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Cover Page Footnote

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NOTES

THE FIRST AMENDMENT DISTINCTION BETWEEN CONDUCT AND CONTENT: A CONCEPTUAL FRAMEWORK FOR UNDERSTANDING FIGHTING WORDS JURISPRUDENCE

*AVIVA O. WERTHEIMER**

"A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."[1]

INTRODUCTION

No fundamental right is more glorified in American society than the right to "freedom of speech." We Americans believe that the right to express our ideas freely, and more importantly, the right to criticize our government, is tantamount to the preservation of all of our other cherished rights.[2] As for the level of protection afforded the right of speech, the First Amendment could not have been more clear or concise on this point: "Congress shall make no law abridging the freedom of speech."[3]

Yet, despite this perception that our First Amendment rights are absolute,[4] there are certain instances when speech rights may be curtailed, for better or worse, in the name of some more compelling purpose.[5] Moreover, there is a considerable body of law that prohibits or punishes libel, slander, perjury, conspiracy, treason and the like, even though these unlawful acts may be accomplished solely by speech.

* I wish to extend my deepest gratitude to Professor Thane Rosenbaum of Fordham University School of Law for his invaluable guidance, encouragement, and editorial support during the preparation of this Note and throughout my law school studies.

1. Towne v. Eisner, 245 U.S. 418, 425 (1918) (Holmes, J.) (citation omitted).

2. *See* Palko v. Connecticut, 302 U.S. 319, 327 (1937) (stating that freedom of speech is "the indispensable condition of nearly every other form of freedom"); *see also* Speiser v. Randall, 357 U.S. 513, 530 (1958) (Black, J., concurring) (stating that the freedoms secured by the First Amendment "are absolutely indispensable for the preservation of a free society").

3. U.S. Const. amend. I.

4. *See* Alex Kozinski & Eugene Volokh, *A Penumbra Too Far*, 106 Harv. L. Rev. 1639, 1654 (1993) (characterizing the First Amendment as "about as close to absolute as the Constitution gets").

5. Even Supreme Court Justices Douglas and Black, who insisted they were First Amendment "absolutists" in the broadest sense, would deny constitutional protection to some speech by simply renaming the speech as: "speech brigaded with action"; "speech plus"; or "not speech." John H. Ely, Democracy and Distrust: A Theory of Judicial Review 109 (1980).

Thus, the notion of "freedom of speech" is clearly "narrower than the unlimited license to talk."[6]

Some fifty years ago, the Supreme Court established the doctrine of "fighting words," which limited the "license to talk" when the chosen words took on the force of violent aggression that was likely to result in retaliatory conduct. The basic principle of the doctrine was that, under certain circumstances, communications—apart from the content of their message—take on a hostile, fighting quality that makes the communications more likely to engender violent consequences. In defining a category termed "fighting words," the Court wrote that "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[7]

In establishing the fighting words doctrine, the Court determined that when a speaker's words do not contribute to dialogue or the expression of ideas, but are instead intended to provoke harmful conduct, they have no value as instruments of "speech." Therefore, they may be regulated without contravening the First Amendment. While "speech" is protected under the Constitution, words that do not promote dialogue or the exchange of ideas are instruments of something other than speech. Depending on the context and circumstances behind the communications, a speaker's words may have nothing at all to do with the exercise of the constitutional right to freedom of speech.[8]

Ultimately, however, the Court designated fighting words as a category of speech wholly unprotected by the First Amendment—even though the fighting words doctrine is only incidentally related to

6. Konigsberg v. State Bar, 366 U.S. 36, 50 (1961).

7. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (citations omitted).

8. This may explain why the Court placed the emphasis on fighting "words," rather than fighting "speech." Words are merely the raw ingredients that have the potential, based on the context of the communication, to evolve into either protected speech or certain forms of unprotected conduct.

In his comic routine, "Filthy Words," social satirist George Carlin aptly observed that there are seven dirty words that "you couldn't say on the public . . . airwaves." FCC v. Pacifica Found., 438 U.S. 726, 751-55 (1978). Carlin then proceeded to use a list of expletives in his monologue "to satirize as harmless and essentially silly our attitudes towards those words." *Id.* at 730.

Ultimately, as a regulatory matter, the Supreme Court upheld an FCC sanction against the Pacifica Foundation, the company that owned the radio station that broadcasted Carlin's monologue. *Id.* at 750. The Court noted that "[i]ndeed, we may assume, *arguendo*, that this monologue would be protected in other contexts." *Id.* at 746-47 (observing that it is "a characteristic of speech such as this that both its capacity to offend and its 'social value' . . . vary with the circumstances"). But it could not say that the FCC had exceeded its statutory power by imposing the sanction for indecent language based on a nuisance rationale. *Id.* at 750.

speech.[9] The Court understood fighting words to be a form of conduct, or "verbal acts,"[10] analogous to conduct that is likely to have violent consequences. From its inception, the premise underlying the doctrine was not the restriction of certain words, but the prevention of instances when those words are used to provoke breaches of the peace.[11]

Since 1942, courts routinely have applied the fighting words doctrine to interpret local and state laws that restricted speech in the service of preventing violence. Yet, in the half century following the Supreme Court's articulation of the doctrine, no convictions in cases in which a defendant was prosecuted under a fighting words statute have been upheld. Instead, in a long line of cases dealing with fighting words, the Court has used a myriad of rationales to uphold some statutes as permissible restrictions on conduct and to strike down other, similar laws as unconstitutional infringements on speech rights.[12] These decisions have produced a seemingly arbitrary distinction between speech and conduct in this area of First Amendment law and reflect what critics argue is the futility of the fighting words doctrine.[13] Indeed, critics have argued that the Court has steadily chipped away at the scope of the doctrine, and that the doctrine's failing record is reason enough to have it formally overturned.[14] Until 1992, however, no Supreme Court decision had explicitly considered that option.

The Supreme Court's 1992 decision in *R.A.V. v. City of St. Paul*[15] questioned the very notion that the First Amendment does not protect the otherwise proscribable category of fighting words.[16] In *R.A.V.*, the Court overturned a conviction for cross burning by striking down the fighting words ordinance under which the defendant had been prosecuted.[17] The Court concluded that, although in the past, the category of fighting words was apparently proscribable in its entirety, the

9. The category of speech called fighting words, like other categories of unprotected speech, is routinely referred to by the Court, and in this Note, as a "proscribable category of speech." *See* R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2552 (1992) (White, J., concurring) (describing categories of proscribable speech).

The Court's use of the categorical approach refers to its designation of discrete categories of speech, such as libel, obscenity and fighting words, which the Court has defined as "not within the area of constitutionally protected speech." Roth v. United States, 354 U.S. 476, 483 (1957); *see also supra* note 7 and accompanying text. *But see infra* note 301 (questioning the viability of the categorical approach after *R.A.V. v. City of St. Paul*).

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

11. *Id.* at 573 (characterizing a fighting words statute as "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").

12. *See infra* part I.A.

13. *See* sources cited *infra* note 305.

14. *See* sources cited *infra* note 305.

15. 112 S. Ct. 2538 (1992).

16. *Id.* at 2543.

17. *Id.* at 2547.

subset of fighting words punishable by the St. Paul ordinance[18] may be entitled to some First Amendment protection.[19] It did not, however, seize the opportunity in *R.A.V.* to overturn the fighting words doctrine altogether.

This confusing decision, in which the Court declined to reaffirm that fighting words fall outside the scope of First Amendment protection as a category of proscribable speech, left state legislators in a quandary. In an era of increasing racial and other bias-motivated violence,[20] legislatures nationwide had to reconsider whether intentionally threatening forms of expression, communicated by one person to another, are constitutionally proscribable as fighting words, or protected by the First Amendment. The discussion spread to academics at universities, concerning politically correct speech and hate speech codes,[21] to race theorists[22] and to cities across

18. The St. Paul ordinance prohibited only those fighting words based on "race, color, creed, religion or gender." *Id.* at 2541 (quoting St. Paul, Minn., Legis. Code § 292.02 (1990)).

19. The Court explained that St. Paul could not punish fighting words based on the content of their message. *Id.* at 2543-45. For a discussion of the Court's opinion in *R.A.V.*, see *infra* part II.A.1.

20. *See* Anti-Defamation League of B'nai B'rith, Hate Crime Statutes: A 1991 Status Report 11 (1991); Erik FitzPatrick, Note, *An Analysis of the Constitutionality of the Vermont Hate Motivated Crimes Statute in Light of the United States Supreme Court's Decisions in* R.A.V. v. City of St. Paul *and* Wisconsin v. Mitchell, 18 Vt. L. Rev. 771, 783-87 (1994) (documenting the increase in hate crimes nationally since 1980).

21. *See* UWM Post, Inc. v. Board of Regents, 774 F. Supp. 1163, 1172 (E.D. Wis. 1991) (setting aside hate speech rules at the University of Wisconsin because the rules restricted speech in excess of fighting words); Doe v. University of Michigan, 721 F. Supp. 852, 863 (E.D. Mich. 1989) (setting aside the University of Michigan hate speech policy because it prohibited words "simply because [they were] found to be offensive"); *see also* Katharine T. Bartlett & Jean O'Barr, *The Chilly Climate on College Campuses: An Expansion of the "Hate Speech" Debate*, 1990 Duke L.J. 574, 582-84 (arguing that the "hate speech" debate should be expanded to include racism, sexism and heterosexism on college campuses); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L.J. 431, 456 (justifying campus speech regulations as "necessary to protect a captive audience from offensive or injurious speech"); Robert A. Sedler, *The Unconstitutionality of Campus Bans on "Racist Speech:" The View from Without and Within*, 53 U. Pitt. L. Rev. 631, 633 (1992) (arguing that virtually any ban on speech at public universities would be unconstitutional under the First Amendment); Nadine Strossen, *Regulating Racist Speech on Campus, A Modest Proposal?*, 1990 Duke L.J. 484, 523-41 (criticizing the regulation of racist speech as a mechanism to combat discrimination on college campuses); James Weinstein, *A Constitutional Roadmap to the Regulation of Campus Hate Speech*, 38 Wayne L. Rev. 163, 191-214 (1992) (arguing that university administrators may regulate hate speech on the basis of its content, in non-public forums such as classrooms).

22. Critical race theory, a popular trend in contemporary legal thinking, is devoted to finding new ways to think about and act in pursuit of racial justice. Race theorists who would regulate hate speech on the basis of its racist content argue that content-based distinctions are acceptable if they further the desirable ends of eradicating racism from American culture and enhancing the freedom of all citizens. The principal architects of critical race theory are Professors Mari J. Matsuda, Charles R. Lawrence

America, concerning hate crime and penalty enhancement legislation.[23]

In the year following *R.A.V.*, the Supreme Court, in *Wisconsin v. Mitchell*,[24] upheld as constitutional a penalty enhancement statute that increased the punishment for a variety of crimes where the defendant targeted a victim because of one or more immutable characteristics, including race, religion or ethnic background.[25] The Court treated the statute in *Mitchell* as a restriction only on conduct—the selection of a victim based on his or her race, religion or ethnic background—and not on speech. While not inconsistent with its analysis in *R.A.V.*, this approach demonstrates the apparent incoherence of the Court's distinction between speech and conduct.[26]

III and Richard Delgado. Each has published a proposal for the regulation of racist speech based on the principles of fighting words. *See* Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets and Name-Calling*, 17 Harv. C.R.-C.L. L. Rev. 133, 179-81 (1982) (proposing an independent tort action for racial insults); Lawrence, *supra* note 21, at 451-53 (advocating regulation of racist speech as fighting words); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320, 2380-81 (1989) (asserting that an absolutist First Amendment response to hate speech perpetuates racism, and advocating regulation of racist speech). All three articles, and an additional article by Professor Kimberle W. Crenshaw, entitled *Beyond Racism and Misogyny: Black Feminism and 2 Live Crew*, were recently published in one volume. *See* Mari J. Matsuda et al., Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment (1993).

23. *Compare* State v. Plowman, 838 P.2d 558, 565 (Or. 1992) (en banc) (upholding a penalty enhancement statute as a proscription on conduct not speech), *cert. denied*, 113 S. Ct. 2967 (1993) *with* State v. Mitchell, 485 N.W.2d 807, 815 (Wis. 1992) (striking a penalty enhancement statute on the grounds that the state may not punish bigoted thought), *rev'd*, 113 S. Ct. 2194 (1993) *and* State v. Wyant, 597 N.E.2d 450, 459 (Ohio 1992) (striking an "ethnic intimidation" penalty enhancement statute because it impermissibly punished thought), *vacated and remanded*, 113 S. Ct. 2954 (1993), *rev'd*, 624 N.E.2d 722, 724 (1994).

While bias crime statutes make bias intent a necessary element of the crime, penalty enhancement statutes increase the punishment for the underlying crime because the victim was selected intentionally due to some bias on the part of the defendant. Nearly every state has passed some sort of "hate crime statute," whether in the form of the former or the latter. *See* Anti-Defamation League of B'nai B'rith, Hate Crime Statutes: A 1991 Status Report (1991).

This Note focuses on statutes that reach speech activity that would not be criminal but for the improper intent of the speaker and the likely results of the speech. For examples of such hate crime statutes, see Colo. Rev. Stat. § 18-9-121 (1986 & Supp. 1994); Conn. Gen. Stat. Ann. § 53a-181b (West 1985 & Supp. 1994); Idaho Code § 18-7902 (1987); Mich. Comp. Laws. Ann. § 750.147b (West 1991); Mont. Code Ann. § 45-5-221 (1993); Okla. Stat. Ann. tit. 21, § 850 (West Supp. 1995); S.D. Codified Laws Ann. § 22-19b-1 (1994); Wash. Rev. Code Ann. § 9A.36.080 (West 1988 & Supp. 1994). This Note also examines statutes that enhance penalties for underlying crimes that may be committed solely by a defendant's speech. For examples of such penalty enhancement statutes, see N.J. Stat. Ann. § 2C:33-4 (West 1982 & Supp. 1994); Vt. Stat. Ann. tit. 13, § 1455-56 (Supp. 1994).

24. 113 S. Ct. 2194 (1993).

25. *Id.* at 2197.

26. Both the St. Paul and Wisconsin laws attempted to prohibit bias motivated hate crimes. The St. Paul ordinance prohibited fighting words on the basis of one of a list of immutable characteristics. *See supra* note 18. The Wisconsin statute enhanced

This Note attempts to provide a framework for understanding the principles underlying the fighting words doctrine. It rejects the notion that the First Amendment, by its terms, precludes all restrictions on speech. Nevertheless, it argues that First Amendment rights are of only minimal significance when it comes to applying the fighting words doctrine.[27] Rather, in creating the fighting words doctrine, the Court sought to restrict only the conduct implications of words, and not the value of words when used to advance ideas in the context of dialogue. Fighting words are, therefore, proscribable on the basis of the conduct they engender, rather than on the basis of the content of the words themselves.

Part I of this Note provides a brief history of the government restrictions placed on speech prior to the creation of the fighting words doctrine. It then reviews the key fighting words cases, beginning with the doctrine's inception in *Chaplinsky v. New Hampshire.* These cases show no clear doctrinal development in understanding how fighting words operate as a proscribable category of speech. Nor do they suggest a predictable pattern of reasoned judgment in this area of First Amendment jurisprudence.

Part II focuses on the Supreme Court's opinion in *R.A.V. v. City of St. Paul,* in which the nine Justices reached consensus only in the final result. Specifically, part II critiques the majority's opinion for its unwarranted departure from established First Amendment principles, as well as its apparent failure to construct an adequate, workable structure for lower courts to follow. Part II also reviews the Court's decision in *Wisconsin v. Mitchell* and highlights the incompatibility of the Court's reasoning between *R.A.V.* and *Mitchell.*

Part III examines the concepts of "speech" and "conduct." This part suggests that the Court's formal distinction between speech and conduct, as pronounced in *United States v. O'Brien,* provides a helpful backdrop for understanding the principles underlying the fighting words doctrine and lends coherence to an otherwise irreconcilable body of caselaw. Part III explains that the fighting words doctrine, though conceived as a proscribable category of speech, was established to prevent potentially violent conduct. Therefore, the Court's decisions in the cases reviewed in part I, and its analysis in *R.A.V.* and

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the penalty when a defendant selected a victim on the basis of a similar list of characteristics. *See supra* text accompanying note 25. Yet, the Court treated the former as an impermissible content-based restriction on speech, and the latter as a justifiable content-based restriction on conduct.

27. Some scholars have suggested that the First Amendment right to free speech should be balanced against other equally valuable fundamental rights, and if necessary, should be compromised to protect those other rights. *See, e.g.,* Akhil R. Amar, *The Case of the Missing Amendments:* R.A.V. v. City of St. Paul, 106 Harv. L. Rev. 124, 155-60 (1992) (asserting that the Thirteenth Amendment's guarantee of freedom from slavery, when balanced against competing First Amendment rights, provides a basis for regulating racist hate speech).

Mitchell as discussed in part II, can be reconciled as further developments in understanding the conduct implications of fighting words.

Part IV suggests that legislatures should consider the conduct implications of fighting words in constructing statutes to prevent the harm and violence associated with hate crimes, even when those crimes are comprised solely of speech. Thus, the fighting words doctrine can be understood and implemented in a manner that reflects the purpose of the original doctrine and is, at the same time, consistent with the Court's current jurisprudence.

I. HISTORICAL BACKGROUND

Although Americans proudly assert their right to free speech as one of the centerpieces of democracy, "it is well understood that the right of free speech is not absolute at all times and under all circumstances."[28] Rather, "the character of every act depends upon the circumstances in which it is done."[29] In fact, just seven years after the framers of the Bill of Rights amended the Constitution to state: "Congress shall make *no law* abridging the freedom of speech,"[30] Congress imposed a restriction on speech. Against the political backdrop of a potential war with France, the Federalists enacted the Sedition Act of 1798 to prohibit defamatory speech against the government.[31] Ironically, the Act targeted political speech, speech now commonly considered to rest at the core of First Amendment protection. Similarly, at the outset of World War I, Congress enacted the Espionage Act of 1917,[32] which again restricted speech critical of the government. The Supreme Court repeatedly rejected First Amendment challenges to the Espionage Act, holding that Congress

28. Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942).

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

30. U.S. Const. amend. I (emphasis added).

31. Act of July 14, 1798, ch. 74, § 2, 1 Stat. 596 (1789). The Act prohibited, in relevant part, the publication of "any false, scandalous and malicious writing . . . against the government of the United States . . . with intent to defame . . . or to excite against them . . . the hatred of the good people of the United States." *Id.*

The Act, targeting political speech, was rigorously enforced against rival Republican Party members; every defendant tried under the Act was convicted. The Supreme Court never considered its constitutionality, though lower federal courts upheld the Act unanimously. The Act expired on March 3, 1801.

32. Act of June 15, 1917, ch. 30, § 3, 40 Stat. 217 (1917). The Act made it a criminal offense, when the country was at war, to "cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces . . . [or to] obstruct the recruiting or enlistment service of the United States." *Id.* The Act was amended in 1918 to make it a crime for a person to "utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about [the] form of government of the United States, or the Constitution of the United States . . . or the flag." Act of May 16, 1918, ch. 75, § 3, 40 Stat. 553 (1918). Approximately 2000 defendants were prosecuted under the Espionage Acts of 1917 and 1918.

For a history of free speech prior to the Espionage Act, see David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 Yale L.J. 514 (1981).

had the right to restrict words "used in such circumstances and . . . of such a nature as to create a clear and present danger."[33] Although it is arguable whether the Sedition and Espionage Acts would survive First Amendment scrutiny today, it is clear that the Supreme Court interpreted the First Amendment to permit restrictions on speech, including political speech, when there was a possibility that the speech could result in violence.

