being employed unevenly by law enforcement, prosecutors, judges, and juries. Thus, there are concerns that if two different classes of people were engaging in the use of the same type of language espousing unpopular opinions, there may be a greater likelihood that persons in traditionally underrepresented groups could be subject to more arrests, prosecutions, and convictions.

Take, for instance, religious minorities. The Fighting Words Doctrine arose in a case prosecuting a member of the Jehovah's Witnesses.[391] Members of this religious minority were subject to widespread harassment and persecution in the United States in the 1930s and 1940s, including via arrest, fining, and jailing for the practicing of their faith.[392] *Chaplinsky* was just one of dozens of cases involving First Amendment rights of Jehovah's Witnesses that came before the Court during that era, showing a greater pattern by law enforcement, prosecutors, and lower courts to use government power against what was viewed by many as an unfavored minority at the time.[393] Although it is for very different reasons, the Westboro Baptist Church in *Snyder* also represented a religious minority group generally viewed with public scorn,[394] and that may have factored into the jury's decisions to award $2.9 million in compensatory damages and $8 million in punitive damages to Snyder in the case.[395]

Another case discussed above, *Houston v. Hill*, involved the prosecution of a gay man in the early 1980s who was known in the community for his

389. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).

390. Healy v. James, 408 U.S. 169, 189 (1972).

391. Chaplinsky v. New Hampshire, 315 U.S. 568, 569 (1942).

392. ZOE KNOX, JEHOVAH'S WITNESSES AND THE SECULAR WORLD: FROM THE 1870S TO THE PRESENT 122–23 (2018).

393. *See* William Shepard McAninch, *A Catalyst for the Evolution of Constitutional Law: Jehovah's Witnesses in the Supreme Court*, 55 U. CIN. L. REV. 997 (1987).

394. *See* Jennings Brown, *The Reviled Westboro Baptist Church Makes a Ton of Money by Suing Communities that Don't Let Them Protest*, BUSINESS INSIDER (Jun. 24, 2015), https://www.businessinsider.com/heres-how-the-reviled-westboro-baptist-church-makes-money-2015-6.

395. Snyder v. Phelps, 562 U.S. 443, 450 (2011).

involvement in a large local gay rights organization.[396] In fact, the trial court in the *Hill* case had found that Hill "is a gay rights activist who claims that the Houston police have 'systematically' harassed him 'as the direct result' of his sexual preferences."[397] The *Hill* case represents an example of a fighting words conviction that may have been at least partially motivated by animus toward someone for their membership in a protected class, in this case a member of the LGBTQ community.

Those who self-identify as communists or socialists represent another often-vilified minority group in the United States.[398] Although communists and other political dissenters are not by virtue of their political beliefs members of a protected class, the Supreme Court's past is replete with First Amendment cases where communists or socialists were prosecuted, perhaps in part because of who they were known to be, rather than the specific expression they were engaged in when arrested. To reference some of the cases discussed above, Charles Schenck, who was prosecuted for the distribution of anti-war pamphlets in *Schenck v. United States*, was the general secretary of the Socialist Party.[399] Benjamin Gitlow, prosecuted for advocating communism in *Gitlow v. New York*, was a member of the Left Wing Section of the Socialist Party.[400] Gregory Lee Johnson, who burned an American flag as a part of a political protest in *Texas v. Johnson*, was a known communist who publicly claimed to be the leader of a group called the Revolutionary Communist Youth Brigade.[401] Numerous other cases exist of communists and socialists who appealed their cases to the Supreme Court on First Amendment grounds.[402]

Perhaps the most relevant concern though is the threat that the Fighting Words Doctrine will be used as a weapon against racial minorities, particularly African Americans, as it often has been in the past.[403] In *Watts v. United States*, a young African American man was prosecuted for engaging in political hyperbole in what was perceived by authorities as a threat to the

396. City of Houston v. Hill, 482 U.S. 451, 453 (1987).

397. *Id.* at 459 n.7 (quoting App. to Juris. Statement B-3, n.1).