Similarly, it was not until fairly recently that the right of "freedom of speech" was even interpreted to protect citizens against state regulations abridging speech.[34] Prior to 1925, the Supreme Court had not questioned that the First Amendment meant: "*Congress* shall make no law abridging the freedom of speech."[35] States were free to regulate the "speech" of their respective citizens subject to the restraints imposed by their own constitutions. Once the Court did recognize the application of the First Amendment to the states, however, it continued to construe this protection narrowly, allowing state regulations to continue largely inviolate of the Constitution.[36]

In 1942, for example, during the Second World War, the Supreme Court upheld a state regulation on speech. In *Chaplinsky v. New Hampshire*,[37] the defendant challenged the constitutionality of the dis-

33. Schenck v. United States, 249 U.S. 47, 52 (1919); *see also* Frohwerk v. United States, 249 U.S. 204 (1919) (upholding a conviction under the Espionage Act); Debs v. United States, 249 U.S. 211 (1919) (same); Abrams v. United States, 250 U.S. 616 (1919) (same).

Justice Holmes, who wrote for a unanimous Court in *Schenck*, *Frohwerk* and *Debs*, was also the sole dissenter in *Abrams*. In *Schenck*, Holmes first articulated the "clear and present danger" test to determine when speech could be constitutionally restricted. His dissent in *Abrams* marked the initial shift from a restrictive construction of the "clear and present danger" test to a more libertarian position in which the test was used more often to protect speech than to restrict it. *See* Geoffrey R. Stone et al., Constitutional Law 1038 (2d ed. 1991). By the early 1940's, Justice Holmes' dissent in *Abrams* had become the law. *See* Michael J. Mannheimer, Note, *The Fighting Words Doctrine*, 93 Colum. L. Rev. 1527, 1537 (1993). The "clear and present danger" test still remains an exception to the First Amendment guarantee of free speech. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding that speech advocating unlawful activity is protected unless "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

34. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925) ("Freedom of speech . . . protected by the First Amendment from abridgement by Congress [is] among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."); *see also* Whitney v. California, 274 U.S. 357, 371 (1927) (including First Amendment guarantee of free speech in the term "liberty" as used in the Fourteenth Amendment); Fiske v. Kansas, 274 U.S. 380, 387 (1927) (same).

35. U.S. Const. amend. I (emphasis added).

36. It was not until after World War II that the Warren Court expanded the use of the First Amendment as a shield to protect free speech. *See* Henry Louis Gates, Jr., *Let Them Talk: Why Civil Liberties Pose No Threat to Civil Rights*, The New Republic, Sept. 20 & 27, 1993, at 37, 39.

37. 315 U.S. 568 (1942).

orderly conduct statute under which he had been convicted.[38] The defendant, a Jehovah's Witness, was prosecuted for calling the Rochester City Marshal "a God damned racketeer" and "a damned fascist" and asserting that "the whole government of Rochester are Fascists or agents of Fascists."[39] The Supreme Court, applying the New Hampshire Supreme Court's limiting construction of the statute,[40] unanimously affirmed the conviction.[41]

The *Chaplinsky* Court established a category of speech that it deemed unprotected by the First Amendment and thus proscribable without fear of compromising fundamental "speech" rights. It coined the term "fighting words"[42] to describe the category of those words, which, "by their very utterance inflict injury or tend to incite an immediate breach of the peace."[43] The Court proclaimed that such words are of "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit . . . is . . . outweighed by the social interest in order."[44]

This definition must have seemed clear and concise to Justice Murphy and the Justices who joined him in the unanimous decision. But in the years following *Chaplinsky*, courts have continuously examined and applied the doctrine of fighting words, apparently, without much clarity or success.

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38. The New Hampshire law at issue stated:

> "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."

Id. at 569 (quoting the Public Laws of New Hampshire, Ch. 378, § 2).

39. *Id.* at 569. The episode took place when the City Marshal warned Chaplinsky that his public denunciation of religion and the distribution of literature about his religious sect, though lawful, were drawing a restless and potentially riotous crowd. *Id.* at 569-70.

40. In evaluating a facial challenge to a state law, the Supreme Court lacks jurisdiction to construe state legislation authoritatively. *See* United States v. Thirty-seven Photographs, 402 U.S. 363, 369 (1971) (citation omitted). Instead, the Court is bound by a state court's limiting construction of that law. *See* Kolender v. Lawson, 461 U.S. 352, 355 (1983); Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 n.5 (1982) (citation omitted).

In *Chaplinsky*, the state court declared that the purpose of the statute was to preserve the public peace; thus, no words were " 'forbidden except such as have a direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed.' . . . The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight." 315 U.S. at 573 (quoting earlier New Hampshire cases, State v. Brown, 38 A. 731 (N.H. 1895) and State v. McConnell, 47 A. 267 (N.H. 1900), in which the New Hampshire Supreme Court had authoritatively interpreted and limited the scope of the statute to instances where the speech tends to cause violence). *But see infra* text accompanying notes 45-47.

41. 315 U.S. at 574.

42. *Id.* at 572.

43. *Id.*

44. *Id.*

A. *When are Words "Fighting Words"?*

Although the purpose of the New Hampshire legislature may have been to purge social discourse of its less palatable elements, the Court's reasoning in *Chaplinsky*, as well as in subsequent cases, demonstrates a different conception of fighting words. The characterization of fighting words as words with only "slight social value" that are "no essential part of any exposition of ideas"[45] may suggest that the *Chaplinsky* Court meant to exclude entirely certain words from the scope of First Amendment protection. But no court has ever applied the doctrine so narrowly. Even with regard to Chaplinsky's statements, no one would claim that the Court intended categorically to except the words "damn" and "fascist" from protected speech.[46] The Court's definition of fighting words must be understood as an attempt to balance the speaker's right to speak with the state's competing interest to keep the peace.[47] It is not that statements such as Chaplinsky's are not, or may never be, expressions of legitimate ideas.[48] Rather, the Court's goal was to prevent breaches of the peace.[49]

The Justices may not have been solely concerned with just the one breach of the peace brought about by Chaplinsky's particular statements. There was, perhaps, more concern that public speech opposing the government in the midst of a world war could lead to other breaches of the peace.[50] With *Chaplinsky*, the Court may have been

45. *Id.*

46. The Court included in its definition of fighting words both what it termed "classical fighting words," as well as "words in current use . . . equally likely to cause violence, and other disorderly words." *Id.* at 573. This flexible definition indicates that the Court understood the fluctuating nature of language in society and intended that the category of fighting words should remain fluid. *See also* National Assoc. of Letter Carriers v. Austin, 418 U.S. 264, 284 (1974) (stating that the word "fascist" in and of itself is protected speech that may be used to express an opinion of someone or some group); Cafeteria Employees Local 302 v. Angelos, 320 U.S. 293, 295 (1943) (describing the word "fascist" as "part of the conventional give-and-take in our economic and political controversies").

47. *Chaplinsky*, 315 U.S. at 573-74.

48. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974) ("Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.").

49. Despite its flowery language regarding the low value of certain speech, the Court understood that the statute was meant to prevent disorderly *conduct*, and not to restrict "speech." In concluding that the statute did not contravene the constitutional right to free expression, the Court wrote that "[i]t is a statute narrowly drawn and limited to define and punish specific *conduct* . . . the use in a public place of words likely to cause a breach of the peace." *Chaplinsky*, 315 U.S. at 573 (emphasis added).

50. Accusing a local politician of fascist tendencies in 1942 certainly could have resulted in a violent response by the politician to whom the remarks were directed. *But see* Lewis v. City of New Orleans, 415 U.S. 130, 135 (1974) (Powell, J., concurring) (stating that a police officer may be expected to exercise a greater degree of restraint than the average citizen). The same might be said about a politician who is exposed to public criticism regularly and should learn restraint in responding to criticism or even personal insults.

signalling how much the conduct implications of words depend on the context of the situation in which the words are spoken. As this Note proceeds to examine the historical line of fighting words-related cases that followed *Chaplinsky*, it is important to consider the vital role played by the conduct implications of words in the different circumstances in which they are spoken, and the Court's somewhat erratic and seemingly unprincipled application of the fighting words doctrine.

In *Terminiello v. Chicago*,[51] a post-war 1949 case, the Court reversed the defendant's conviction for disorderly conduct.[52] The charge against the defendant arose from his address to a group of some eight hundred people in which he criticized various political and racial groups for activities he denounced as "inimical to the nation's welfare."[53] The city ordinance under which the defendant was charged prohibited persons from " 'making any improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach of the peace.' "[54] The Court never reached the issue of whether the defendant's speech constituted fighting words.[55] Instead, it reversed the conviction on the ground that the statute, as construed by the trial judge, was overbroad.[56]

The trial judge had instructed the jury that they could convict the defendant for a breach of the peace if his "misbehavior . . . stirs the public to anger, invites dispute, [or] brings about a condition of unrest."[57] The Supreme Court reasoned that the statute, as interpreted by the trial judge, prohibited more expression than was necessary to secure the peace.[58] The Court noted with irony that "indeed [speech may] best serve its high purpose when it induces a condition of unrest."[59] Thus, the trial judge's construction, which was binding on the Supreme Court, rendered the statute unconstitutionally overbroad.[60]

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51. 337 U.S. 1 (1949).

52. *Id.* at 6.

53. *Id.* at 2-3. Though a group of police officers had been assigned to control the mass of protestors outside the auditorium where the defendant was speaking, they could not maintain order. Several disturbances broke out. *Id.* at 3.

54. *Id.* at 2 n.1 (quoting Municipal Code of Chicago § 193-1 (1939)).

55. *See id.* at 3.

56. *Id.* at 6. As applied to First Amendment issues, the doctrine of overbreadth requires that the Court strike down a law that sweeps within its ambit not only proscribable speech, but speech that is otherwise protected under the First Amendment. *See* Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973).

57. 337 U.S. at 3.

58. Although the government argued that the Illinois appellate courts had assumed that only "conduct constituting 'fighting words' " was punishable under the statute, the Court rejected that contention. It concluded instead that, as construed on the record in the judge's jury charge, at least part of the ordinance was unconstitutionally overbroad. *Id.* at 5-6. Because the record was unclear as to which provision the defendant's charge rested on, the defendant's conviction had to be overturned. *Id.* at 6.

59. *Id.* at 4.

60. *Id.* Justice Vinson, in his dissent, pointed out that, like the Illinois appellate courts, defendant's counsel also understood the ordinance as prohibiting only the use

Just two years later, in a similar case, *Feiner v. New York*, the Court directly addressed whether a defendant's political speech before a racially mixed audience was punishable under a disorderly conduct statute.[61] In the course of a speech about racial discrimination and civil liberties delivered on a street corner to publicize a meeting of the Young Progressives of America,[62] the defendant, Feiner, made derogatory remarks about President Truman, local politicians and the American Legion.[63] Upon refusing to accede to a police officer's request to discontinue his remarks, Feiner was arrested.[64] The defendant challenged his conviction under the disorderly conduct statute on the ground that the statute violated the First Amendment.[65] Despite its recent holding in *Terminiello*, the Court upheld the conviction.[66] It reasoned that, on the basis of the facts presented, the defendant was not convicted because of "the making or the content of his speech . . . [but because of] the reaction which it actually engendered."[67]

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of fighting words. *Id.* at 7 (Vinson, J., dissenting). Defendant's counsel did not object to the one "offending sentence" in the trial judge's jury charge, nor did he include it in the petition for certiorari. *Id.* The objection to the trial judge's overbroad construction of the statute was thus not even presented to the Court for review and should not have resulted in a reversal of the defendant's conviction. *Id.*

61. 340 U.S. 315 (1951). The *Feiner* Court did not articulate its concerns in terms of fighting words. Nevertheless, the disorderly conduct statute in that case was quite similar to the New Hampshire statute in *Chaplinsky*. Section 722 of the Penal Law of New York, under which the defendant in *Feiner* was convicted, provided in pertinent part:

> "Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct: *1. Uses offensive . . . abusive or insulting language, conduct or behavior; 2. Acts in such a manner as to annoy, disturb . . . or be offensive to others;* 3. Congregates with others on a public street and refuses to move on when ordered by the police."

Id. at 318 n.1 (emphasis added) (quoting N.Y. Penal Law § 722). Both the New York and New Hampshire statutes used the same terminology, including the words "offensive" and "offend or annoy," to describe the prohibited activity. *See supra* note 38. Though the New Hampshire statute did not include the requirement of an intent to provoke a breach of the peace, the New Hampshire Supreme Court construed the statute as a law to prevent breaches of the peace. *See supra* note 40. As a disorderly conduct statute, the New York statute is also similar to the Chicago ordinance in *Terminiello v. Chicago*. *See supra* text accompanying note 54.

62. *Feiner*, 340 U.S. at 329-30 (Douglas, J., dissenting).

63. *Id.* at 316-17. Excerpts from Feiner's remarks as revealed by the record included: "Mayor Costello (of Syracuse) is a champagne-sipping bum; he does not speak for the negro people" and "President Truman is a bum." *Id.* at 330 (Douglas, J., dissenting).

64. *Id.* at 317-18.

65. *Id.* at 316.

66. *Id.* at 321.

67. *Id.* at 319-20. The Court did not specify under which section of the statute the defendant was charged. For a text of the statute, see *supra* note 61.

According to the majority, the defendant "gave the impression that he was endeavoring to arouse the Negro people against the whites . . . . The statements before such a mixed audience 'stirred up a little excitement.' " *Id.* at 317. In his dissent, however,

In the same year *Feiner* was decided, the Court heard another First Amendment case, *Beauharnais v. Illinois*,[68] in which it upheld a defendant's conviction for distributing white supremacist propagandistic leaflets on the streets of Chicago.[69] The state court had construed the challenged statute[70] as a criminal libel law.[71] Accepting the Illinois

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Justice Black concluded that the defendant was convicted because of the unpopular views he expressed and not for congregating unlawfully on a street corner. *Id.* at 321-22 (Black, J., dissenting). Justice Black noted that even the trial judge admitted that he understood that the street corner meeting was a lawful one. *Id.* at 322 n.2. Moreover, even accepting the findings below (Justice Black criticized the Court for failing to review the evidence to determine if there had been a denial of a federally protected right), it was still "far-fetched to suggest that the 'facts' show any imminent threat of riot or uncontrollable disorder." *Id.* at 325. Only after one man told police to stop Feiner or he would stop him himself, did the police warn Feiner to end his speech and eventually have him arrested. In fact, Justices Black and Douglas asserted that if the police had any role in the incident, it should have been to protect Feiner's constitutional right to speak. *Id.* at 327 (Black, J., dissenting); *id.* at 331 (Douglas, J., dissenting).

In other similar instances involving political gatherings and demonstrations, the Court concluded that there was no imminent danger of a breach of the peace. It, therefore, reversed those convictions because they were improperly based on the defendants' political messages. *See, e.g.*, Cox v. Louisiana, 379 U.S. 536, 545-46 (1965) (reviewing the facts of the case, including a film of events, and reversing a disorderly conduct conviction of a leader of two thousand students who were demonstrating to protest segregation); Edwards v. South Carolina, 372 U.S. 229, 237 (1963) (reversing a disorderly conduct conviction for an African-American student demonstration because the evidence "showed no more than that the opinions which they were peaceably expressing were sufficiently opposed to the views of the majority . . . to attract a crowd and necessitate police protection"); *cf.* Star Opera Co., Inc. v. Hylan, 178 N.Y.S. 179 (Sup. Ct. 1919) (holding that in a rare situation when public authorities cannot in good faith control a mob audience hostile to the speaker's views, necessity requires that the speaker be restrained).

68. 343 U.S. 250 (1952).

69. *Id.* at 267. The leaflet that Beauharnais was charged with unlawfully distributing was an application for membership in the White Circle League of America, Inc., petitioning the Mayor and the City Council of Chicago:

> to halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro . . . . If persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro, surely will.

Id. at 252.

70. Section 224(a) of the Illinois Criminal Code provided in relevant part:

> "It shall be unlawful for any person . . . [to] advertise or publish, present or exhibit in any public place in this state any . . . publication or exhibition [which] portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots."

Id. at 251 (quoting Ill. Rev. Stat. 1949).

71. *Id.* at 253. Though the Illinois statute was not treated as a fighting words statute, it had similar characteristics to a fighting words statute. Libel, like fighting words, traditionally has been treated as a proscribable category of speech. *See supra* text accompanying note 7. The Court did not require a showing of an imminent breach of the peace. *Beauharnais*, 343 U.S. at 266 ("Libelous utterances not being

court's construction, the Supreme Court reasoned that if libel was punishable when directed at individuals, then the same libelous comments when directed at a group surely also could be punishable.[72] Despite the fact that libel is unprotected speech whether or not it incites violence, the Court relied heavily on the historical evidence of racial violence in Chicago to support its conclusion.[73] It reasoned that the Illinois legislature was justified in prohibiting this sort of leafletting, though it ordinarily would not be likely to cause breaches of the peace, because in Illinois, racial intolerance had already resulted in violent rioting.[74]

The next important case that impacted the doctrine of fighting words was *United States v. O'Brien*.[75] In that 1968 case, the Supreme Court upheld the defendant's conviction for burning his draft card in front of a crowd of onlookers.[76] The defendant was expressing his political opposition to American military involvement in Vietnam and, therefore, argued that the statute at issue and his conviction violated his First Amendment rights.[77] Nevertheless, the Court upheld

within the area of constitutionally protected speech, it is unnecessary . . . to consider [whether the activity resulted in a] 'clear and present danger.' "). Nevertheless, the state supreme court had described the words prohibited by the statute as those "liable to cause violence and disorder." *Id.* at 254. Additionally, the Court's finding that it was unnecessary even to consider the issue of imminent violence rested on the notion that the tendency to induce a breach of the peace was the traditional justification for criminal libel laws, which had always been thought to be immune from the First Amendment. *Id.*; *see also* Collin v. Smith, 578 F.2d 1197, 1205 & n.14 (7th Cir.) (rejecting the state's alternative reading of *Beauharnais* as sanctioning the prohibition of speech without reference to a fear of violence), *cert. denied*, 439 U.S. 916 (1978).

72. *Beauharnais*, 343 U.S. at 258 ("[I]f an utterance directed at an individual may be the object of criminal sanctions, we cannot deny to a State power to punish the same utterance directed at a defined group, unless we can say that this is a willful and purposeless restriction unrelated to the peace and well-being of the State.").

73. *Id.* at 259-61. Quoting Cantwell v. Connecticut, 310 U.S. 296, 310 (1940), the Court stated that " '[t]he danger in these times from the coercive activities of those who in the delusion of racial or religious conceit *would incite violence and breaches of the peace* in order to deprive others of their equal right to the exercise of their liberties, is emphasized by events familiar to all.' " *Beauharnais*, 343 U.S. at 261 (emphasis added).

74. It is widely accepted that *Beauharnais* is probably no longer good law in light of subsequent decisions limiting defamation actions. *See, e.g.*, Collin v. Smith, 578 F.2d 1197, 1205 (7th Cir.) (suggesting that *Beauharnais* is no longer good law), *cert. denied*, 439 U.S. 916 (1978); *see also* Laurence H. Tribe, American Constitutional Law § 12-17, at 926-27 (2d ed. 1988). Nevertheless, the Court has not seized on numerous opportunities to formally overturn *Beauharnais*. *See* Collin v. Smith, 439 U.S. 916, 919 (1978) (Blackmun, J., dissenting from denial of certiorari) (arguing that the Court should have agreed to hear *Collin* because the case conflicted with *Beauharnais*, which "ha[d] not been overruled or formally limited in any way"). Additionally, the holding in *Wisconsin v. Mitchell*, discussed *infra* part II.B, suggests that the interest in preventing potential racial violence, coupled with a history of racial strife, may again be considered sufficient to justify a restriction on speech rights in order to prevent the harmful conduct likely to result from fighting words.