398. Hazel Erskine, *The Polls: Freedom of Speech*, 34 PUB. OP. Q. 483, 486–90 (1970).

399. Schenck v. United States, 249 U.S. 47, 49 (1919).

400. Gitlow v. New York, 268 U.S. 652, 655 (1925).

401. HOWARD BALL, A DEFIANT LIFE: THURGOOD MARSHALL AND THE PERSISTENCE OF RACISM IN AMERICA 332 (1998).

402. *See generally* Pierce v. United States, 252 U.S. 239 (1920); United States *ex rel.* Milwaukee Social Democratic Publ'g v. Burleson, 255 U.S. 407 (1921); Whitney v. California, 274 U.S. 357 (1927); Stromberg v. California, 283 U.S. 359 (1931); De Jonge v. Oregon, 299 U.S. 353 (1937); Herndon v. Lowry, 301 U.S. 242 (1937); Schneiderman v. United States, 320 U.S. 118 (1943); American Commc'ns Ass'n v. Douds, 339 U.S. 382 (1950); Dennis v. United States, 341 U.S. 494 (1951); Harisiades v. Shaughnessy, 342 U.S. 580 (1952); Yates v. United States, 354 U.S. 298 (1957); Barenblatt v. United States, 360 U.S. 109 (1959); Communist Party of United States v. Subversive Activities Control Bd., 367 U.S. 1 (1961); Scales v. United States, 367 U.S. 203 (1961); Kleindienst v. Mandel, 408 U.S. 753 (1972).

403. TIMOTHY C. SHIELL, AFRICAN AMERICANS AND THE FIRST AMENDMENT 157 n.22 (2019); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 512 & n.139 (1990).

President; Watts's statement also included a comment that highlighted the importance of race to his expression: "They are not going to make me kill my [B]lack brothers."[404] In another example discussed above, *Street v. New York*, a fighting words prosecution was commenced against an African American man for burning a flag and using disparaging language about the country.[405] In *Lewis v. New Orleans*, a fighting words prosecution was undertaken against an African American woman for the words she uttered to a police officer.[406] That racial animus at issue in the case is evident from the police officer's comments to Lewis when she exited her vehicle during a traffic stop: "You get in the car woman. Get your [B]lack ass in the god damned car or I will show you something."[407] *Gooding v. Wilson* was yet another case where an African American man was charged for the profanity he used against law enforcement officers.[408] Perhaps the most incredible example was *Edwards v. South Carolina* (1963), where a state supreme court sustained convictions of civil rights protestors who held signs stating, "Down with Segregation"[409] and "I am proud to be a Negro."[410] Because *Edwards* involved a conviction for breach of the peace, when the Supreme Court of the United States subsequently overturned these convictions, the Justices specifically felt completed to conclude that "the record is barren of any evidence of 'fighting words.'"[411]

Even though Supreme Court of the United States ultimately invalidated every single lower court fighting words conviction appealed to it after *Chaplinsky*, due to the confusion of the *Chaplinsky* precedent, law enforcement, prosecutors, juries, and lower court judges believed that the expressions in these cases were fighting words outside of First Amendment protection. If we consider some of the language that resulted in arrests, prosecutions, and convictions in *Street*, *Lewis*, and *Edwards*, it does not stretch the imagination to envision that the Fighting Words Doctrine could be used as racial pretext to criminalize peaceful protestors today. Take, for instance, demonstrations around the country in 2020 protesting George Floyd's killing and (in many cases) protesting police practices generally. Arrests and prosecutions of such protestors raise questions about viewpoint discrimination and targeting speakers based on their race. Those assemblies were racially diverse, but a large percentage of the protestors and organizers

404. Watts v. United States, 394 U.S. 705 (1969).

405. Street v. New York, 394 U.S. 576, 578–79 (1969).

406. Lewis v. City of New Orleans, 415 U.S. 130, 131 n.1 (1974).

407. *Id.*

408. David F. McGowan & Ragesh K. Tangri, *A Libertarian Critique of University Restrictions of Offensive Speech*, 79 CALIF. L. REV. 825, 826 n.5 (1991).

409. Strossen, *supra* note 403, at 512 n.139 (quoting Edwards v. South Carolina, 372 U.S. 229, 236 (1936)).

410. *Id.*

411. *Edwards*, 372 U.S. at 236.

were African Americans.[412] Some of the more provocative signage used included the following: "No Lives Matter ['Til Black Lives Matter,"[413] "We Pay You to Protect Us, Not Kill Us,"[414] "Indifference Is Evil,"[415] "Police Violence Is Not An Accident," [416] "Blue Lives Murder,"[417] "No Justice, No Peace,"[418] "White Silence Is Violence,"[419] "Who Do You Call When the Murderer Wears a Badge?,"[420] "Fuck the Police,"[421] "Abolish the Police,"[422] and "ACAB."[423]

Although audiences may find some of these signs to be offensive, and some of them make bold claims or accusations, they all clearly deserve constitutional protection based on Court precedents like *Cohen*, *Johnson*, *R.A.V.*, and *Snyder*. Furthermore, many of the signs used in these protests contained nothing that a reasonable person would consider offensive or attempting to provoke a physical altercation, including "We Shall Overcome,"[424] "Justice 4 George,"[425] "I Can't Breathe,"[426] "Don't Shoot,"[427] and "Injustice Anywhere Is a Threat to Justice Everywhere."[428] Still, *Edwards* shows that even seemingly inoffensive messages could be deemed to cause a breach of the peace by those in power as long as the Fighting Words Doctrine exists. Some of the messages used in the 2020 Floyd protests could be interpreted to be at least as offensive as the words used by Chaplinsky and, according to the flawed logic in *Chaplinsky*, some of them could be interpreted as intending to illegally enrage the intended audience. These signs were often displayed to law enforcement (similar to how Chaplinsky directed his expression at law enforcement), and sometimes they

412. Brian Mann, Black Protest Leaders To White Allies: 'It's Our Turn To Lead Our Own Fight,' NPR (Sept. 22, 2020), https://www.npr.org/2020/09/22/913094440/black-protest-leaders-to-white-allies-it-s-our-turn-to-lead-our-own-fight.

413. Kelsey Borresen & Chris McGonigal, *32 Powerful Signs From Anti-Racism Protests Around the World*, HUFFPOST (June 3, 2020), https://www.huffpost.com/entry/powerful-signs-george-floyd-protests_l_5ed7e934c5b62d6a474d3dfd?.

414. *Id.*

415. *Id.*

416. *Id.*

417. *Id.*

418. Dylan Scott & Kainaz Amaria, *Thousands of Americans Across the US Are Peacefully Marching Against Police Violence*, VOX (May 30, 2020), https://www.vox.com/2020/5/30/21275600/george-floyd-protest-photos-minneapolis-atlanta-new-york.

419. *Id.*

420. *Id.*

421. *Id.*

422. *Id.*

423. *Id.* This is an acronym that stands for "All Cops Are Bastards." Chris Woodyard*, George Floyd Marches: Five Slang Words, Terms that Protesters Want You to Know*, USA TODAY (June 5, 2020), https://www.usatoday.com/story/news/2020/06/05/george-floyd-protests-5-slang-words-terms-you-need-know/3158426001/.