75. 391 U.S. 367 (1968).

76. *Id.* at 369, 372.

77. *Id.* at 370.

the challenged statute and affirmed the conviction on the ground that the purpose of the statute—to criminalize the mutilation of draft cards—was unrelated to the suppression of "speech," and the defendant's conduct plainly violated the statute.[78]

Though it had just upheld O'Brien's draft card burning conviction the previous year, in *Street v. New York*,[79] the Supreme Court reversed a similar conviction for flag burning.[80] The defendant, while burning an American flag, stated in public: " 'We don't need no damn flag.' "[81] Since the defendant's statement was not so inherently inflammatory as to be likely to cause others to retaliate violently, it did not constitute fighting words and could not be the basis for the lower court's verdict.[82] The Court was unable to determine from the record whether the defendant was punished because of his conduct—burning the flag—or his politically charged words,[83] and therefore, set aside the conviction.[84]

78. Though *O'Brien* was not analyzed as a fighting words case, the Court set forth a useful test for determining when conduct combined with speech may nevertheless be punishable despite the incidental infringement on the right of free speech. *See infra* part III.A (setting forth the test in *O'Brien*); *infra* part III.B (asserting that the Court has in fact been applying the basic principles of the *O'Brien* test to fighting words as early as in *Chaplinsky*).

79. 394 U.S. 576 (1969).

80. *Id.* at 581. The decisions in *O'Brien* and *Street* were based on different statutes, but the facts of the cases are similar. Both defendants were protesting government conduct, or the lack of it. Each burned a symbolic object to express his disapproval of his government's policy. Yet, arrests for essentially similar forms of expression resulted in contrary results.

81. *Id.* at 579. The defendant, upon hearing of the shooting of civil rights leader James Meredith, took an American flag to a New York street corner and ignited it in protest of the shooting. The defendant was arrested and charged with malicious mischief under § 1425(16)(d) of the New York Penal Law, which made it a crime to " 'publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by words or act [any flag of the United States].' " *Id.* at 578 (quoting N.Y. Penal Law § 1425 (1909)).

82. *Id.* at 592. The Court noted that, even assuming that Street's remarks constituted fighting words, the challenged statute had not been narrowly drawn to punish only fighting words, and the lower courts had failed to so construe the statute. *Id.*; *see also* Gooding v. Wilson, 405 U.S. 518, 528 (1972) (striking down an overbroad statute because it was not narrowly construed to apply only to words that had a direct tendency to cause acts of violence).

83. *Street*, 394 U.S. at 590. The Court did not even consider whether the two elements of conduct and speech were in fact inseparable. Instead, it focused on the language of the statute, which prohibited, in the same clause, mutilation of the flag or contempt of the flag by words or act. *Id.* at 578. The defendant clearly violated the law through his conduct of mutilating the flag and his casting of contempt upon the flag by burning it. Yet, the Court focused on the possibility that the defendant was arrested and convicted only on account of his words. *Id.* at 590.

84. *Id.* at 586. The Court analyzed the case under the principle set forth in Stromberg v. California, 283 U.S. 359 (1931), stating that if a conviction is based on a general verdict, and the record fails to show which clause of a statute the conviction was based on, if one of the clauses of the statute is invalid, the conviction cannot stand. *Street*, 394 U.S. at 585-86 (citing *Stromberg*, 283 U.S. at 367-68).

That same year, the Court also decided *Brandenburg v. Ohio*,[85] which involved a Ku Klux Klan leader who was convicted under the Ohio Criminal Syndicalism Act for advocating violence at a Klan rally.[86] The Supreme Court reversed the conviction by invalidating the Act because it criminalized the mere advocacy of violence, as distinguished from "incitement to imminent lawless action."[87] Though this doctrine of "imminent lawless action" is an exception to the First Amendment, it has never been understood to constitute a category of proscribable speech like libel, obscenity and fighting words.[88] Despite its similarity to the principles underlying the fighting words doctrine,[89]

The Court later invalidated another conviction for flag burning, in Texas v. Johnson, 491 U.S. 397 (1989). In that case, the Court directly addressed the speech/conduct issue. *See infra* text accompanying notes 114-21.

85. 395 U.S. 444 (1969). Though *Brandenburg* was not a fighting words case, it is included in this review because of its relevance in the development of the Court's jurisprudence with regard to the fighting words doctrine.

86. *Id.* at 445. The defendant had addressed a meeting of the Ku Klux Klan that was filmed by a television news reporter and later broadcast on local and national news programs. Dressed in Klan regalia, the defendant addressed the following statement to the rally: "[I]f our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken." *Id.* at 446. Other scattered phrases audible on the tape, though not necessarily spoken by the defendant, included: "Bury the niggers"; "Send the Jews back to Israel"; and "Nigger will have to fight for every inch he gets from now on." *Id.* at 446 n.1.

The Act under which defendant was charged made it criminal to " 'advocat[e] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform' [and to] 'voluntarily assembl[e] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.' " *Id.* at 444-45 (quoting Ohio Rev. Code Ann. § 2923.13).

87. *Id.* at 449. Through a series of criminal syndicalism cases, the Court earlier had derived the principle that "the constitutional guarantees of free speech . . . do not permit a State to forbid or proscribe advocacy of the use of force . . . except where such advocacy is directed to inciting . . . imminent lawless action and is likely to incite or produce such action." *Id.* at 447 (referring to Dennis v. United States, 341 U.S. 494, 516-17 (1951) (sustaining the constitutionality of the Smith Act, a criminal syndicalism act, on the above principle) and Yates v. United States, 354 U.S. 298, 320-24 (1957) (overturning a conviction under the Smith Act because the trial judge's jury instructions improperly allowed a conviction for the mere advocacy of violence)). This doctrine of "imminent lawless action" harkens back to the "clear and present danger" test that was first articulated in the early twentieth century as a jurisprudential basis to justify restrictions on speech in the service of another more important goal of preventing violence. *See supra* notes 32-33 and accompanying text.

88. Perhaps this is yet another adventure in semantics, a fatefully appropriate and ironic result in light of a constitutional amendment that was drafted to preserve, as sacred, the right to free speech, while at the same time, ensure that language itself remains vital and fluid. By focusing on "imminent lawless *action*," the *Brandenburg* Court, 27 years after *Chaplinsky*, spoke directly to the conduct implications of speech, rather than to speech itself. *Brandenburg* can be seen as a refinement of the proscribable categories of speech, because, from the outset, the Court rejected the notion that words directed to causing harmful conduct should be considered "speech" at all.

89. Essentially, the only difference between the two doctrines is the make-up of the audience to whom the speaker is addressing his or her remarks. The paradigmatic fighting words case involves a speaker who is hostile toward a particular ad-

the Court always has applied the doctrine of "imminent lawless action" explicitly as a proscription on conduct, not speech.[90]

It was not until the 1970s, however, that the Warren Court directly attempted to clarify the important distinction between disorderly conduct and the expressive value that such activities may have in the context of First Amendment principles of "free speech." In *Cohen v. California*,[91] the Court reversed the disorderly conduct conviction of a Vietnam War protestor.[92] The defendant was charged with disorderly conduct after walking through the corridors of the Los Angeles County Courthouse wearing a jacket bearing the message "Fuck the Draft" on the back.[93] Despite the fact that Cohen's activity might be descriptively defined as conduct, and that the charge against him was for disorderly conduct, the Supreme Court focused its analysis on the nature of Cohen's expression.[94] It determined that the slogan on Co-

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dressee. Under the doctrine of imminent lawless action, the speaker addresses a friendly audience and incites them to action. The principle goal underlying both doctrines, however, is the same—the prevention of breaches of the peace that may arise from aggressively charged speech.

In *Brandenburg*, the fact pattern did not fit the fighting words paradigm because it involved an audience of Klan members who were supportive of, not hostile to, the speaker's views. 395 U.S. at 445. Thus, the Court needed a different mechanism to apply the basic principle of fighting words. It, therefore, articulated the analogous doctrine of imminent lawless action, which accommodated the facts in *Brandenburg*. *Cf.* Stephen W. Gard, *Fighting Words as Free Speech*, 58 Wash. U. L.Q. 531, 537 (1980) (stating that although the two doctrines are comparable, "the personally abusive epithet element [required of fighting words] focuses on the content of the words uttered by the speaker. . . . [while] the requirement of a likelihood of a violent reaction focuses on the circumstances in which the words are used").

90. *See infra* part III.B (arguing that the fighting words doctrine also has been applied to prohibit conduct and not speech).

91. 403 U.S. 15 (1971). For a thoughtful discussion of *Cohen*, see William Cohen, *A Look Back at* Cohen v. California, 34 UCLA L. Rev. 1595 (1987).

92. 403 U.S. at 26.

93. *Id.* at 16. The defendant was convicted under the part of California Penal Code § 415 that made it a misdemeanor to " 'maliciously and willfully disturb[ ] the peace or quiet of any neighborhood or person [by] . . . offensive conduct . . . or use any vulgar, profane, or indecent language within the presence or hearing of women or children.' " *Id.* at 16 n.1 (quoting Cal. Penal Code § 415). Although the record stated that women and children were "present in the corridor" through which Cohen walked, the Los Angeles Municipal Court convicted the defendant under the first part of the provision. *Id.* at 16.

The Court easily could have deemed the statute overbroad; it was susceptible to overbroad interpretations and had not been authoritatively limited by the state court. In fact, only three years after *Cohen*, the Court vacated and remanded another conviction under the same statute precisely because it determined that the statute was overbroad. *See* Rosen v. California, 416 U.S. 924, 924 (1974); *see also id.* at 931 (Douglas, J., dissenting) (stating that he would have reversed the judgment because the statute was overbroad and there had been no limiting construction by the state court).

94. *But cf.* 403 U.S. at 27-28 (Blackmun, J., dissenting) (asserting that Cohen's "absurd antic" was mainly conduct and little speech, and the Court's "agonizing over First Amendment values seems misplaced and unnecessary").

hen's jacket was a political statement, not a personal insult.[95] As a political statement, the message had communicative value that was protected by the First Amendment.[96]

The Court emphasized that the concept of "speech" is multifaceted and that words themselves are only one of the elements that make up "speech."[97] Moreover, it recognized that a speaker's choice of words to convey a message may be as important for its emotive impact as for its communicative value.[98] The Court added that it is not for the government or the courts to determine how best to convey a message.[99] Thus, in *Cohen*, the Court rejected the government's attempt to punish Cohen's political message under the guise of a charge of disorderly conduct.[100]

Despite the Court's new interest in the nature of speech itself, in two cases that followed *Cohen*, *Gooding v. Wilson*[101] and *Lewis v. City of New Orleans*,[102] the Court declined to review the circumstances surrounding the challenged speech. Instead, it overturned the convictions by deeming the statutes in those cases to be unconstitutionally overbroad.[103] In *Gooding*, the defendant was one of a group picket-

95. *Id.* at 20. It is noteworthy that, like Cohen's message, the challenged expressions in *Chaplinsky*, *Terminiello*, *Feiner*, *O'Brien* and *Street* were also political in nature, but the Court chose not to make such a distinction in those cases.

96. *Id.* at 25-26.

97. *See id.* at 26. The Court stated that "much linguistic expression serves a dual communicative function: it conveys not only ideas . . . but otherwise inexpressible emotions as well." *Id.*

98. *Id.* Thus, the statements "Fuck the draft" and "I disagree vehemently with the government's draft policy" may have similar communicative value, but no one would argue that they are interchangeable. Yet, while the former may resemble fighting words and the latter does not, both statements are protected speech when spoken in peaceful circumstances, which was precisely the situation in *Cohen*. *See also* Franklyn S. Haiman, *Speech v. Privacy: Is There a Right Not to Be Spoken To?*, 67 Nw. U. L. Rev. 153, 189 (1972) (stating that with speech, its form and its content are so inextricably tied that the medium chosen to express a message is as integral an element of the message as its substantive content).

99. *Cohen*, 403 U.S. at 24. Speech may not be punished simply because the form it takes is disturbing to the listener. After all, "one man's vulgarity is another's lyric." *Id.* at 25; *see also* Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971) (stating that "so long as the means are peaceful, the communication need not meet standards of acceptability"). Moreover, "[t]he constitutional right of free expression is . . . designed and intended to remove governmental restraints from the arena of public discussion, putting the decision . . . largely in the hands of each of us . . . ." 403 U.S. at 24. *But see* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 568 (1991) (holding that the government interest in the societal disapproval of nude dancing is sufficient to uphold a restriction on the expression of that activity).

100. *Cohen*, 403 U.S. at 23.

101. 405 U.S. 518 (1972).

102. 415 U.S. 130 (1974).

103. To explain its reason for failing to consider the facts of each case, the Court offered the following:

> It matters not that the words [appellant] used might have been constitutionally prohibited under a narrowly and precisely drawn statute. At least when statutes regulate or proscribe speech and when "no readily apparent con-

ing in front of an army headquarters to protest American involvement in Vietnam and blocking the doorway so that new recruits could not enter the building.[104] Upon the group's refusal to cooperate with police and move away from the door, a scuffle ensued in which the defendant committed an assault and battery against two police officers.[105] Though the assault and battery charges were affirmed, the defendant's conviction for use of "abusive language" was reversed by the Supreme Court.[106]

The statute at issue prohibited the use of "opprobrious words or abusive language, tending to cause a breach of the peace."[107] The statute was comparable to the New Hampshire statute in *Chaplinsky*,[108] and the purpose of the statute comported with the purpose underlying the fighting words doctrine. Nevertheless, the Court used arcane and technical dictionary definitions of the terms "opprobrious" and "abusive" to conclude that the statute restricted speech beyond fighting words, and therefore, was unconstitutionally overbroad.[109] The Court was concerned with the possibility that, in addition to fighting words, the statute may have had a chilling effect on protected speech as well. In *Gooding*, the overbreadth considerations outweighed the actual violence that may have resulted from the verbal exchange.

Similarly, in *Lewis v. City of New Orleans*,[110] an argument between the defendant and a police officer precipitated the defendant's arrest and conviction under a New Orleans ordinance that made it a crime

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> struction suggests itself as a vehicle for rehabilitating the statutes" . . . the transcendent value to all society of constitutionally protected expression is deemed to justify allowing "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity" . . . . This is deemed necessary because persons 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.

Lewis, 415 U.S. at 133-34 (quoting and reaffirming holding in Gooding v. Wilson, 405 U.S. at 520-21).

104. *Gooding*, 405 U.S. at 519 n.1.

105. *Id.*

106. The indictment alleged that the defendant spoke the following phrases to specific officers: "White son of a bitch, I'll kill you . . . 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." *Id.*

107. The Georgia statute, in relevant part, provided: " 'Any person who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor.' " *Id.* at 519 (quoting Georgia Code Ann. § 26-6303).

108. *See supra* note 38; *see also* Lewis v. City of New Orleans, 415 U.S. 130, 137 (1974) (Blackmun, J., dissenting) (criticizing the Court's decision in *Gooding* to strike down the statute because the language in the statute "virtually tracked the language used by the *Chaplinsky* Court" in describing and outlawing the use of fighting words).

109. *Gooding*, 405 U.S. at 524-25.

110. 415 U.S. 130 (1974).

"and a breach of the peace . . . to curse . . . or [use] opprobrious language toward" an on-duty police officer.[111] The Court struck down the statute because the Louisiana Supreme Court, on remand in light of *Gooding*, failed to construe the statute adequately to apply only to fighting words.[112] The use of the term "opprobrious," which was deemed overbroad in *Gooding*, also made the New Orleans ordinance impermissibly overbroad.[113]

The last case reviewed in this section is another flag burning case. In *Texas v. Johnson*,[114] the Court overturned the defendant's conviction for the "desecration of a venerated object" in violation of Texas criminal law.[115] During the 1984 Republican National Convention, the defendant, Gregory Lee Johnson, had ended a day long political protest by burning an American flag in front of Dallas City Hall.[116] Though onlookers were offended by Johnson's gesture, there was no threat of violence or riot.[117]

The Supreme Court concluded that Johnson's conduct, which undoubtedly violated the statute, was expressive activity under the First Amendment.[118] The flag desecration law was thus subject to strict scrutiny.[119] The Court determined that the state's interest in preserving the flag as a symbol of nationhood could not justify infringing on the defendant's First Amendment rights.[120] Thus, although Johnson's communication took the form of conduct, the Court treated it as protected expression.[121]

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111. *Id.* at 132 (quoting New Orleans, La., Ordinance 828 M.C.S. § 49-7).

112. *Id.* at 132. *But see id.* at 138 (Blackmun, J., dissenting) (stating that the state court on remand specifically construed the ordinance as narrowed to fighting words).

113. *Id.* at 132.

114. 491 U.S. 397 (1989).

115. *Id.* at 400 n.1 (quoting Tex. Penal Code Ann. § 42.09 (West 1989) (prohibiting the desecration of a national flag)).

116. *Id.* at 399. Demonstrators continued to chant "America, the red, white and blue, we spit on you" while the flag burned. *Id.*

117. *Id.*

118. To reach that conclusion, the Court inquired whether " '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.' " *Id.* at 404 (quoting Spence v. Washington, 418 U.S. 405, 410-11 (1974)). The state court already had dismissed the government's argument that its goal was to prevent breaches of the peace because the statute was not narrowly drawn to prohibit only those flag burnings likely to cause a breach of the peace. *Id.* at 401. Moreover, the court stressed that another Texas statute specifically prohibited breaches of the peace. *Id.*

119. *See infra* note 200 (describing the strict scrutiny test).

120. While the statute prohibited burning a flag in a way that would denigrate its value as a national symbol, it permitted other flag burnings, say for the purpose of disposing of a dirty or torn flag. 491 U.S. at 411. The Court stated that "[i]f 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." *Id.* at 414 (citations omitted).

121. The following term, the Court struck down another flag burning conviction, this time under the Flag Protection Act of 1989, which Congress had passed in response to the Court's decision in *Texas v. Johnson*. *See* United States v. Eichman, 496

The line of First Amendment cases described in this part suggests that the Court has not been particularly successful in articulating a standard for knowing when words are fighting words.[122] The apparently anomalous results of these cases[123] reflect the power of words to mean different things in different situations. Nevertheless, one element of the fighting words doctrine that the Court has developed and refined since *Chaplinsky* is the significance of the addressee in relation to the speaker of the fighting words.

B. *The Import of the Addressee in Fighting Words*

Although one element of the definition of fighting words requires a face-to-face encounter, the Court in *Chaplinsky* did not directly address this element.[124] The New Hampshire Supreme Court did construe the language of the disorderly conduct statute to require that the challenged words tend to cause violence "by the persons to whom, individually, the remark is addressed."[125] But the identity of the addressee, though clearly of some import to the drafters of the New Hampshire statute, was not a central concern given the facts surrounding Chaplinsky's remarks. Because the defendant directed his remarks to the city marshal, who was present to hear them, it was unnecessary for the Court to focus on the "face-to-face" requirement.[126]

Whether communications constitute fighting words, however, depends in large part on the addressee of the communications. In subsequent cases, where the identity of a particular addressee was less apparent, the Court was forced to analyze and interpret this element of the fighting words doctrine. It had to locate a specifically identifiable person to whom the speaker's invitation to fight was directed. In doing so, it further defined the scope of the doctrine by specifying, through application, the types of circumstances in which expressive communications could constitute fighting words.

U.S. 310, 312 (1990). The Court noted that "[a]lthough the Flag Protection Act contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government's asserted *interest* is 'related to the suppression of free expression,' and concerned with the content of such expression." *Id.* at 315 (quoting *Johnson*, 491 U.S. at 410).

122. *See supra* note 8 and accompanying text (suggesting that words themselves cannot be fighting words without reference to the circumstances in which they are spoken).

123. *See infra* part I.C (discussing the inconsistencies in the cases reviewed in part I.A).

124. The Court stated only that the statute prohibited "the face-to-face words plainly likely to cause a breach of the peace by the addressee." Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942).

125. *Id.*

126. *Id.* at 569. The remark about the government of Rochester was also directed to the marshal, who was the government's representative. *Id.* Professor Tribe has suggested that the *Chaplinsky* Court "focused primarily on the content of the communication without closely examining the context within which it was uttered." Tribe, *supra* note 74, § 12-10, at 850.

In *Cohen v. California*,[127] the Court acknowledged that the four-letter expletive on Cohen's jacket commonly is used in a provocative manner.[128] But it noted that in this instance, "[n]o individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult."[129] Moreover, "the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense."[130] The government had to show more than an interest in protecting passersby, who could protect themselves by averting their eyes or walking away.[131] The communication had to be directed at someone in particular in order to trigger retaliation by that addressee.[132] The burden would be on the government to show that the addressee was in some way "powerless to avoid [the expressive] conduct."[133]

In several subsequent cases in which the Court overturned fighting words convictions on the basis of overbroad statutes, the Court emphasized that fighting words must " 'have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed.' "[134] Though the *Chaplinsky* Court had articulated an objective standard by which to measure fighting words,[135] the cases sug-

127. 403 U.S. 15 (1971).

128. *Id.* at 20. The Court implied that in certain face-to-face circumstances, the expletive on Cohen's jacket could be communicated in a manner meant to incite another to retaliate. *Id.*

129. *Id.*; *see also* Texas v. Johnson, 491 U.S. 397, 409 (1989) (burning an American flag in public could not be considered fighting words because no reasonable onlooker would have viewed the expressive activity as "a direct personal insult or an invitation to exchange fisticuffs"); Hess v. Indiana, 414 U.S. 105, 107 (1973) (defendant's statement "We'll take the fucking street later" was not a personal insult because it was not directed at a particular individual).

130. *Cohen*, 403 U.S. at 21.

131. *Id.*

132. *See* Cantwell v. Connecticut, 310 U.S. 296, 309 (1940) (stating that provocative words must be "directed to the person of the hearer").

133. *Cohen*, 403 U.S. at 22. The Court stated that "[t]he ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." *Id.* at 21; *see* Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975) (stating that the government may protect listeners from offensive speech, but "only when the speaker intrudes on the privacy of the home," or the listener cannot practically avoid exposure).

134. Gooding v. Wilson, 405 U.S. 518, 524 (1972) (citation omitted); *see* Lewis v. City of New Orleans, 415 U.S. 130, 133-34 (1974) (discussed *infra* text accompanying notes 137-40); Brown v. Oklahoma, 408 U.S. 914, 914 (1972) (remanding, in light of *Cohen* and *Gooding*, case in which defendant used the word "motherfucking" at a public meeting); Rosenfeld v. New Jersey, 408 U.S. 901, 902-03 (1972) (same).

135. The Court cited to the state court's description of the test as " 'what men of common intelligence would understand would be words likely to cause an average addressee to fight.' " Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) (quoting 18 A.2d 754, 762 (N.H. 1941)).

gest that the Court was not willing to rely on a purely objective standard.[136]

For example, in *Lewis v. City of New Orleans*, the statute had a limited application: prohibiting offensive language spoken to an on-duty police officer.[137] The case established that it was unconstitutional to make it a per se crime to address profanities to an on-duty police officer. But it did not address directly whether fighting words were punishable "when addressed to a police officer trained to exercise a higher degree of restraint than the average citizen."[138] Scholars have suggested that the standard is not and should not be the original "objective" standard of the reasonable addressee.[139] Rather, courts should apply the standard of a reasonable person in the position of the addressee.[140] Such a result is consistent with the idea that words

136. *See, e.g.*, *Gooding*, 405 U.S. at 528 (stating that "the standard allowing juries to determine guilt 'measured by common understanding and practice' does not limit the application of [the challenged statute] to 'fighting' words defined by *Chaplinsky*"); *see also* Thomas F. Shea, *"Don't Bother to Smile When You Call Me That"—Fighting Words and the First Amendment*, 63 Ky. L.J. 1, 15 (1975) (claiming that *Gooding* essentially overruled *Chaplinsky*).

137. Lewis v. City of New Orleans, 415 U.S. 130, 132 (1974).

138. *Id.* at 132 n.2. Justice Powell, concurring, suggested that the standard may not be the objective standard articulated in *Chaplinsky*. Powell stated that "[i]t is unlikely . . . that the words said to have been used here would have precipitated a physical confrontation between the middle-aged woman who spoke them and the police officer in whose presence they were uttered." *Id.* at 135 (Powell, J., concurring). Justice Powell questioned whether or not the words could even constitute fighting words because police officers should exercise a higher level of self-restraint. *Id.*

This inquiry is a clear departure from a consideration of the average addressee in *Chaplinsky*. *See* City of Houston v. Hill, 482 U.S. 451, 462-63 (1987) (considering whether a police officer should be held to a higher standard of restraint by using a subjective test based on the likely reaction of the particular addressee); Ashton v. Kentucky, 384 U.S. 195, 200 (1966) (same); *see also* Note, *The Demise of the Chaplinsky Fighting Words Doctrine: An Argument For Its Interment*, 106 Harv. L. Rev. 1129, 1135-37 (1993) [hereinafter *Demise of Chaplinsky*] (arguing that the objective standard in *Chaplinsky* has not been applied in actual cases).

139. *See* Shea, *supra* note 136, at 14 (arguing that the Court altered the fighting words doctrine by adopting a subjective standard to determine the likelihood of retaliation from the addressee); Strossen, *supra* note 21, at 509 (asserting that the Court narrowed the definition of fighting words to the second prong—words likely to cause a breach of the peace—and required a contextual evaluation of each challenged utterance); Tribe, *supra* note 74, § 12-18, at 929 & n.9 (describing a doctrinal shift in the development of fighting words by incorporating into the standard the "clear and present danger test"); *cf.* Gard, *supra* note 89, at 554-56 (asserting that the Court has continued to apply an objective standard, but has placed the objective "reasonable person" in the circumstances of the addressee).

140. Other scholars have suggested that even the requirement of likely retaliatory conduct does not adequately accommodate the range of possible responses to fighting words. *See, e.g.*, Kent Greenawalt, *Insults and Epithets: Are They Protected Speech?*, 42 Rutgers L. Rev. 287, 296-97 (1990) (suggesting that the age of the victim of abusive epithets, and thus the likelihood of retaliation, should not be relevant in determining whether the words are punishable); Lawrence, *supra* note 21, at 453-55 (observing that in cases where minorities are outnumbered by their victimizers, they are more likely to flee than to fight back, a response that the objective standard of fighting words does not adequately accommodate); Matsuda, *supra* note 22, at 2355-56 &

themselves are innocent until exploited in circumstances where particular addressees are likely to retaliate.

C. *The Crisis in Conflicting Results in Fighting Words Cases*

Arguably, since *Chaplinsky*, the Court has narrowed the scope of the fighting words doctrine through a case-by-case analysis, and the doctrine has evolved from a speech restrictive doctrine to one that protects a great deal of unpopular speech. In each case, the Court determined, based on the facts presented, whether the statute was narrowly construed to prohibit only fighting words, and if so, whether the challenged expression constituted fighting words. In the process, the original two-pronged definition of fighting words as those words likely "to inflict injury or cause a breach of the peace" has all but collapsed, so that the doctrine now more closely resembles the more basic "clear and present danger" test.[141]

This theory, though precise and neat, does not account for apparent inconsistencies in the Court's overall analysis of the cases and the contrary results of seemingly similar cases. The Court's decisions do not trace an evolving doctrinal development of fighting words. Thus, the decisions in these confusing cases often seem arbitrary and unprincipled.

Similar circumstances often resulted in contrary holdings.[142] For example, the defendants in *Terminiello v. Chicago* and *Feiner v. New York* both were speaking about politically charged issues before large crowds.[143] Yet in *Terminiello*, where the disturbances erupted on account of the defendant's incitements,[144] the Court reversed the charge of disorderly conduct because of an improper jury instruction to which neither the defense attorney nor the appellate courts had objected.[145] In *Feiner*, on the other hand, the defendant was lawfully congregating on a street corner that was regularly used for public gatherings, and his speech incited no actual violence.[146] Nevertheless, the Court affirmed the conviction on the grounds of disorderly conduct.[147] The circumstances in *Terminiello* presented just as likely an occasion for violence as those in *Feiner*, and yet the Court decided the cases con-

n.191 (noting that retaliatory violence as the standard for when words become fighting words does not account for victims who are silenced in a "demoralized, passive state").

141. *See* Philip Weinberg, R.A.V. *and* Mitchell: *Making Hate Crime a Trivial Pursuit*, 25 Conn. L. Rev. 299, 314 (1993); *Demise of Chaplinsky*, *supra* note 138, at 1133 n.34.

142. *Compare* Terminiello v. Chicago, 337 U.S. 1 (1949) *with* Feiner v. New York, 340 U.S. 315 (1951).

143. *See supra* text accompanying notes 53 and 61.

144. *See supra* note 53 and accompanying text.

145. *See supra* notes 57-60 and accompanying text.

146. *Feiner*, 340 U.S. at 322 n.2 (Black, J., dissenting); *see supra* note 67.

147. *See supra* notes 66-67 and accompanying text.

trarily. These anomalous results seem to cast doubt upon the Court's willingness to apply the fighting words doctrine with consistency and reasoned judgment.

Other times, the Court interpreted similar statutes differently and arrived at contrary holdings. For example, in *Street v. New York*, one subsection of the statute was deemed unconstitutional.[148] Since the conviction was a general one, and the Court was unable to determine under which subsection the defendant was convicted, it relied on the *Stromberg* analysis to overturn the conviction.[149]

The same problem presented itself in *Feiner v. New York*. The challenged statute had several clauses,[150] and it was unclear under which of the clauses the defendant had been convicted. Clauses one and two, which prohibited offensive, abusive or annoying language or behavior, could easily have been construed as overbroad because their language was strikingly similar to the New Hampshire statute in *Chaplinsky*, but without any narrowing construction. Regarding the third clause, which prohibited congregating on public streets in defiance of a police officer's request to move, even the trial judge agreed that the defendant's public address was a lawful one.[151] Under the circumstances, the Court could have ruled that, like in *Street*, the general conviction could not stand. Yet, the Court was unconcerned with the details of the conviction and affirmed the lower court. Again, there appears to be no principled explanation for the Court's choice to apply the *Stromberg* analysis in one case, but not in the other.

In yet other cases, the Court relied on the doctrine of overbreadth to strike down statutes without even considering a defendant's challenged behavior.[152] For example, in *Gooding v. Wilson*,[153] the Court struck down a breach of the peace statute despite the fact that the law closely resembled the New Hampshire statute in *Chaplinsky* and was understood by the parties, and the lower courts, to apply only to fighting words.[154] Yet in other instances, such as in *Beauharnais v. Illinois*[155] and in *Cohen v. California*,[156] the Court focused on the nature of the behavior and the content of the speech with no more than a reference to the possible deficiencies of the statutes.

Additionally, the Court's distinction between speech and conduct also appears arbitrary. For example, the defendants' activities in *Cohen v. California* and *Texas v. Johnson* were considered expressive

148. *See supra* note 82. For a discussion of *Street*, see *supra* notes 79-84 and accompanying text.
149. *See supra* note 84 (describing the *Stromberg* analysis).
150. For a text of the New York statute in *Feiner*, see *supra* note 61.
151. *See supra* note 67.
152. *See supra* note 103.
153. For a discussion of *Gooding*, see *supra* notes 104-09 and accompanying text.
154. *See supra* note 108 and accompanying text.
155. For a discussion of *Beauharnais*, see *supra* notes 68-74 and accompanying text.
156. For a discussion of *Cohen*, see *supra* notes 91-100 and accompanying text.

conduct protected by the First Amendment.[157] Yet in *O'Brien*, where the defendant was similarly exercising his speech rights, the Court found that the activity was primarily conduct that could be restricted. The Court could have concluded that O'Brien's draft card burning was also protected expressive conduct, but it neglected to consider that option.[158]

The simplest means to justify the Court's decisionmaking in this area is to distinguish each case on the facts presented. Although this approach will explain some of the Court's decisions, it does not account for the rest. Every case is unique factually, but this is too simplistic an explanation because it says little about what principles the Court employed in reaching its conclusions. Neither does it account for the practical reality that the Court hears only a small percentage of the cases for which certiorari is filed, and its decisions at least should provide guiding principles for the lower courts to follow.

Another possible explanation is to distinguish the cases on the basis of the statutes presented in each. Since the Court is limited to deciding the case before it[159] and is bound by a state court's construction of the statute or ordinance at issue, it has no choice but to determine first the validity of the specific law. This explanation would resolve why the Court never reached the factual issues in some cases. But it does not explain why the Court concluded that some statutes were overbroad despite state court limiting constructions,[160] while others suffered from a trial judge's overly broad charge to a jury.[161] It also does not explain why the language in some statutes, though clearly analogous to the New Hampshire statute in *Chaplinsky*, could not be understood to prohibit the same fighting words that the Court deemed proscribable in *Chaplinsky*.

One last explanation for these apparent discrepancies in the Court's holdings is related to the timing of the decisions. In periods of war, the Court appears to have been more inclined to permit restrictions on speech. As far back as 1798,[162] and certainly during World War I,[163] World War II[164] and the conflict in Vietnam, the Court permitted restrictions on speech that it otherwise might not have upheld. Thus, while the Court upheld Chaplinsky's conviction in 1942, it struck down Terminiello's conviction in 1949, despite the fact that both cases

157. *See supra* notes 95-96 and accompanying text; *supra* note 118 and accompanying text.

158. *See infra* part III.A.

159. *See* U.S. Const. art. III, § 2.

160. *See* Gooding v. Wilson, 405 U.S. 518, 524-25 (1972).

161. *See* Terminiello v. Chicago, 337 U.S. 1, 6 (1949).

162. *See supra* note 31 and accompanying text.

163. *See supra* notes 32-33 and accompanying text.

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

presented similar circumstances, and, in the latter case, there was a real possibility of a violent eruption.[165]

Similarly, the Court upheld O'Brien's conviction in 1968, but struck down Street's conviction one year later, despite the fact that each protest burning was intended and understood by viewers to communicate a political message.[166] Street's protest, however, was not explicitly related to Vietnam,[167] while O'Brien's protest was in direct defiance of the government's military policy.[168]

While the preceding explanations may offer some insight into the Court's decisions in this area, they do not justify or make those decisions any more principled. This gap in understanding is ultimately unsatisfactory because it suggests a lack of coherent and reasoned judgment on the part of the Court. But perhaps the Court's somewhat erratic pattern of fighting words decisions may be attributable to a larger framework or overriding principle that goes unacknowledged, but nonetheless operates as a driving force behind the Court's jurisprudence.[169]

II. Two Distinctive Cases

The line of fighting words-related cases that followed *Chaplinsky* appear to use an assortment of First Amendment principles to reverse some convictions and uphold others. Two recent hate crime cases, *R.A.V. v. City of St. Paul*[170] and *Mitchell v. Wisconsin*,[171] illustrate this apparent lack of a coherent jurisprudence.

A. *R.A.V. v. City of St. Paul*

In June 1992, the Supreme Court struck down a St. Paul ordinance that prohibited fighting words[172] on the " 'basis of race, color, creed, religion or gender.' "[173] The defendant, Robert Viktora, along with several other teenagers, had burned a cross on an African-American family's lawn. The City of St. Paul prosecuted Viktora under its Bias-

165. *See supra* note 53 and accompanying text.

166. *See supra* note 118 and accompanying text (describing the Court's test in *Spence* to determine if conduct is intended as an expressive communication).

167. *See supra* note 81.

168. *See supra* text accompanying note 77; *cf.* Cohen v. California, 403 U.S. 15 (1971). Cohen's protest march through the corridors of a courthouse, like O'Brien's draft card burning, clearly was related to the government's policy regarding Vietnam. But the Court upheld O'Brien's conviction and struck down Cohen's because, despite their similar expressive content, O'Brien's form of conduct was itself punishable, while Cohen's was not.

169. *See infra* part III.

170. 112 S. Ct. 2538 (1992).

171. 113 S. Ct. 2194 (1993).

172. The Court adopted the Minnesota Supreme Court's narrow construction of the ordinance to apply only to the proscribable category of fighting words, but still found the ordinance facially invalid. *See* 112 S. Ct. at 2542.

173. *Id.* at 2541 (quoting St. Paul, Minn., Legis. Code § 292.02 (1990)).

Motivated Crime Ordinance.[174] Though Justice Scalia noted in the last words of the Court's opinion that "burning a cross in someone's front yard is reprehensible,"[175] the Court ultimately reversed Viktora's conviction on the grounds that the ordinance unconstitutionally prohibited speech on the basis of the content of the idea expressed.[176]

Justice Scalia reasoned that even if the ordinance reached only unprotected fighting words, St. Paul could not constitutionally regulate only some kinds of fighting words on the basis of the content of the intended message.[177] The ordinance was unconstitutional because it restricted in a content-discriminatory manner only those speakers who expressed views on particular "disfavored subjects" that were listed in the ordinance.[178] Fighting words based on another unlisted subject, such as sexual orientation, political affiliation or a physical disability, would go unpunished under the ordinance.[179] By not prohibiting all fighting words, but only those of a particularly noxious content, the St. Paul ordinance ran afoul of the Constitution. The point of the First Amendment, Justice Scalia wrote, is that "majority preferences must be expressed in some fashion other than silencing speech on the basis of its content."[180]

1. The Court's Opinion

In *R.A.V.*, the majority established a "rule"[181] that "[c]ontent-based regulations are presumptively invalid."[182] The rationale presented for

174. The St. Paul Bias-Motivated Crime Ordinance provided:

> "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."

Id. (quoting St. Paul, Minn., Legis. Code § 292.02 (1990)).

175. *Id.* at 2550.

176. *Id.*

177. *Id.* at 2545; *see infra* notes 181-83 and accompanying text.

178. *R.A.V.*, 112 S. Ct. at 2547. Not only did the Court conclude that the ordinance was unconstitutionally content-based, but it also determined that the ordinance was viewpoint discriminatory; it favored those who advocated "racial, color, etc." tolerance, but condemned those who might oppose such tolerance and might choose to speak out on their views. *Id.* at 2547-48.

179. *Id.* at 2547.

180. *Id.* at 2548.

181. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1178-83 (1989) (explaining why bright line "rules" are superior to "standards"). For an excellent discussion of the rules/standards distinction, see Kathleen M. Sullivan, *The Supreme Court 1991 Term: Foreword: The Justices of Rules and Standards*, 106 Harv. L. Rev. 22, 57-69 (1992).

182. *R.A.V.*, 112 S. Ct. at 2542. Under this rule, the Court found the St. Paul ordinance invalid even though the class of speech at issue, fighting words, historically had been "unprotected" by the First Amendment. Justice Scalia's only explanation for

this general principle was that content discrimination " 'rais[es] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.' "[183] In the case of speech that is already proscribable, however, content discrimination often poses no threat of government censorship.[184] Justice Scalia noted that in three instances, regulation of proscribable speech may be constitutionally content-based. The first is "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable."[185] The second is when the subclass of proscribable speech is "associated with the particular 'secondary effects' of the speech, so that the regulation is '*justified* without reference to the content of the . . . speech.' "[186] The third is when a "content-based subcategory . . . can be swept up incidentally within the reach of a statute

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this anomaly was that previous cases that deemed fighting words unprotected should not be taken literally. *See id.* at 2543. *But see* Rankin v. McPherson, 483 U.S. 378, 397-98 (1987) (Scalia, J., dissenting) (describing fighting words as "statements that we have previously held entitled to no First Amendment protection").