424. Scott & Amaria, *supra* note 418.

425. *Id.*

426. *Id.*

427. Borresen & McGonigal, *supra* note 413.

428. *Id.*

were accompanied by corresponding chants by large groups of people in the presence of law enforcement.[429] The confusion caused by *Chaplinsky* may have contributed to what the New York City Department of Investigation concluded was "excessive enforcement" during the 2020 Floyd protests in violation of the First Amendment.[430] The use of excessive force against protestors in 2020 was not limited to New York City.[431]

The last eight decades have taught us that even what some may deem offensive expressions are, without more, protected by the First Amendment, as they provoke us to think about matters of public concern in new ways. And yet, the numerous cases appealed to the Court over those many years have also taught us that every time a new slogan or expressive activity is used in this context, it risks resulting in an arrest, prosecution, and conviction before it might be overturned on appeal years later. This problem, caused by the lack of clarity that exits in the Fighting Words Doctrine, is untenable if we are to abide by and embrace both the Free Speech Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.

VI. STARE DECISIS PERMITS OVERRULING A PRECEDENT THAT IS AS DEFECTIVE AS *CHAPLINSKY*

For all of the reasons above, the Fighting Words Doctrine has no place in First Amendment jurisprudence. The time has come for the Court to finally overrule *Chaplinsky*. Laws that try to adhere to the Doctrine suffer from the defects of either overbreadth/vagueness or content/viewpoint discrimination. The volume of offensive speech that the Court has now ruled protected by the First Amendment means that what used to be exceptions have now swallowed the fighting words rule. The goal of protecting public safety is better accomplished by the Court's more recent standard of allowing for the prohibition of imminent lawless action and true threats. The threat of weaponizing the Fighting Words Doctrine against minority populations, particularly people of color, and not rectified until potentially years later when a conviction is overturned by the Supreme Court of the United States, is unacceptable.

The debate over when to overrule precedents is an old one in Anglo-American law. On the one hand, Justice Louis Brandeis once argued that "*Stare decisis* is usually the wise policy, because in most matters it is

429. *Id.*

430. Ali Watkins, *An Unprepared N.Y.P.D. Badly Mishandled Floyd Protests*, Watchdog Says, N.Y. TIMES (Feb. 12, 2021), https://www.nytimes.com/2020/12/18/nyregion/nypd-george-floyd-protests.html.

431. *See* Adam Gabbatt, *Protests About Police Brutality Are Met with Wave of Police Brutality Across US*, GUARDIAN (June 6, 2020), https://www.theguardian.com/us-news/2020/jun/06/police-violence-protests-us-george-floyd.

more important that the applicable rule of law be settled than that it be settled right."[432] On the other hand, Justice Holmes once admonished that:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[433]

Following Justice Holmes, the Court has stated that cases may be overruled "when governing decisions are unworkable or are badly reasoned"[434] because "[*s*]*tare decisis* is not an inexorable command."[435] The Court has held that this is "particularly true in constitutional cases,"[436] due to the inability of the Legislative Branch to correct a judicial mistake short of the initiation of a constitutional amendment.

Constitutional history shows prominent examples of cases where past decisions were badly reasoned or became unworkable. The Court adopted the liberty of contract as a substantive right protected by the Fourteenth Amendment's Due Process Clause in cases like *Lochner v. New York* (1905)[437] and *Adkins v. Children's Hospital* (1923).[438] However, the economic realities of the Great Depression caused the Court to rethink, and overrule, the liberty of contract in *West Coast Hotel v. Parrish* (1937).[439] Similarly, *Plessy v. Ferguson* (1896) upheld under the Fourteenth Amendment's Equal Protection Clause the constitutionality of laws requiring racial separation in public accommodations.[440] The Court overruled this "separate but equal doctrine" in *Brown v. Board of Education* (1954), finding that: "[I]n the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal," and "[a]ny language in *Plessy v. Ferguson* contrary to this finding is rejected."[441] The *Brown* Court based its ruling on modern psychological knowledge, which it found had advanced significantly since the *Plessy* decision.[442] Conversely, after the Court found a constitutionally protected right to abortion in *Roe v. Wade* (1973),[443] it upheld that right in *Planned Parenthood v. Casey* (1992), reasoning as follows: "No evolution of legal principle has