183. *R.A.V.*, 112 S. Ct. at 2545 (citations omitted).

184. *Id.*

185. *Id.* For example, "the Federal Government can criminalize only those threats of violence that are directed against the President, since the reasons why threats of violence are outside the First Amendment . . . have special force when applied to the person of the President." *Id.* at 2546 (citation omitted).

St. Paul's ordinance arguably falls into this exception because the very reason why fighting words are outside the First Amendment has special force when applied to racial and other minorities. *See* Wisconsin v. Mitchell, 113 S. Ct. 2194, 2201 (1993); *see also* Delgado, *supra* note 22, at 136-39 (asserting that the physical and psychological harm of racist speech is uniquely significant); Matsuda, *supra* note 22, at 2335-41 (same); The Honorable John Paul Stevens, The *Freedom of Speech*, 102 Yale L.J. 1293, 1311 (1993) (suggesting that "racial, religious, and gender-based invectives can cause distinct and especially grievous injury, particularly when used by members of a powerful group against an individual already disadvantaged by a hostile environment").

186. *R.A.V.*, 112 S. Ct. at 2546 (alteration in original) (quoting Renton v. Playtime Theatres, 475 U.S. 41, 48 (1986)).

In *Renton*, the Court ruled that the challenged ordinance, which prohibited the location of an adult theater within "1,000 feet of any residential zone . . . church, park, or school," 475 U.S. at 46, was "completely consistent with [the] definition of 'content-neutral' speech regulations as those that 'are *justified* without reference to the content.' " *Id.* at 48 (quoting Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976)). The Court noted that "even if this were a case involving a special governmental response to the content of one type of movie," it would still be upheld as constitutional on the grounds that the government may draw content-based distinctions when special interests are concerned. *Id.* at 49 (citing Young v. American Mini Theatres, Inc., 427 U.S. 50, 82 n.6 (1976) (Powell, J., concurring)). *But see* Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 475 U.S. 1 (1986) (plurality opinion) (decided on the same day as *Renton*, but contrarily stating that time, place and manner restrictions must still be content-neutral to be valid).

In *R.A.V.*, the Court ultimately admitted that the zoning ordinance in *Renton* was in fact a content-based regulation. 112 S. Ct. at 2546. Even there, however, the Court merely relabeled that type of regulation from "content-neutral" to "content-based," and then excepted it from the new per se rule against content-based regulations. *Id.*

directed at conduct rather than speech."[187] Finally, the Court added a catchall exception to the rule against content-based restrictions: a regulation need not be content-neutral when "the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot."[188]

The majority claimed that St. Paul's facially content-based ordinance did not fit into any of the above exceptions.[189] The Court conceded that St. Paul may have a compelling interest in preventing the harmful effects of bias-related crimes, such as cross burnings. But, it asserted, the "existence of adequate content-neutral alternatives" made it unnecessary even to consider whether the ordinance could be upheld under any of the exceptions to the rule.[190]

2. The Departure from Established First Amendment Jurisprudence

According to the concurring Justices, the Court's reasoning "require[d] serious departures from the teaching of prior cases,"[191] and it did so "without providing a coherent replacement theory."[192] Justices White, Blackmun and Stevens criticized the majority for failing to decide the case according to settled "overbreadth" doctrine.[193] Additionally, Justice White asserted that the majority abandoned the categorical approach,[194] which has been a "firmly entrenched part of our First Amendment jurisprudence."[195] Justice Stevens rejected both

187. *Id.* (citing United States v. O'Brien, 391 U.S. 367, 376-77 (1968)). The Court claimed that Title VII's prohibition against sexual discrimination in employment is a permissible rule that might encompass a content-based proscription of only sexually derogatory fighting words. *See infra* part III (arguing that fighting words regulations may be understood as regulating conduct under *O'Brien*); *infra* part IV (suggesting that a statute to prohibit certain uniquely harmful types of fighting words, modeled on the language of Title VII, would be constitutional).

188. 112 S. Ct. at 2547. The Court suggested that a content-based prohibition of only those obscene movies with blue-eyed actresses would not trigger any First Amendment scrutiny. *Id.* The problem with the Court's catchall exception is that it has the potential to encompass prohibitions far more suspect than the Court's fantastical example, and therefore, in its extreme, to swallow the rule.

189. *Id.* at 2548-49. *But see supra* notes 185-87 and accompanying text.

190. *R.A.V.*, 112 S. Ct. at 2550 (citing Boos v. Barry, 485 U.S. 312, 329 (1988)).

191. *Id.* at 2551 (White, J., concurring).

192. *Id.* at 2560 (White, J., concurring).

193. For a description of the overbreadth doctrine, see *supra* note 56.

The concurrences would have invalidated the St. Paul ordinance on the grounds that, despite the state court's narrowing construction, the ordinance still reached speech that merely annoyed others but did not rise to the level of fighting words. *See* 112 S. Ct. at 2559 (White, J., concurring).

Justice White also noted that the Court lacked jurisdiction to decide the case on the majority's rationale because the majority's theory of content-based restrictions was never argued before Minnesota's highest court, or even before the Supreme Court. *Id.* at 2551 & n.2 (White, J., concurring).

194. *See supra* note 9 and accompanying text.

195. *R.A.V.*, 112 S. Ct. at 2552 (White, J., concurring). White asserted that the Court has long held certain discrete categories of expression to be proscribable on the

the majority's and White's "absolute" principles in favor of a multi-faceted analysis that would account for relevant factors, including the content and context of the speech and the nature of the regulation.[196]

It is arguable whether a decision based on the doctrine of overbreadth would have been instructive to lower courts seeking guidance from the Supreme Court on how to analyze hate crime laws.[197] The Court apparently viewed the problem with St. Paul's ordinance as more than sloppy drafting. Had the Court used this case to overturn or redefine fighting words as a proscribable category of speech, arguably there would have been good reason to reject thereafter the simple solution of overbreadth in favor of a more substantial overhaul.[198] This, however, was not the case; although the Court did not overturn the doctrine entirely, it failed to articulate a new definition for the old category of fighting words. Instead, it articulated a broad rule against content-based restrictions on speech, without considering that the rule might, in its future application, sweep more broadly than intended and thereby restrict otherwise protected speech.[199]

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basis of their content. *Id.* In particular, Justice White still subscribed to the notion that fighting words are a proscribable category of speech because their evil content is unworthy of First Amendment protection. *Id.* Justice White argued that it is inconsistent to proscribe an entire category of speech because its content is evil, but not allow government to treat a subset of that proscribable category differently without violating the First Amendment. *Id.* at 2553; *see also id.* at 2562 (Stevens, J., concurring) (stating that "the Court's revision of the categorical approach seems to me something of an adventure in a doctrinal wonderland").

196. *See id.* at 2566-67 (Stevens, J., concurring). Justice Stevens argued that the Court properly rejected the absolute nature of the categorical approach, but wrongly embraced a "rule" approach. For Stevens, no absolute rule could adequately encompass the complex nature of speech. *Id.* at 2567. Moreover, in this case, the Court's rule required the grandfathering of so many exceptions to account for established caselaw as to make the rule more like an arbitrary standard. *Id.* at 2564-65 (Stevens, J., concurring) (asserting that the Court, upon recognizing that it has turned First Amendment law "on its head," "quickly offers some ad hoc limitations on its newly extended prohibition on content-based regulations"); *id.* at 2556 (White, J., concurring) (stating that "[t]he Court has patched up its argument with an apparently nonexhaustive list of ad hoc exceptions").

197. Despite its limited capacity for guidance in the area of fighting words, the Court has often used the overbreadth doctrine to overturn laws prohibiting fighting words. *See, e.g.*, Terminiello v. Chicago, 337 U.S. 1, 6 (1949) (involving the application of a fighting words construction to a breach of the peace statute that ultimately did not save the statute from overbreadth).

198. A critical overhaul of the fighting words doctrine may have been in order because of its apparent limited usefulness. *See Demise of Chaplinsky*, *supra* note 138, at 1141-46 (arguing that the Court should overturn the fighting words doctrine).

199. In explaining his preference for general rules, Justice Scalia has admitted that rules are inherently imprecise as compared to standards, which take into account the factual circumstances of a case. But he appeared unconcerned about those marginal cases that might be wrongly decided because a bright line rule failed to consider sufficiently the facts of the case. *See* Scalia, *supra* note 181, at 1183.

The Court also offered no legitimate explanation for "discarding [the] firmly established strict scrutiny analysis."[200] With some exceptions,[201] the use of a strict scrutiny analysis presupposes an outcome of invalidity of the challenged law and is thus akin to a bright line rule.[202] Therefore, the "strict scrutiny" test should have fit snugly within the framework of Scalia's rules-based analysis. Moreover, the Court conceded that St. Paul's interests were compelling and that the ordinance promoted those interests.[203] The Court nevertheless failed to apply the test. Instead, the Court rationalized that the existence of adequate content-neutral alternatives undercut any defense of the ordinance.[204]

Finally, Justice Stevens criticized the Court's new per se rule against content-based regulations. The notion that distinctions on the basis of content are per se invalid, Stevens observed, has a "simplistic appeal, but lacks support in our First Amendment jurisprudence."[205] Stevens asserted that "content-based distinctions, far from being presumptively invalid, are an inevitable and indispensable aspect of a coherent understanding of the First Amendment."[206] The status of speech as

200. *R.A.V.*, 112 S. Ct. at 2555 (White, J., concurring). When deciding the constitutionality of a regulation implicating a fundamental right, the Court has used a two-tiered "strict scrutiny" analysis to consider: whether the regulation is necessary to serve a compelling state interest, and if so, whether it is narrowly tailored to achieve that end. *See id.* at 2554.

Justice White contended that under the majority's view, a narrowly drawn content-based ordinance could never withstand "strict scrutiny" if its purpose could be accomplished by banning a wider category of speech. Thus, the majority not only failed to apply the test in this case, but effectively abandoned this "fundamental tool" of analysis. *Id.*

201. Six months prior to the decision in *R.A.V.*, the Court, with Justice Scalia concurring, applied the strict scrutiny test to a content-based statute implicating First Amendment rights. *See* Burson v. Freeman, 112 S. Ct. 1846, 1858 (1992) (upholding, under a strict scrutiny analysis, a prohibition of voter solicitation and distribution of campaign materials within 100 feet of a polling entrance). Justice Scalia offered no justification for failing to apply the same analysis in *R.A.V.*

202. *See* Scalia, *supra* note 181, at 1178-79.

203. *R.A.V.*, 112 S. Ct. at 2549. Thus, the Court conceivably could have concluded that the ordinance could withstand strict scrutiny analysis.

204. *Id.* at 2550. More likely, the Court "manipulated doctrine to strike down an ordinance whose premise it opposed." *Id.* at 2560 (Blackmun, J., concurring). Justice Blackmun observed that the Court's motivation was not the preservation of values underlying the First Amendment, but rather a fear of progressive notions of political correctness and cultural diversity. *Id.* Consequently, the Court never considered whether First Amendment values actually would be compromised by prohibiting intimidation in the form of cross burning. *See id.*

205. *Id.* at 2566 (Stevens, J., concurring). Stevens properly criticized the Court's reliance on Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972), for the proposition that content-based regulations are presumptively invalid. 112 S. Ct. at 2563 (Stevens, J., concurring). In that case, "the Court indicated that Chicago's selective proscription of nonlabor picketing *was not per se unconstitutional*, but rather could be upheld if the City demonstrated that nonlabor picketing was 'clearly more disruptive than [labor] picketing.' " *Id.* (quoting *Mosley*, 408 U.S. at 100 (emphasis added)).

206. *Id.* at 2563 (Stevens, J., concurring). Stevens listed several examples of cases in which the Court has upheld content-based restrictions, including FCC v. Pacifica Found., 438 U.S. 726 (1978) (plurality opinion) (upholding a restriction on the broad-

protected or proscribable always has been determined by its content.[207] Additionally, the level at which a particular kind of speech is protected also depends upon its subject matter. For example, speech about public officials is protected at a higher level than speech about private individuals.[208] Clearly, regulations that distinguish between types of speech are content-based, and yet the Court has upheld them as constitutional.[209]

In the case of the St. Paul ordinance, which prohibited fighting words based on race, color, creed, religion or gender, the identities of the speaker and the addressee are, and should be, relevant factors in determining whether speech violates the ordinance. Even under a general fighting words ordinance, these same factors would be relevant in determining if the challenged expression constituted fighting words.[210] If fighting words based on the disfavored topics listed in the St. Paul ordinance do cause distinct harm,[211] there seems little reason to prohibit St. Paul from listing those subjects in the ordinance, especially if it is truly interested in protecting those targeted groups.

Prior to *R.A.V.*, the Court never had applied a rule of content-neutrality to invalidate a regulation aimed at criminalizing constitutionally unprotected speech.[212] Both reason and precedent governed

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cast of specific indecent words) and Broadrick v. Oklahoma, 413 U.S. 601 (1973) (upholding a restriction on the speech of state employees with regard to partisan political matters). 112 S. Ct. at 2563-64; *see also* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 716 (1931) (holding that in war time, "the publication of the sailing dates of transports or the number and location of troops" may be restricted although the publication of other war related information would be protected under the First Amendment).

207. 112 S. Ct. at 2563 (Stevens, J., concurring). Justice Stevens' point is that even with categorical absolutes, it is impossible to talk about speech regulations without talking about the content of the speech. *Id.* For instance, even fighting words have content, and their prohibition is often based on this content. But that has never before taken fighting words out of the category of proscribable speech. *See* Young v. American Mini Theatres, Inc., 427 U.S. 50, 66 (1976) (stating that "it is the content of the utterance that determines whether it is a protected epithet or an unprotected 'fighting comment' ").

208. 112 S. Ct. at 2563 (Stevens, J., concurring).

209. *See supra* note 206. Stevens' rationale for the inevitability of content-based regulations on speech is analogous to his critique of the majority's bright line rule for speech. Bright line rules simply cannot be applied effectively to speech without reference to the content of the speech. *See supra* note 8 and accompanying text; *see also* pp. 829-30. According to Stevens, even a general restriction on fighting words is content-based, because applying it to a challenged statement requires an analysis of the content of the statement and the context of the circumstances in which that statement is made. 112 S. Ct. at 2566-67 (Stevens, J., concurring).

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

211. *Compare* this Note, which advocates that the conduct implications of certain fighting words cause distinct harms *with* Matsuda, *supra* note 22, at 2336-38 (suggesting that the words themselves cause distinct psychological harms).

212. Even in the area of protected speech, the Court has stated that "it is not rare that a content-based classification of speech has been accepted because . . . within the confines of the given classification, the evil to be restricted so overwhelmingly out-

against doing so in *R.A.V.* The Court, nonetheless, declined to overturn Viktora's conviction on either of the settled First Amendment grounds of overbreadth or strict scrutiny, and instead, applied its new rule.

B. *Wisconsin v. Mitchell*

Following the Court's decision in *R.A.V.*, state courts attempted to follow and apply *R.A.V.* in First Amendment cases.[213] For example, on the basis of its understanding of *R.A.V.*, the Wisconsin Supreme Court reversed the aggravated battery conviction of a black teenager whose penalty was increased because his beating of a white boy was bias-motivated.[214] The Wisconsin Supreme Court held that the penalty enhancement statute used to increase Mitchell's maximum penalty from two to seven years[215] violated the First Amendment because it punished offensive thought.[216]

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weighs the expressive interests . . . that no process of case-by-case adjudication is required." New York v. Ferber, 458 U.S. 747, 763-64 (1982).

213. *See, e.g.*, State v. Wyant, 597 N.E.2d 450, 459 (Ohio 1992) (striking down an "ethnic intimidation" statute because it impermissibly infringed on First Amendment speech rights), *vacated and remanded*, 113 S. Ct. 2954 (1993), *rev'd*, 624 N.E.2d 722 (1994); State v. Plowman, 838 P.2d 558, 564-65 (Or. 1992) (en banc) (upholding Oregon's content-based "intimidation" law and distinguishing it from the St. Paul ordinance in *R.A.V.* as a proscription on conduct, not speech); State v. Talley, 858 P.2d 217, 230-31 (Wash. 1993) (striking down the content-based provision of a hate crime statute, which specified cross burning and defacement of property with certain types of symbols as per se violations, because the provision, even if construed to prohibit only fighting words, was overbroad); State v. Mitchell, 485 N.W.2d 807, 817 (Wis.) (striking down a content-based penalty enhancement statute because it impermissibly punished offensive thought), *rev'd*, 113 S. Ct. 2194 (1993).

214. *See* State v. Mitchell, 485 N.W.2d 807 (1992) (Mitchell I), *rev'd*, 113 S. Ct. 2194 (1993) (Mitchell II). The defendant, along with a group of teenagers, was discussing a scene from the film "Mississippi Burning" in which a white man beats a young black boy. *Mitchell II*, 113 S. Ct. at 2196. Mitchell asked his friends: "Do you all feel hyped up to move on some white people?" and "You all want to fuck somebody up? There goes a white boy; go get him." *Id.* at 2196-97. Mitchell and his friends proceeded to beat a white boy into a coma. *Id.*

Mitchell presents facts that have more in common with *Brandenburg* than with *Chaplinsky*. *See supra* note 89 (observing that the *Brandenburg* doctrine of "imminent lawless action" is essentially analogous to the fighting words doctrine, except that it applies to an audience of sympathetic listeners). Mitchell may not have been speaking fighting words, but his remarks, directed as they were to a sympathetic audience and in an effort to incite imminent lawlessness, were tantamount to harmful conduct, and not speech. *See infra* text accompanying note 217.

215. 113 S. Ct. at 2197. The Wisconsin penalty enhancement statute provides for an increased penalty for an offense whenever the defendant " '[i]ntentionally selects the person against whom the crime . . . is committed or selects the property which is damaged or otherwise affected by the crime . . . because of race, religion, color, disability, sexual orientation, national origin or ancestry of that person.' " *Id.* at 2197 n.1 (quoting Wis. Stat. § 939.645(1)(b)(1989-90)). The statute was amended in 1992, but the amendments were not at issue in the *Mitchell* case.

216. *Mitchell I*, 485 N.W.2d at 811. The court concluded that the statute punished "the 'because of' aspect of the defendant's selection, the *reason* the defendant se-

On appeal, the United States Supreme Court unanimously reversed the state court, holding that the penalty enhancement was constitutional because it punished the "conduct" of intentionally selecting the victim.[217] Because the statute restricted "conduct" and not "speech," it was subject to a lower level of scrutiny than the strict scrutiny applied in First Amendment analysis.[218] The Court agreed with the government that its interest in redressing the "greater individual and societal harm" inflicted by bias-inspired crimes was rationally related to the penalty enhancement provision, and thus sufficient to justify the regulation.[219] The Court was untroubled by the fact that the statute might suffer from some form of "underbreadth."[220] It also rejected

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lected the victim," *id.* at 812, and therefore, impermissibly punished the defendant for his beliefs.

217. *Mitchell II*, 113 S. Ct. at 2201. The defendant argued that the penalty enhancement statute impermissibly punished a defendant's discriminatory motive. *Id.* at 2200. The Court conceded that the only reason for the enhanced penalty was the defendant's discriminatory motive for selecting the victim, but reasoned that motive is indeed a relevant factor in sentencing. *Id.* at 2199-2200. It stated that "motive plays the same role under the Wisconsin statute as it does under federal and state antidiscrimination laws, which we have previously upheld against constitutional challenge." *Id.* at 2200 (citations omitted).

For further consideration of the punishment of motive in penalty enhancement statutes, compare Susan Gellman, *Sticks and Stones Can Put You in Jail, but Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. Rev. 333, 364-65 (1991) [hereinafter *Sticks and Stones*] (distinguishing motive from intent and arguing that penalty enhancement statutes unconstitutionally punish motive) and Susan Gellman, *Hate Crime Laws are Thought Crime Laws*, 1992/1993 Ann. Surv. Am. L. 509, 509-10 (criticizing *Wisconsin v. Mitchell* and asserting that penalty enhancement statutes, even if decidedly constitutional, are "all sizzle and no steak") with Eric G. Grannis, Note, *Fighting Words and Fighting Freestyle: The Constitutionality of Penalty Enhancement For Bias Crimes*, 93 Colum. L. Rev. 178, 188-91 (1993) (arguing that Gellman's distinction between motive and intent is fallacious) and Note, *Hate is Not Speech: A Constitutional Defense of Penalty Enhancement For Hate Crimes*, 106 Harv. L. Rev. 1314, 1319-23 (1993) (criticizing Gellman's thesis that penalty enhancement statutes punish bigoted thought and noting that the distinction between motive and intent is "a specious one").

218. *Mitchell II*, 113 S. Ct at 2201 ("[T]he statute in this case is aimed at conduct unprotected by the First Amendment.").

219. *Id.* It is interesting to compare Wisconsin's interest in enhancing the penalty for certain kinds of bias-motivated crimes with St. Paul's interest in preventing harm associated with certain types of fighting words. *See supra* text accompanying note 190. In *Mitchell*, the Court deferred to the state's interest. In *R.A.V.*, the state advanced the same interest to justify its Bias-Motivated Crime Ordinance. The Court deemed it compelling, but immaterial, to its analysis. *R.A.V.*, 112 S. Ct. at 2550. Thus, the only difference between the states' interests in *Mitchell* and *R.A.V.* seems to have been the level of scrutiny to which those interests were subjected by the Court.

220. In *R.A.V.*, Justice White had argued that the Court's rule against content-based restrictions could protect speech that traditionally has fallen outside the scope of First Amendment protection. Under the Court's new analysis, a statute that prohibited only a subset of fighting words would be considered unconstitutionally "underbroad" because its purpose could have been accomplished by banning a wider category of speech. *Id.* at 2553-54 (White, J., concurring).

the defendant's argument that the statute was overbroad because of its potential "chilling effect" on free speech.[221]

According to the Court, its decision in *R.A.V.* was easily distinguishable:

> That case involved a First Amendment challenge to a municipal ordinance . . . [which] only proscribed a class of 'fighting words' deemed particularly offensive by the city . . . . [W]e held that it violated the rule against content-based discrimination. But whereas th[at] ordinance . . . was explicitly directed at expression (i.e., 'speech' or 'messages'[)], the statute in this case is aimed at conduct . . . .[222]

This distinction is seemingly arbitrary, however, because the *R.A.V.* statute also could have been interpreted to outlaw the "conduct" of cross burning.

C. *Two Distinct Cases*

R.A.V. and *Mitchell* are in fact distinguishable, but insufficiently so in order to justify such incongruous and seemingly contrary results. The *R.A.V.* Court analyzed a difficult hate crime statute and concluded that it violated the First Amendment. *Mitchell*, in contrast, treated a penalty enhancement statute as a prohibition of certain conduct that only minimally implicated speech rights.

When the facts in *R.A.V.*—a cross burning by a white man on the lawn of a black family—are placed alongside the facts in *Mitchell*—the assault of a white victim by a group of black teenagers—the incompatibility of the Court's analysis becomes evident. Assaulting a boy because he is white is as much expression as intimidating an African-American family by burning a cross on their lawn. Similarly, burning a cross to intimidate an African-American family is as much conduct as assaulting a white boy.

The primary issue in *Mitchell* was not the physical assault. In all probability, there would have been no physical contact between Mitchell and the victim if the boy had been non-white. The purpose of Mitchell's activity was not to commit an assault, but to express his

221. *Mitchell II*, 113 S. Ct. at 2201. The defendant argued that the statute chilled the free expression of those who would be concerned that their prior speech could be used as evidence of bias motivation in a subsequent crime covered by the statute. The Court responded that this "sort of chill" is too "attenuated and unlikely" to support a claim of overbreadth. *But see* Grimm v. Churchill, 932 F.2d 674, 675-76 (7th Cir. 1991) (using information from a police officer's relative regarding a defendant's history of making racial slurs to determine if the police officer had probable cause to arrest the defendant on charges of ethnic intimidation); *see also* Gellman, *Sticks and Stones*, *supra* note 217, at 360-61 (asserting that the *Mitchell* Court underestimated the chilling effect of its decision).

222. *Mitchell II*, 113 S. Ct. at 2200-01 (citations omitted); *see R.A.V.*, 112 S. Ct. at 2546 (distinguishing the St. Paul ordinance from laws, such as the *Mitchell* penalty enhancement statute, that are "directed not against speech but against conduct").

anger about the treatment of African-Americans by white men, as depicted in a movie. His chosen means to communicate that expression was the assault of a white person. Mitchell's assault of a white boy was thus "an undifferentiated whole, 100% action and 100% expression. It involve[d] no conduct that is not at the same time communication, and no communication that does not result from conduct."[223] The same may be said of Robert Viktora's activity of burning a cross on the lawn of an African-American family.[224]

R.A.V. and *Mitchell* are technically distinguishable. The challenged statutes are different; one is a First Amendment case, while the other is a criminal conduct case. Conceptually, however, they are indistinguishable because they both raise speech and conduct issues. The facts of the cases are roughly analogous; each presents circumstances of bias-motivated hatred based on race. Also, the state interests in each case could have been considered sufficiently compelling to justify the constitutionality of each statute. How then did the Court reach different results in the two cases?

At first glance, the Court's analysis in each case seems overly influenced by the particular statute of the case. Surely it is the Court's job to decide whether the statute presented before it is constitutional. But the history of fighting words jurisprudence is filled with examples in which the Court manipulated the statutory analysis in order to arrive at a more favorable outcome—often choosing to apply one of a variety of possible rationales to justify a particular result.[225] Again, the Court's decisions appear to have been arbitrary and unprincipled.

This Note suggests that although the decisions appear to be irreconcilable, in fact, the Court was guided in each case by the same prevailing principle underlying the fighting words doctrine. In *Chaplinsky* and its progeny, including most recently, *R.A.V.* and *Mitchell*, the Court has stepped in whenever it determined that, in a given set of circumstances, potentially violent consequences were likely to arise from the expression of aggressively charged communications. The conduct implications of fighting words provide a framework through which to understand what might otherwise be viewed as an inconsistent jurisprudence.

This Note asserts that in fighting words and other speech-related cases, the Court has always focused on the harmful consequences and the potential for retaliatory conduct that may arise from provocative words uttered in certain circumstances. Even when the Court appears to be restricting speech, it is merely prohibiting harmful conduct that

223. John H. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, 1495 (1975). Ely made the statement in reference to the draft card burning in *United States v. O'Brien*. *Id.*

224. *See* Lawrence, *supra* note 21, at 694.

225. *See supra* part I.C.

takes on the character of speech by depending on language for its existence. Thus, the apparently shocking pronouncement of Justice Scalia in *R.A.V.*, that even fighting words may engender some protection under the First Amendment,[226] comes as no surprise.[227] In fact, even in its initial pronouncement of the fighting words doctrine in *Chaplinsky*, the Court's real interest was in preventing breaches of the peace, not in restricting speech.[228]

III. The Distinction Between Speech and Conduct

This part explores the Court's formal articulation of the distinction between speech and conduct in *United States v. O'Brien*. It then uses the framework provided in *O'Brien* as a basis for understanding the conceptual differences between speech and conduct and the Court's treatment of the two in the context of fighting words. This Note asserts that this speech/conduct distinction is the key to reconciling the apparent inconsistencies in fighting words jurisprudence and applying the fighting words doctrine effectively.

A. *The Formal Distinction Between Speech and Conduct*

The distinction between speech and conduct was formally articulated in *United States v. O'Brien*.[229] The defendant in that case, David Paul O'Brien, intentionally burned his draft card before a public crowd on the steps of the South Boston Courthouse.[230] When hostile crowd members turned violent, an FBI agent lead O'Brien away from the crowd and then arrested him.[231] He was convicted for intentionally violating the regulation of the Universal Military Training and Service Act that required possession of one's draft card at all times.[232] O'Brien challenged his conviction on the ground that the 1965

226. *R.A.V.*, 112 S. Ct. at 2543-44.

227. *See, e.g., id.* at 2567 (Stevens, J., concurring) (acknowledging that the "categorical approach is unworkable and the quest for absolute categories of 'protected' and 'unprotected' speech [is] ultimately futile").

228. *See supra* note 49.

229. 391 U.S. 367 (1968).

230. *Id.* at 369. The FBI agents who arrested O'Brien claimed that, at the time of the arrest, they knew only that O'Brien and his companions had burned small white cards. Only later did they learn that the card O'Brien burned was actually his registration certificate. *Id.* at 369 n.1. At trial, O'Brien stated that he had burned the registration certificate in order to protest the Vietnam war and to influence others to adopt his antiwar beliefs. *Id.* at 370.

231. *Id.* at 369.

232. Although O'Brien was charged under the original language of 50 U.S.C. § 462(b) of the Universal Military Training and Service Act of 1948, Congress had amended § 462(b)(3) in 1965 to make it an offense for anyone " 'who forges, alters, *knowingly destroys, knowingly mutilates*, or in any manner changes any such certificate.' " *Id.* at 370 (original statute amended by italicized words) (quoting 50 U.S.C. § 462(b)(6), 79 Stat. 586 (1965)) .

Amendment to the Act, under which he was convicted, was unconstitutionally enacted to abridge First Amendment rights.[233]

The Supreme Court held that the government's interest in tracking the distribution and possession of draft cards was sufficient to sustain O'Brien's conviction,[234] despite the fact that O'Brien's arrest was probably unrelated to record keeping. In retrospect, the stated governmental purpose of the legislation may appear suspect. But even in 1968, the Court would not have invalidated the statute on the basis of improper legislative motive,[235] so long as the regulation furthered a substantial government interest.[236]

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233. O'Brien argued that conduct punishable under the 1965 Amendment was already punishable under a "nonpossession regulation" that required registrants to keep their registration certificates in their " 'personal possession at all times.' " *O'Brien*, 391 U.S. at 371 (quoting 32 C.F.R. § 1617.1 (1962)). If Congress' purpose was to ensure accurate record keeping, then the nonpossession regulation should have been a sufficient measure under which to prosecute the defendant and others who lost or intentionally destroyed their certificates.

The Court of Appeals for the First Circuit agreed and concluded that the 1965 Amendment was unconstitutional. O'Brien v. United States, 376 F.2d 538, 541 (1st Cir. 1967). Since the government already could punish the nonpossession of a registration certificate, the court concluded that the 1965 Amendment must have been intended to apply to the public destruction of cards, and therefore, to punish persons engaged in political protests. *Id.*

234. The Supreme Court distinguished the government interests served by the nonpossession regulation and the 1965 Amendment:

> The gravamen of the offense defined by the [1965 Amendment] is the deliberate rendering of certificates unavailable for the various purposes which they may serve. Whether registrants keep their certificates in their personal possession at all times, as required by the [nonpossession] regulations, is of no particular concern under the 1965 Amendment, as long as they do not mutilate or destroy the certificates so as to render them unavailable.

O'Brien, 391 U.S. at 380-81.

The 1965 Amendment required proof of the defendant's intent; the Court should have required the government to prove that O'Brien's intent was to frustrate its record keeping system. However, whether O'Brien lost or burned his draft card should have been irrelevant if the government's interest in the regulation was the accuracy of its records. More likely, the amendment was reflective of Congress' desire to stop the protest burnings of draft cards.

235. In an appendix to its opinion, the Court cited to portions of the legislative history of the 1965 Amendment, which suggested that the legislature may have intended to restrict speech rights. It stated: " 'The House Committee on Armed Services is fully aware of, and shares in, the deep concern . . . over the increasing incidences in which individuals . . . openly defy and encourage others to defy the authority of their Government by destroying or mutilating their draft cards.' " *Id.* at 387 (quoting H.R. Rep. No. 747, 89th Cong., 1st Sess. (1965)).

236. The Court also cited to the Senate Committee report, which advanced a substantial government interest in stopping the mutilation of draft cards. It stated: " 'The Committee has taken notice of the defiant destruction and mutilation of draft cards by dissident persons who disapprove of national policy. If allowed to continue unchecked this contumacious conduct represents a potential threat to the exercise of the power to raise and support armies.' " *Id.* (quoting S. Rep. No. 589, 89th Cong., 1st Sess. (1965)). *But see id.* at 383 (indicating that inquiry into legislative intent is a tricky and unreliable business); *see also* Tribe, *supra* note 74, § 12-6, at 823 (asserting that judicial inquiry into legislative motives would be futile if courts were asked to discern

The Court construed the statute as a regulation on the conduct of draft card burning, and not as a restriction on the expression of anti-war sentiment. It therefore avoided having to apply a strict scrutiny analysis.[237] Rather, the Court applied an intermediate level of scrutiny, which required that the government identify only a substantial, not a compelling, interest that was unrelated to the suppression of speech.[238] According to the *O'Brien* Court, "when 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important government interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[239] Thus, the fact that O'Brien's activity also was a form of expressive communication was irrelevant to the determination that his conduct had other consequences that the regulation was aimed at preventing.

The *O'Brien* Court articulated a four-prong test to determine whether the government regulation was sufficiently important to justify the limitation on free speech.[240] The elements of the test are as follows: (1) the conduct is such that it may be constitutionally regulated; (2) the regulation furthers a substantial government interest; (3) the government interest is unrelated to the suppression of free speech; and (4) the limitations on speech are no greater than what are essential to further the asserted government interest.[241] To some degree, the *O'Brien* test requires that courts, at the outset of their inquiries, make arbitrary distinctions between the elements of speech and conduct in order to determine the predominant element being restricted by a given regulation. If the speech element predominates in a regulation, courts may not apply the *O'Brien* standard, but will instead subject the law to a strict scrutiny analysis.[242] On the other hand, if the

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an impermissible "sole" or "dominant" purpose behind legislation, because the intentions of legislators will always be "multiple and mixed").

237. *See supra* note 200.

238. *O'Brien*, 391 U.S. at 377.

239. *Id.* at 376. Even the *O'Brien* standard would have been unconstitutional under the *R.A.V.* rule prohibiting content-based restrictions on speech. Thus, the Court in *R.A.V.* added the *O'Brien* standard as another exception to the general rule. *See supra* note 187 and accompanying text.

240. *O'Brien*, 391 U.S. at 377. The four-prong *O'Brien* test has become the standard application for "complex" cases in which activity includes both "speech" and "nonspeech" or "conduct" elements.

The *O'Brien* test theoretically applies only to statutes that look to regulate conduct. This Note asserts, however, that the *O'Brien* standard also may be applied to statutes that appear to regulate only speech. Some speech regulations can be understood as laws intended to prevent the harmful conduct that is likely to result from such speech, and not as laws intended to restrict the content of the speech itself. *See infra* part III.B.

241. 391 U.S. at 377. The *O'Brien* Court found that the 1965 Amendment met the four requirements, and consequently, that O'Brien's conviction was constitutional. *Id.*

242. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 403 (1989) (stating that if a case falls outside the *O'Brien* test, the Court must use a higher level of scrutiny to determine if the state's interest justifies the regulation).

regulation is focused on preventing certain conduct, courts may apply the more deferential *O'Brien* test, even if some expression will necessarily be restricted as a result of enforcing the regulation.

The flexibility of the *O'Brien* framework is most apparent in the case of non-obscene adult forms of entertainment, such as bars offering nude dancing[243] and theaters offering adult films.[244] For example, applying the *O'Brien* test, a sharply divided Court in *Barnes v. Glen Theatre, Inc.*[245] upheld a public decency statute[246] challenged by a bar and an adult entertainment center that wanted to offer live nude dancing.[247] Regarding the Court's consideration of the second prong of the *O'Brien* test, the majority as much as conceded that it could not pinpoint exactly what substantial interest the legislators sought to further.[248] But it was satisfied that the statute's purpose was to protect "societal order and morality."[249] Because the statute furthered a legitimate government interest, the Court accepted at face value that

243. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991).

244. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976).

245. 501 U.S. 560 (1991). Chief Justice Rehnquist wrote for the majority, which included only Justices O'Connor and Kennedy, and himself. Justices Scalia and Souter filed separate opinions concurring in the judgment. Justice White, joined by Justices Marshall, Blackmun and Stevens, filed the dissent. *Id.* at 562.

246. The statute provided in relevant part that " 'a person who knowingly or intentionally, in a public place . . . appears in a state of nudity . . . commits public indecency' " and is guilty of a misdemeanor. *Id.* at 569 n.2 (quoting Ind. Code § 35-45-4-1 (1988)). The statute defined nudity as the showing of private parts with anything " 'less than a fully opaque covering.' " *Id.* (quoting Ind. Code § 35-45-4-1(b) (1988)). Arguably, much of current fashion would violate the Indiana ordinance.

247. *Barnes*, 501 U.S. at 562-63. The Court of Appeals for the Seventh Circuit had concluded that nude dancing for entertainment purposes is protected expression and that "the public indecency statute was an improper infringement of that expressive activity because its purpose was to prevent the message of eroticism and sexuality conveyed by the dancers." *Id.* at 565 (referring to Miller v. Civil City of South Bend, 904 F.2d 1081 (1990)). The Supreme Court agreed that nude dancing is a form of expressive activity, but proceeded to apply the four-prong *O'Brien* standard to reverse the lower court and uphold the statute as a permissible regulation of conduct. *Id.* at 566-67; *see also* California v. LaRue, 409 U.S. 109, 118 (1972) (applying *O'Brien* test, but finding nude dancing to be expressive activity).

248. *Barnes*, 501 U.S. at 567-68.

249. *Id.* at 568. The Court reasoned that a state's traditional police power includes the power to provide for the "morals" of society. *Id.* at 569. The Court relied on the infamous case, Bowers v. Hardwick, 478 U.S. 186 (1986), for the proposition that legislators may legislate notions of morality. *Id.* However, it is virtually impossible to measure a government's interest in the enforcement of morality. *See* Vincent Blasi, *Six Conservatives in Search of the First Amendment: The Revealing Case of Nude Dancing*, 33 Wm. & Mary L. Rev. 611, 640 (1992). It is equally difficult to define claims of moral harm in any meaningful standardized manner. *See id.* Because it is conceptually limitless, the morality justification potentially could be used to justify a wide range of restrictions on speech. *See* Joel M. Gora, *On The Brink: The First Amendment in the Rehnquist Court, 1990-91 Term*, 9 Touro L. Rev. 120, 140 (1992) (suggesting that free speech cases such as Erznoznik v. Jacksonville, 422 U.S. 205 (1975) and Cohen v. California, 403 U.S. 15 (1971) would have come out differently under the lax standard in *Barnes*).

the restriction was intended only to prevent public nudity, and not to suppress any message conveyed by the dancers.[250] While reasonable persons, including four of the Justices,[251] disagreed as to the correctness of the Court's holding,[252] it is at least derived from a principled inquiry, albeit one that permits great flexibility.

The broad range of applications of the *O'Brien* test is also apparent in two cases in which the Court upheld zoning ordinances that restricted the location of adult film theaters.[253] Both cases applied the *O'Brien* standard, combined with a secondary effects argument,[254] to conclude that a restriction on First Amendment rights was permissible to further the government's interest in preserving the "character of its neighborhoods"[255] and the "quality of urban life."[256]

In *City of Renton v. Playtime Theatres, Inc.*,[257] the Court concluded that since the government's predominant "concerns were with the secondary effects of adult theaters,"[258] the ordinance was properly ana-

250. It stated only that "[t]he requirement that the dancers don pasties and a G-string does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic." *Barnes*, 501 U.S. at 571.

251. *See supra* note 245.