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432. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) (emphasis added).
433. Oliver Wendell Holmes Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).
434. Payne v. Tennessee, 501 U.S. 808, 827 (1991).
435. *Id.* at 828.
436. *Id.*
437. Lochner v. New York, 198 U.S. 45 (1905).
438. Adkins v. Children's Hosp., 261 U.S. 525 (1923).
439. W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 399–400 (1937).
440. Plessy v. Ferguson, 163 U.S. 537, 544 (1896).
441. Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954).
442. *Id.* at 494.
443. Roe v. Wade, 410 U.S. 413 (1973).

left *Roe*'s doctrinal footings weaker than they were in 1973. No development of constitutional law since the case was decided has implicitly or explicitly left *Roe* behind as a mere survivor of obsolete constitutional thinking."[444]

More recently, in *Janus v. AFSCME* (2018), the Court declared that "*stare decisis* applies with perhaps least force of all to decisions that wrongly denied First Amendment rights."[445] Quoting a prior case, the *Janus* Court reasoned that the Court "has not hesitated to overrule decisions offensive to the First Amendment (a fixed star in our constitutional constellation, if there is one)."[446] Thus, the pull of *stare decisis* is weaker in constitutional law than in other American law; within constitutional law, *stare decisis* has less pull with the First Amendment than anywhere else. As also explained in *Janus*, "[a]n important factor in determining whether a precedent should be overruled is the quality of its reasoning."[447]

Taking these considerations into account, the *Chaplinsky* precedent has reached the point of collapse jurisprudentially, even if there remains a danger that it will be applied improperly in the legal system below the Supreme Court. As explored in Part III, the reasoning used in the case was of a poor quality even when the case was decided.[448] As explained in Part IV, any logical underpinnings of the decision have been replaced in more recent cases, similar to what occurred with *Lochner* and *Plessy*.[449] Indeed, the notion that we should all be aware of certain words that will naturally cause the average listener to fly into a rage and that these words may not be spoken, goes against decades of case law extending free speech protection to new forms of expression without regard to the reaction of the listener.[450] This makes *Chaplinsky*'s test unworkable in the contemporary era. Rather than attempting to identify fighting words, the Constitution permits another solution: prohibiting expression that incites imminent lawless action and banning true threats. Although in *Chaplinsky* the Court discerned that fighting words could be easily identified because "men of common intelligence would understand [the] words likely to cause an average addressee to fight," today's reality reflects a different notion: persons of common intelligence understand that the Fighting Words Doctrine should be overruled.[451]

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444. Planned Parenthood v. Casey, 505 U.S. 833, 857 (1992).

445. Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2478 (2018).

446. *Id.* (quoting Fed. Election Comm'n v. Wisconsin Right to Life, Inc., 551 U.S. 449, 500 (2007) (Scalia, J., concurring in part and concurring in judgment)).

447. *Id.* at 2479.

448. *See supra* Part III (examining the Court's decision in *Chaplinsky*).

449. *See supra* Part IV (discussing the application of the *Chaplinsky* decision in more recent cases).

450. *See supra* Parts III–IV (discussing the Fighting Words Doctrine).

451. Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942).

VII. OTHER AVENUES EXIST TO PROMOTE CIVILITY IN DISCOURSE

Finally, the Constitution does not leave us with what might be considered the unsustainable position that we are straightjacketed to watch our public discourse become increasingly angry and uncivil, peppered with more profanity and epithets if the Fighting Words Doctrine is overturned. Granted, there is a constitutional prerogative to protect uncivil forms of expression because, as the Court explained in *Cohen*, our discourse loses something much greater if we attempt to use government power to enforce strict rules of decorum in debate: "Words are often chosen as much for their emotive as their cognitive force."[452] Nevertheless, if we want to do what we can to encourage and promote a more respectful public dialogue, the First Amendment provides various options for us to pursue.