252. Professor Blasi suggested that if the state's interest was indeed to prevent public nudity, perhaps it should have sent out a state employee to affix fig leaves to nude paintings in public museums. *See* Blasi, *supra* note 249, at 642. Professor Blasi added that the Court could have more clearly distinguished nude go-go dancing from the fine arts. The Court's failure to separate these high and low level forms of artistic expression suggests the possibility that the nudity prohibition could be applied to other forms of expression. *Id.* at 643.

253. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 43 (1986) (upholding a regulation that restricted the location of an adult theater "within 1000 feet of any residential zone, single- or multiple-family dwelling, church, park or school"); Young v. American Mini Theatres, Inc., 427 U.S. 50, 52 (1976) (upholding a zoning ordinance that differentiated between motion picture theaters and adult theaters and dictated that adult theaters "may not be located within 1,000 feet of any two other 'regulated uses' or within 500 feet of a residential area").

254. The secondary effects argument is a variation of the *O'Brien* standard. It enables the Court to consider the effects of conduct and to regulate that conduct, because of its harmful secondary effects. For example, in *Renton*, the Court determined that the interest in preventing the adverse effects of adult theaters, including "neighborhood blight," was sufficient to justify a restrictive zoning ordinance despite the fact that the opening of an adult theater was lawful in itself. *Renton*, 475 U.S. at 51-52.

Note that the secondary effects test is the second exception to the *R.A.V.* rule against content-based restrictions. *See supra* note 186 and accompanying text.

255. *American Mini Theatres*, 427 U.S. at 71. The government determined that "a concentration of the 'adult' theaters causes the area to deteriorate and become a focus of crime." *Id.* at 71 n.34.

256. *Renton*, 475 U.S. at 48. The government claimed that the ordinance was "designed to prevent crime, protect the city's retail trade, maintain property values, and generally 'protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life,' not to suppress the expression of unpopular ideas." *Id.* (alteration in original) (citation omitted).

257. 475 U.S. 41 (1986).

258. *Id.* at 47.

lyzed as a "time, place and manner"[259] restriction on conduct and was "unrelated to the suppression of free expression."[260] In *Renton*, as in *Young v. American Mini Theatres, Inc.*, the Court treated the government's interest in the quality of urban life as worthy of "high respect."[261] It did not explain the basis for finding the interest to be a "substantial" one.[262]

As the adult entertainment cases show, the *O'Brien* standard is sufficiently flexible to accommodate all sorts of restrictions on speech when the government advances a neutral interest. The primary inquiry driving the Court's analysis in *O'Brien* was not whether conduct outweighed speech or speech outweighed conduct in the particular case.[263] Rather, the Court examined whether the harmful consequences of the activity necessitated that the activity be proscribed. It determined that the conduct of draft card burning was sufficiently harmful to the government's ability to maintain an efficient draft registration so as to make the activity punishable. There was, therefore, no need to balance the individual's right to speech with the government's right to regulate conduct.

Similarly, with regard to other regulations, if courts can identify some aspect of conduct that is the target of a law, then they can apply

259. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (defining the time, place and manner test for evaluating restrictions on expression in public forums). The *Renton* Court applied this public forum test to private property. *Renton*, 475 U.S. at 48; *see also* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 288-89 (1984) (stating that the time, place and manner test is interpreted as similar to the *O'Brien* test).

260. *Renton*, 475 U.S. at 48. *But see* Boos v. Barry, 485 U.S. 312, 316 (1988) (Brennan, J., concurring) (stating that the "ill-defined nature of the *Renton* analysis certainly exacerbates the risk that many laws designed to suppress disfavored speech will go undetected" under the guise of conduct with secondary effects).

261. *Renton*, 475 U.S. at 50 (citing *American Mini Theatres*, 427 U.S. at 71).

262. The government offered no proof that the presence of adult film theaters in a community had or would have harmful secondary effects. Rather, the Court accepted the government's reliance on the experiences of other non-comparable cities to support its claim that adult theaters have harmful effects on the surrounding community. *Id.* at 51; *American Mini Theatres*, 427 U.S. at 71 n.34.

If the interest in improving city life and preventing possible increases in crime was sufficiently "substantial" to support the content-based zoning restriction on adult theaters, the interest in racial harmony in a community fraught with racial violence should have been a sufficiently substantial interest to support restrictions on race based fighting words. *See* Beauharnais v. Illinois, 343 U.S. 250, 259-61 (1952) (relying upon historical evidence of racial violence to uphold a content-based restriction on speech). *But see* R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) (striking selective fighting words ordinance designed to prevent bias-motivated hate crimes, despite the clear presence of a compelling interest in protecting citizens from the unique harms associated with hate crimes).

263. Professor Thomas Emerson argued that the distinction between speech and conduct, though not absolute, could be a useful tool to determine which elements predominate in any given circumstance. Thomas I. Emerson, The System Of Freedom Of Expression 14-20 (1970). Though Emerson's analysis may yield interesting debate, it is not the investigation that the Court undertook to arrive at its conclusion.

the *O'Brien* standard to nudity restrictions, zoning ordinances and a variety of other types of regulations. The cases demonstrate that, despite the high value we place on the First Amendment, it is and has always been vulnerable to compromise, whether to facilitate military record keeping, to prevent violence or even to enforce a certain standard of morality.

The wide range of discretion afforded courts under the *O'Brien* standard presupposes that in some instances, the standard may be improperly applied. Nevertheless, the rationale underlying the speech/conduct distinction is a sensible one, for it enables the Court to make principled, albeit subjective, judgments about the constitutionality of regulations that restrict certain types of activity.[264] To the extent that a court can identify the existence of harmful conduct that the government has an important interest in regulating, the activity can be restricted even if it also possesses expressive elements. The distinction prevents " 'an apparently limitless variety of conduct [from being] labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea.' "[265] The Court made clear in *O'Brien*, as in *Chaplinsky*, that there are instances when the expression of an idea, regardless of its content, may be constitutionally restricted in order to prevent the greater harm that would otherwise likely result.

B. *The Practical Distinction Between Speech and Conduct*

The right to free speech is valuable in so far as it enables the speaker to participate in a dialogue.[266] Outside the context of a dia-

264. This is not to suggest that the Court will always find the "right" decision. Arguably, even *O'Brien* was wrongly decided. *See* Brandenburg v. Ohio, 394 U.S. 444, 455 (Douglas, J., concurring) (noting that the Court's affirmance of O'Brien's conviction was "not . . . consistent with the First Amendment"); *see also* Emerson, *supra* note 263, at 83-87 (disagreeing with the *O'Brien* holding and arguing that in that case, the expressive element in burning a draft card clearly predominated over the conduct element); Ely, *supra* note 223, at 1494-95 (same).

There will always be an element of subjectivity in determining the permissibility of state regulations that restrict speech. *See* Stevens, *supra* note 185, at 1299-1300 (explaining that the First Amendment, when applied to the states through the Fourteenth Amendment, guarantees only that states may not restrict speech rights without due process, and that, "when the permissibility of a deprivation depends [in part] on the presence or absence of 'due process' . . . an element of judgment is necessarily injected into the constitutional calculus"). The *O'Brien* standard at least provides a framework to limit that subjectivity. *Cf.* Tribe, *supra* note 74, § 12-7, at 827 (arguing that the conduct/speech distinction "must be seen at best as announcing a conclusion of the Court, rather than as summarizing in any way the analytic processes which led the Court to that conclusion").

265. Wisconsin v. Mitchell, 113 S. Ct. 2194, 2199 (1993) (quoting United States v. O'Brien, 391 U.S. 367, 376 (1968)). But nor should an apparently limitless variety of "speech" be labeled conduct whenever the government needs a neutral reason to restrict the activity. *See, e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560, 567-68 (1991) (applying the four-prong *O'Brien* test to uphold a regulation restricting public nudity on the basis of a state's interest in societal order and morality).

266. *See* Tribe, *supra* note 74, § 12-8, at 837.

logue, a speaker's right to speech becomes only an empty right to talk. It is, therefore, most helpful to distinguish between "contexts in which talk leaves room for reply and those in which talk triggers action or causes harm without the time or opportunity for response."[267] The distinction between speech and conduct in *O'Brien* provides a useful framework in which to determine when words fall within the former context of dialogue, and when, as in the latter context, they constitute fighting words.

The Court's inquiry in *O'Brien* was limited to the conduct element of the defendant's communications, because the focus of the statute was on the regulation of conduct.[268] The same inquiry may be undertaken with respect to communications that take the form of speech.[269] When a person's speech, directed to another person or group of persons, is of a quality that is likely to engender violent conduct, that communication, though verbal, is not speech as a part of a dialogue.[270] Such speech is more akin in nature to conduct, because it is more likely to provoke conduct, than dialogue. Therefore, it may be restricted as fighting words without regard to the message being communicated. When the conduct implications of fighting words are so understood, it becomes clear that the Court, in applying the fighting words doctrine, has been using the speech/conduct distinction ever since it first articulated the doctrine in *Chaplinsky v. New Hampshire*.[271]

Of the eleven cases reviewed in part I, three dealt with circumstances in which a defendant's activity clearly included elements of both speech and conduct.[272] In *United States v. O'Brien*, where the Court established the *O'Brien* test, it affirmed the conviction because the statute in that case focused on preventing only conduct.[273] In the two flag burning cases, the Court determined that the Texas and New York statutes challenged in those cases were intended to restrict the speech element of the expressive activity, despite the fact that the act

267. *Id.*

268. *See supra* note 232.

269. This assertion does not suggest that speech is analogous to conduct and necessarily may be restricted whenever a government determines that the speech has harmful consequences. In fact, the Court has applied a greater level of scrutiny to regulations of speech than it has to regulations of conduct. *See* Texas v. Johnson, 491 U.S. 397, 406 (1989) (stating that governments may regulate expressive conduct more freely than they may regulate the written or spoken word). Rather, the point is that courts have discretion in their initial determination of whether a regulation is primarily one of conduct or speech. In making this determination, courts may choose to identify some aspect of regulating conduct embedded in the law, even if it appears to regulate only speech.

270. *See supra* note 8 and accompanying text; *see also* pp. 829-30.

271. *See supra* note 7 and accompanying text.

272. *See* Texas v. Johnson, 491 U.S. 397 (1989); Street v. New York, 394 U.S. 576 (1969); United States v. O'Brien, 391 U.S. 367 (1968).

273. *But see* sources cited *supra* note 264 (arguing that *O'Brien* was wrongly decided).

of flag burning clearly contemplates a conduct component.[274] Therefore, the Court applied a strict scrutiny analysis and not the more deferential *O'Brien* test. Because the government interest was not compelling, the Court struck down the statutes as impermissible infringements on speech.[275]

In several of the cases in which defendants engaged only in speech activity, the Court overturned convictions despite the fact that the statutes had been limited by state court constructions to prohibit only fighting words.[276] These cases do not prove, however, that the fighting words doctrine is ineffectual or futile.[277] Rather, they are a testament to the fact that fighting words cannot be understood as a precise category of proscribable speech. "Fighting words" are not defined by a particular list of words that, when spoken, are unprotected by the First Amendment. The use of language, the nuances and subtleties of words, the context in which words are used to elicit compassion or to invoke retaliatory anger, are very complex and often inscrutable. A simple construction of a statute to prohibit only fighting words necessarily cannot assist the Court in interpreting the statute and determining whether it infringes on free speech.[278] State court constructions also do not prevent the Court from overturning convictions when the circumstances necessitate that they be overturned.

For example, though the trial and appellate courts in *Terminiello v. Chicago* understood the statute in that case to apply only to fighting words, the Court determined that the statute was overbroad.[279] In that case, the defendant's political speech had been scheduled in ad-

274. The Court did not apply the *O'Brien* test per se in *Street v. New York*. But the statute in that case, like the statute in *Texas v. Johnson*, fell outside the *O'Brien* standard because it prohibited contempt for the flag by speech or conduct. *See supra* note 81. The Court determined that the statute could have been aimed at punishing those who expressed disdain for the flag on account of their political views. Therefore, it could not be said that the regulation was unrelated to the suppression of free speech, as required by the third prong of the test. *See supra* notes 240-41 and accompanying text.

Regarding the statute in *Texas v. Johnson*, see *supra* notes 118-21 and accompanying text.

275. *Johnson*, 491 U.S. at 422; *Street*, 394 U.S. at 594.

276. *See, e.g.*, Gooding v. Wilson, 405 U.S. 518, 528 (1972) (striking down the statute because it was overbroad, despite having been given a fighting words construction).

277. *But see* sources cited *infra* note 305.

278. Whenever a lower court would construe a statute as limited to fighting words, it would declare that only expressions falling within the narrow category of fighting words could be punished. This Note argues that the doctrine of fighting words is based on preventing retaliatory conduct and not on restricting speech—let alone a definable category of speech. Thus, whenever a lower court applied a narrowing fighting words construction to a statute, that statute was doomed to be struck down by the Court on appeal. Instead of assisting a reviewing court, a fighting words construction ultimately limited a court's ability to interpret the statute as a regulation on conduct.

279. For a discussion of *Terminiello*, see *supra* notes 51-60 and accompanying text.

vance, and a team of police officers had been assigned to parole what the police expected would be an unruly crowd.[280] To affirm such a conviction would have set a dangerous precedent for limiting the First Amendment's protection of political speech. Therefore, the circumstances necessitated that the Court overturn the conviction.

In *Gooding v. Wilson* and *Lewis v. City of New Orleans*, the Court again used the overbreadth doctrine as a simple means to overturn the convictions.[281] The Court was compelled to overturn the convictions because of one distinguishing factor—the addressee in each case was a police officer. In general, the Court is willing to accept the notion that speech that provokes violence may be proscribed. But to uphold such proscriptions when the speech is directed at police officers would have put extraordinary discretion at the hands of the police who are often the only witnesses to a defendant's use of so-called fighting words. Moreover, it would have implied that police officers, when challenged by fighting words, may be provoked to violence as easily as might the "average addressee."[282] In other words, the Court resolved that police officers have a special obligation, over and above that of the average person, not to be vulnerable to verbal provocation.[283]

In contrast, in *Cohen v. California*,[284] the conduct of walking through a courthouse was lawful in itself. Since the activity was clearly intended to convey a political message, and it did not raise the possibility of imminent violence, there was no reason to uphold the disorderly conduct conviction. There was simply no disorderly conduct to punish;[285] any conviction would have been improperly based on the content of the defendant's message.

The same may be said of the circumstances in *Brandenburg v. Ohio*.[286] The statute at issue in that case was a criminal syndicalism act, and the fact pattern did not fit the typical fighting words scenario.[287] Nevertheless, the Court focused on the conduct implications of fighting words. Had Brandenburg's speech been of a quality that

280. *See supra* note 53 and accompanying text.

281. For a discussion of *Gooding* and *Lewis*, see *supra* notes 101-13, 137-38 and accompanying text.

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

283. Fighting words, by definition, should never be proscribable when directed at police officers, because there should be no likelihood of retaliatory conduct. *See, e.g.*, Gooding v. Wilson, 405 U.S. 518 (1972) (declining to affirm the conviction on the grounds that the statute was limited to fighting words, even though the defendant's speech clearly threatened violence to the police officer addressee); *see also* Lewis v. City of New Orleans, 415 U.S. 130 (1974) (following *Gooding* to strike down a fighting words statute that was limited to speech directed to on-duty police officers).

284. For a discussion of *Cohen*, see *supra* notes 91-100, 127-33 and accompanying text.

285. *See supra* text accompanying note 129.

286. For a discussion of *Brandenburg*, see *supra* notes 85-87 and accompanying text.

287. *See supra* note 89.

could have "incited imminent lawless action," the Court would have upheld his conviction. But the Court determined that there was no possibility of violent conduct in response to Brandenburg's speech[288]—whether it be inspired by his speech, or in retaliation. Despite its hateful message, Brandenburg's speech was not likely to lead to harmful conduct.

Feiner v. New York[289] is analogous to the other cases involving disorderly conduct statutes, except in *Feiner*, the Court upheld the conviction. The facts of the case conformed to both the "fighting words" and "imminent lawless action" paradigms because the defendant had addressed a crowd of both critics and supporters of his ideas.[290] The Court ultimately upheld the conviction by focusing on the conduct implications of fighting words. The circumstances in the case warranted this result, because in *Feiner*, unlike in *Brandenburg*, the Court found that violence was imminent.[291]

Only one of the statutes challenged in the cases reviewed in part I was clearly "content-based," as the Court defined the term in *R.A.V.*[292] Nevertheless, the Court upheld that law in *Beauharnais v. Illinois*.[293] Since it was debatable whether *Beauharnais* was still good law prior to *R.A.V.*,[294] and it is clear that *R.A.V.* practically overruled

288. Brandenburg v. Ohio, 395 U.S. 444, 445-46 (1969) (noting that "no one was present other than the participants and the newsmen who made the film" and "[m]ost of the words uttered during the scene were incomprehensible when the film was projected").

289. For a discussion of *Feiner*, see *supra* notes 61-67 and accompanying text.

290. The majority stated that there was a possibility that the defendant would incite his supporters to react violently towards critics in the crowd. Feiner v. New York, 340 U.S. 315, 317 (1951).

291. *Id.* at 319-20. According to Justice Black's dissent, however, the facts did not indicate that violence was imminent. *Id.* at 325 (Black, J., dissenting). Thus, he asserted, the conviction must have rested on the content of Feiner's speech, and not on his conduct. *Id.* at 321-22; *see supra* note 67.

That the Justices disagreed as to whether a riot was looming does not detract from the thesis that fighting words is a conduct-related doctrine. The conduct principle of fighting words, as set out in this Note, is meant only to lend coherence to the Court's jurisprudence in this area of law. It does not suggest that the Court was correct in every decision. In the case of *Feiner*, the Justices' disagreement as to the imminence of violence actually underscores their focus on whether harmful *conduct* was likely to result from the defendant's activity.

292. *See supra* notes 181-83 and accompanying text.

293. For a discussion of *Beauharnais*, see *supra* notes 68-74 and accompanying text. The state convinced the Court that its fear of violence was reasonable in light of the history of racial riots in the state. *See supra* note 73; *see also* Collin v. Smith, 578 F.2d 1197, 1204 (7th Cir.) (protecting a Nazi march through a Jewish neighborhood as expressive activity and noting that the state failed to show an actual fear of violence), *cert. denied*, 439 U.S. 916 (1978).

294. *See supra* note 74. The Court has since rejected the state's interest in that case as insufficient to justify the infringement on free speech. But until *R.A.V.*, no case had conflicted directly with the holding in *Beauharnais*, so it had never been formally overruled. The Court's pronouncement in *R.A.V.* that content-based restrictions on speech are presumptively invalid presented such an opportunity to overrule *Beauharnais*, and yet the Court failed to do so.

the case, one wonders why the Court did not formally overrule *Beauharnais* on the basis of its new rule against content-based restrictions on speech.[295]

This Note asserts that the Court deliberately declined to overrule *Beauharnais*. Had it formally overruled *Beauharnais* in the same breath as it called St. Paul's interest "compelling," that statement would have been mere lip service in the name of political correctness. Instead, the Court signalled that St. Paul's interest in preventing hate crimes, like Illinois' interest in preventing further racial violence, was indeed compelling. It indicated that such an interest could be effectively protected through legislation, just not legislation that impermissibly infringed on the First Amendment.[296]

No decision after *Chaplinsky* explicitly affirmed a conviction on the basis of fighting words. However, every decision reviewed in part I applied a fighting words analysis to affirm or reverse lower court decisions. In each case, the Court considered the conduct implications of fighting words to determine whether there was any likelihood of violent conduct arising from a defendant's expressive activity.