First, there is a role for educational institutions to cultivate civil discourse among young people. For instance, under the First Amendment, public colleges and universities possess academic freedom, which has "long has been viewed as a special concern of the First Amendment."[453] This academic freedom includes the power to foster civil discourse on campus, such as through inviting speakers and holding forums, requiring coursework on the freedom of expression, and teaching about what is required by the First Amendment.[454] Although private universities are not bound by the First Amendment the way public universities are,[455] as private institutions they are protected from the government restricting their institutional expression,[456] so they can employ the same types of strategies as public universities to promote civil discourse. For another example, public K–12 schools may use activities to cultivate civil discourse among young people, and in doing so they have a special purview to prohibit expression on their grounds that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."[457]

In addition to the activities and discipline that can be done to promote more civil discourse in educational settings, there could be repercussions elsewhere for persons who engage in offensive speech. This includes how institutions interact with their employees. Although public employers must observe "a public employee's right, in certain circumstances, to speak as a

452. Cohen v. California, 403 U.S. 15, 26 (1971).

453. Grutter v. Bollinger, 539 U.S. 306, 324 (2003) (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978)).

454. Eric T. Kasper, *Public Universities and the First Amendment: Controversial Speakers, Protests, and Free Speech Policies*, CAP. U. L. REV. 529, 582–83 (2019).

455. Elizabeth Mertz, *The Burden of Proof and Academic Freedom: Protection for Institution or Individual?*, 82 NW. U. L. REV. 492, 524 (1988).

456. Christopher J. Roederer, *Free Speech on the Law School Campus: Is It the Hammer or the Wrecking Ball that Speaks?*, 15 U. ST. THOMAS L.J. 26, 48 n.86 (2018).

457. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).

citizen addressing matters of public concern,"[458] public employers may impose sanctions for offensive expressions that are solely on matters of private concern.[459] Private employers have even more freedom in disciplining employees or requiring them to undergo training related to the use of offensive expression, as "[t]he Free Speech Clause of the First Amendment constrains governmental actors and protects private actors."[460] For the same reason, private persons may react as they see fit to others who engage in offensive expression, including by cutting business relations or ending friendship ties with those using such language.

Above all else, though, if we want the freedom of speech to be maintained as a cultural value, we should—both within institutional capacities and as individuals—work to support the freedom of expression.[461] Even in the private sector, we should, when we can, avoid tactics similar to blacklisting (such as was the case during the Cold War) for those expressing ideas we find disagreeable.[462] We should be willing to listen to different views and perspectives, civilly engage others in discourse to the extent possible, and encourage that respectful exchange of ideas in others. This is behavior that can be modeled by politicians, the media, civic leaders, and indeed all of us. Beyond ensuring that the government does not use its coercive power to criminally punish persons, we can exercise our freedom of expression in a way that helps to promote it and its values.[463] It is up to us to persist in making sure this right remains vibrant and an important part of our national political culture. Judge Learned Hand, in his "Spirit of Liberty" speech in 1944, given shortly after *Chaplinsky* was decided, proclaimed the following: "Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there, it needs no constitution, no law, no court to save it."[464] Instead of continuing to see the legal system grapple with the confusing, amorphous heckler's veto that is the Fighting Words Doctrine, the Supreme Court should end it and rely on us to put our efforts into cultivating liberty as Judge Hand suggested.

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458. Garcetti v. Ceballos, 547 U.S. 410, 417 (2006).

459. San Diego v. Roe, 543 U.S. 77, 84 (2004) (finding that a municipality did not violate the First Amendment for terminating a police officer for selling videotapes showing him engaging in sexually explicit acts).

460. Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1926 (2019).

461. *See* MICHAEL KENT CURTIS, FREE SPEECH, THE PEOPLE'S DARLING PRIVILEGE: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 3 (2000) (reviewing how the freedom of speech has been an American cultural value for centuries).

462. *See* BRIAN NEVE, ELIA KAZAN: THE CINEMA OF AN AMERICAN OUTSIDER 59–60 (2009).

463. *See supra* Part VII (discussing ways civil discourse can be promoted).

464. GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 470 (2d ed. 2011).