Similarly, the Court's decisions in *R.A.V.* and *Mitchell* can be reconciled under a conduct-related doctrine of fighting words. In *Mitchell*, the state succeeded at prohibiting the types of bias-motivated hatred that St. Paul was attempting to prohibit. In *Mitchell*, however, the state properly regulated the non-speech element of the activity, both in terms of the underlying crime and the selection of the victim.[297] Because St. Paul failed to ferret out the non-speech element of the activity, its ordinance impermissibly restricted First Amendment speech rights.[298]

Much has been written about the scathing debate among the Justices in the *R.A.V.* opinions and the import of the Court's holding with respect to future First Amendment jurisprudence.[299] The real significance of the case, however, is not that the Justices disagreed so vehe-

295. If, like fighting words, the category of libel is not entirely outside the scope of First Amendment protection, then the content-based restriction in the Illinois statute, see *supra* note 70, would be presumptively unconstitutional under *R.A.V.* as well.

296. The problem with the St. Paul ordinance was that it prohibited fighting words *about* the disfavored topics of race, color, creed, religion and gender. The Court recommended that a law prohibiting "fighting words that are *directed at* certain persons or groups" would be constitutional provided it could withstand Fourteenth Amendment equal protection challenges. *R.A.V.*, 112 S. Ct. at 2548 (emphasis added). Such a law would be permissible precisely because it focuses on the conduct implications of fighting words, and not on the words themselves.

297. *See supra* notes 217-19 and accompanying text; *see also* Grannis, *supra* note 217, at 216-19 (arguing that penalty enhancement statutes are constitutional under the *O'Brien* standard).

298. *R.A.V.*, 112 S. Ct at 2550, 2560, 2561.

299. *See, e.g.*, David Goldberger, *Hate Crime Laws and Their Impact on the First Amendment*, 1992/93 Ann. Surv. Am. L. 569, 570-75 (discussing the Court's split opinions in *R.A.V.* and their impact on future First Amendment law); Weinberg, *supra* note 141, at 301-09 (same).

mently over the proper means to analyze the St. Paul ordinance. Rather, the decision is pivotal because a unanimous Court agreed that the St. Paul ordinance unconstitutionally restricted speech that was protected under the First Amendment. Despite the heinous circumstances of the case, none of the Justices who may have even wanted to affirm the conviction could find a way to interpret the St. Paul ordinance as a regulation of conduct.

To be sure, the Court's reasoning deviates from traditional First Amendment analysis.[300] Nevertheless, it can be understood as yet another example of how the conduct implications of fighting words, and not the words themselves or their content, are the focus of the Court's analysis. It is therefore more significant that the Court rejected the categorical approach[301] than that it replaced it with a rule against content-based speech restrictions. By rejecting the notion that fighting words are a discrete category of proscribable speech, the Court candidly acknowledged that fighting words have more to do with the conduct implications of the challenged words than with the words themselves.

The Court's decision in *Mitchell* thus follows from its analysis in *R.A.V.* The *Mitchell* Court unanimously affirmed the conviction precisely because the Wisconsin statute prohibited conduct, not speech, and the defendant's conduct violated the statute. Thus, the two cases are not only reconcilable,[302] but they demonstrate the Court's consistency in applying the doctrine of fighting words.[303]

The Court's initial establishment of the fighting words doctrine as a category of speech falling outside the scope of the First Amendment virtually ensured that the doctrine would be misunderstood as primarily a proscription on speech. In fact, the fighting words doctrine was originally intended, and has always been considered, to focus on the conduct implications of words spoken in hostile circumstances. It is thus better understood as comparable to its offspring, the conduct-

300. *See supra* part II.A.2.

301. It is arguable whether, in rejecting the categorical approach with respect to fighting words, the Court also intended to do away with the other traditional categories of proscribable speech, as articulated in *Chaplinsky*. *See supra* note 7 and accompanying text; *see also supra* note 195 and accompanying text (discussing the *R.A.V.* Court's rejection of the categorical approach). Perhaps fighting words, which depend so much more on the circumstances in which they are spoken than do the other proscribable categories, can be regulated just as well without being confined to categorical rules.

302. *But cf.* Constitutional Law Conference, 62 U.S.L.W. 2263, 2272 (Nov. 2, 1993) (Professor Kathleen Sullivan asserted that *Mitchell* and *R.A.V.* are irreconcilable).

303. The difference in the outcomes of the cases has more to do with the City of St. Paul's misconception of the fighting words doctrine than with the Court's faulty application. If St. Paul had understood that the doctrine is designed to prevent the harmful conduct likely to arise from fighting words, then it could have drafted a law prohibiting the conduct aspect of speech without infringing impermissibly on the right to express ideas.

related doctrine of imminent lawless action,[304] than to other proscribable categories of speech.

IV. Applying the Conduct Principle of the Fighting Words Doctrine

Since neither prong of the *Chaplinsky* Court's original definition of fighting words has been used formally to uphold a fighting words conviction, many scholars have questioned whether there is anything more than an empty shell of a doctrine left to preserve.[305] Yet, while the decision in *R.A.V.* questioned the very existence of fighting words as a category of proscribable speech,[306] it did not seize that opportunity to overturn the doctrine. The following year's decision in *Mitchell* suggested that the principles that compelled the Court in 1942 to establish the fighting words doctrine are still very much at work in the Court's First Amendment jurisprudence.

Many states have followed the Court's lead in *Mitchell* to uphold penalty-enhancement statutes on the grounds that the statutes prohibit conduct, and not expression protected under the First Amendment.[307] In most cases, however, the underlying crimes are clearly related to conduct. Thus, while these statutes serve an important purpose in prohibiting physical offenses committed because of bias motivations, they do not reach the very activity that the fighting words doctrine was meant to prevent.

The notion that words can constitute acts with legal consequences is as old as law itself and permeates most areas of modern law.[308] For

304. *See supra* notes 88-90 and accompanying text.

305. *See* Gard, *supra* note 89, at 536 (asserting that a case-by-case adjudication has so eroded fighting words that what remains is "nothing more than a quaint remnant of an earlier morality"); Shea, *supra* note 136, at 1-2 (stating that fighting words, no matter how narrowly defined, are still protected speech); Strossen, *supra* note 21, at 510 (stating that the Court's narrow construction of *Chaplinsky* has led commentators to suggest that it is no longer good law); *Demise of Chaplinsky*, *supra* note 138, at 1140, 1145 (arguing that the "inflict injury" prong is essentially overruled and that the "breach of peace" prong also should be explicitly rejected).

306. *See supra* part II.A.

307. *See, e.g.*, People v. Aishman, 22 Cal. Rptr. 2d 311 (Cal. App.) (upholding a statute increasing the punishment for felonies committed on account of one of a list of specified reasons), *petition for review granted*, 862 P.2d 663 (Cal. 1993); Stegmaier v. State, 863 S.W.2d 924 (Mo. Ct. App. 1993) (upholding a statute increasing the severity of a crime if committed because of one of several factors); People v. Miccio, 589 N.Y.S.2d 762 (Crim. Ct. 1992) (upholding a statute increasing simple harassment to aggravated harassment when motivated by bias); State v. Ladue, 631 A.2d 236 (Vt. 1993) (upholding a statute increasing the penalty for a crime when committed on the basis of one of a list of specified reasons); State v. Talley, 858 P.2d 217 (Wash. 1993) (en banc) (upholding a penalty enhancement scheme on the grounds that the state may punish the intentional selection of the victim because of his or her race or other immutable characteristic).

308. *See* Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 Vand. L. Rev. 265, 270 (1981) (stating that the First Amendment right of free speech does not include the right to "fix prices, breach contracts, make false warran-

instance, a promise made orally may bind the promisor in contract.[309] Under other circumstances, oral statements may constitute fraud.[310] Similarly, a false or malicious oral statement about another person may result in a tort action for slander.[311] In the criminal sphere, words between two or more persons about the planning of a criminal act may constitute conspiracy even if no criminal action follows.[312] In a trial court, words may be verbal acts not subject to the hearsay rules.[313] Thus, the classification of harmful speech as a form of illegal conduct should be readily acceptable to the Court.[314]

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ties, place bets with bookies, threaten [or] extort," even though each may be accomplished by speech).

309. *See* John D. Calamari and Joseph M. Perillo, The Law of Contracts § 19-1, at 774-76 (3d ed. 1987).

310. *See* United States v. Daly, 756 F.2d 1076, 1082 (5th Cir. 1985) (stating that illegal conduct in the preparation of false income tax returns is not protected by the First Amendment just because the conduct was carried out by means of language).

311. *See* W. Page Keeton et al., Prosser and Keeton on the Law of Torts §§ 112-13, at 788-93 (5th ed. 1984).

312. *See* N.Y. Penal Law § 105 (McKinney 1987). The law does require evidence of an overt act in furtherance of the conspiracy, *id.* at § 105.20, but the act may consist solely of speech. *See* People v. Weaver, 550 N.Y.S.2d 467 (1990) (telephone conversations between conspirators concerning the purchase of cocaine were overt acts in furtherance of a conspiracy to distribute cocaine); People v. Bongarzone, 500 N.Y.S.2d 532 (1986) (conversations between the defendant's mother and another defendant were sufficient independent acts by a coconspirator, which tended to further the conspiracy and did not simply restate the agreement to conspire).

313. *See* Christopher B. Mueller & Laird C. Kirkpatrick, Evidence Under The Rules 135 (2d ed. 1993).

314. Most recently, the Supreme Court vacated the judgment in the controversial speech case, Harleston v. Jeffries, 21 F.3d 1238 (2d Cir. 1994), *vacated and remanded*, No. 94-112, 1994 WL 388592 (U.S. November 14, 1994), in which City College of the City University of New York was found to have violated the First Amendment rights of a professor by limiting his term as chair of the black studies department, in part because of the harmful consequences likely to arise from a virulently anti-semitic speech that he had given. 21 F.3d at 1241. The Court remanded the case in light of its recent decision in Waters v. Churchill, 114 S. Ct. 1878 (1994), in which it vacated a Seventh Circuit judgment because the court had used the wrong standard to determine whether a discharged public employee's First Amendment rights had been violated. *Id.* at 1891.

The Supreme Court's decision in *Jeffries* follows a line of cases involving the speech rights of government employees. In the earliest of these cases, the Court balanced the right of public employees to speak on matters of public concern with the interest of the state, as employer, to promote efficiency in performing public services through its employees. *See* Pickering v. Board of Educ., 391 U.S. 563, 569 (1968). The operative test in this area of First Amendment law hinges on whether the employer can reasonably conclude that the employee's speech might be disruptive of the government's delivery of public services.

Although government employee speech is treated differently than private speech, and the *Jeffries* case is limited to First Amendment claims against public employers, the principle underlying the Court's analysis in this line of cases is the same. Words spoken in certain circumstances may be more akin to conduct than to speech in the response they invite. In those instances when words take on the force of disruptive activity, they may be regulated in the service of other more important goals, such as the efficient management of public administration.

Therefore, the question remains: How can legislatures and courts apply the fighting words doctrine to hate crimes in a manner that effects the goals of the doctrine without infringing impermissibly on the rights of free speech guaranteed by the First Amendment? This part suggests two ways in which the fighting words doctrine may continue to be effectively applied in the construction of constitutional "fighting words" statutes. The first is a version of the two-provision statute in *Mitchell*, with a content-neutral criminal component and an additional content-based penalty enhancement component. The second model is a single provision statute that parallels the structure of the employment discrimination provision of Title VII of the Civil Rights Act of 1964.[315]

A. *A Two-Provision Fighting Words Statute*

In *R.A.V.*, Justice Scalia proposed that "a prohibition of fighting words that are directed at certain persons or groups" would be facially valid.[316] Practically, his proposal could amount to a general fighting words restriction and an additional prohibition against directing the comments toward a particular person or group. This recipe for a constitutional statute foreshadowed the Court's favorable response to the penalty enhancement statutes that states enacted following *R.A.V.* Yet, the Court's result in *Mitchell* was based on a penalty-enhancement statute that appears to preclude precisely this type of statutory construction.

The Wisconsin statute[317] exempts from penalty enhancement any crime " 'if proof of race, religion, color, disability, sexual orientation, national origin or ancestry is required for a conviction for that crime.' "[318] Proof that a victim was selected because of race, religion, or another listed characteristic technically is not necessary to sustain a conviction under a general fighting words prohibition. However, in order to determine whether challenged words even constitute fighting words, courts must inquire into the associations of the addressee.

See also Alexander M. Bickel, The Morality Of Consent 72 (1975) (comparing assaultive speech to physical aggression); Lawrence, *supra* note 21, at 452 (likening racial epithets to physical blows); Shea, *supra* note 136, at 9 (asserting that abusive speech is "not a form of communicative speech but rather a medium of something approaching a physical assault").

315. *See* 42 U.S.C. § 2000e-2(a)(1) (1988 & Supp. IV 1992).

316. *R.A.V.*, 112 S. Ct. at 2548. Justice Scalia distinguished this proposed statute, which would be neutral with respect to the content of the words prohibited, from the St. Paul ordinance, which prohibited "fighting words that contain . . . messages of 'bias-motivated' hatred." *Id.*

317. Section 1 of the Wisconsin penalty-enhancement statute provides that if a person commits a crime and intentionally selects the victim " 'because of race, religion, color, disability, sexual orientation, national origin or ancestry,' " the penalties for the underlying crime are enhanced. *Mitchell II*, 113 S. Ct. at 2197 n.1 (quoting Wis. Stat. § 939.645(1)(b) (West 1993)).

318. *Id.* (quoting Wis. Stat. § 939.645(4) (West 1993)).

For example, the expressive activity of cross burning has potentially harmful consequences when directed at African-Americans[319] and may constitute fighting words in that context. The same activity conducted at a meeting of white supremacists would not constitute fighting words at all.[320] While proof of a listed characteristic is not "required" as an element of the crime, a court will require evidence of race, religion or other unique characteristic to determine if a defendant's speech violates the prohibition against fighting words. Therefore, as a practical matter, the language of the *Mitchell* statute, which requires that there be an underlying crime apart from the bias motivation, precludes structuring a fighting words statute in a way that makes fighting words a general crime, and at the same time, enhances the penalty because of the bias associated with the crime.

Most recently, however, the Supreme Court of New Jersey upheld a harassment statute with a penalty enhancement provision in which some purely verbal communications could constitute the underlying crime. In *State v. Mortimer*,[321] the defendant was charged with fourth degree harassment for spray painting the words "Dots U Smell" on the house of a Pakistani family.[322] The harassment statute under which the defendant was convicted provided in relevant part that a person commits an offense if:

> "[W]ith purpose to harass another, he: a. Makes, or causes to be made, a communication or communications . . . in offensively coarse language, or any other manner likely to cause annoyance or alarm; . . . d. A person commits a crime of the fourth degree if in committing an offense under this section, he acted, at least in part, with ill will, hatred or bias toward, and with a purpose to intimidate, an

319. *See* Lawrence, *supra* note 21, at 471-72; Matsuda, *supra* note 22, at 2365-66.

320. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 445 (1969) (burning a cross at a Ku Klux Klan rally); *see also* supra note 8 (suggesting that it is the use and context of a word that determines its value either as speech or unprotected conduct).

321. State v. Mortimer, 641 A.2d 257, 260 (N.J. 1994), *cert. denied*, 63 U.S.L.W. 3347 (U.S. Oct. 31, 1994) (No. 94-5898).

On the same day that the court decided *Mortimer*, it also struck down a hate crime statute virtually analogous to the St. Paul ordinance in *R.A.V.* State v. Vawter, 642 A.2d 349, 352 (N.J. 1994). Although the court disagreed with the Supreme Court's analysis in *R.A.V.*, it was compelled to follow the Court's holding. *Id.* at 357.

322. *Mortimer*, 641 A.2d at 260. The New Jersey Supreme Court described the epithet as "a scurrilous, offensive allusion that incorporates a reference to the tika, a mark on the forehead of some Hindus, especially women, indicating caste or status, or worn by both sexes as an ornament." *Id.*

The defendant also was charged with another count of harassment for painting a swastika on a car parked in front of the home of a Jewish family. *Id.* The defendant pleaded guilty to that count and agreed to pay restitution to the family in exchange for the state's recommendation to the trial court to dismiss the other count and limit any sentence to a maximum of five years probation. *Id.*

Before his sentencing, the Supreme Court handed down its decision in *R.A.V. Id.* On the basis of that decision, the defendant withdrew his plea and filed a motion to dismiss, which the trial court granted. *Id.* at 260-61.

individual or group of individuals because of race, color, religion, sexual orientation or ethnicity."[323]

The defendant argued that subsection (a) was itself unconstitutionally vague.[324] The court rejected that claim, stating that "the requirement, applying to all of section 4, that a defendant act 'with purpose to harass another' serves to clarify the otherwise-vague phrases of subsection a."[325] Although the court did not technically apply a "fighting words" construction to its harassment statute, the language of subsection (a) closely tracks the language of the New Hampshire statute in *Chaplinsky*.[326] Additionally, the intent requirement also parallels the language of the New Hampshire statute.[327] Thus, while the court refrained from applying a fighting words construction to the statute, the harassment law essentially prohibits the same speech activity that is the basis of the fighting words doctrine.[328]

On the basis of the holdings in *R.A.V.* and *Mitchell*, the New Jersey Supreme Court could have reasoned that the underlying crime, which consisted only of speech, was not sufficiently tailored to prohibit only fighting words, and was, therefore, impermissibly overbroad. Or, it could have concluded that because the underlying crime consisted only of speech, the penalty enhancement provision essentially punished speech because of its bigoted content, making it impermissibly content-based.

Instead of placing a technical fighting words construction on the statute, however, the court applied the conduct principle of fighting words to uphold the statute. The court construed subsection (a) as a prohibition of the conduct implications of fighting words, distinct from the penalty enhancement provision in subsection (d).[329] Thus, subsection (a) comprises an independent verbal offense.[330] Subsection (d) acts as a typical penalty enhancement provision, without reference to the substance of the offense in subsection (a).[331] Together, the two provisions target harmful, bias-motivated fighting words, while only

323. *Id.* at 260 (quoting N.J. Stat. Ann. 2C:33-4d (West 1991)).

324. *Id.* at 264.

325. *Id.* at 266. (citing State v. Finance Am. Corp., 440 A.2d 28 (N.J. 1981)).

326. *See supra* note 38.

327. *Compare* the text of the New Hampshire statute, *supra* note 38 ("with intent to deride, offend or annoy") *with* the text of the New Jersey statute, *supra* text accompanying note 323 ("with purpose to harass another").

328. The standard dictionary definition of the term "harass"—to disturb or irritate persistently—does not necessarily require retaliatory conduct on the part of the victim of harassment. The American Heritage Dictionary of the English Language 600 (1976). Nevertheless, in statutory constructions, the term "harassment" is often used to describe a misdemeanor when, "with purpose to harass," one " 'insults, taunts or challenges another in a manner likely to provoke violent or disorderly response.' " Black's Law Dictionary 494 (6th ed. 1991) (quoting the Model Penal Code § 250.4).

329. 641 A.2d at 261.

330. *Id.* (describing subsection (a) as "freestanding, because [it] defines an offense in its own right").

331. *Id.* The court stated that because subsection (a) comprised its own offense:

incidentally restricting speech. Moreover, any incidental restriction on speech is without reference to the content of that speech.

B. *A Single Provision Fighting Words Statute*

The New Jersey statute reviewed in *Mortimer* was formally structured as a penalty enhancement statute, with separate provisions for the underlying crime and the increased penalty. However, since the primary provision prohibits only the conduct implications of fighting words, it is unnecessary to classify separately a list of designated types of fighting words, which when directed at particular groups, are likely to have particularly violent consequences. In other words, because the underlying provision only incidentally restricts speech, it falls within the *O'Brien* exception to the *R.A.V.* rule against content-based speech restrictions.[332] There is, therefore, no need to separate out a general, neutral fighting words provision from a content-based penalty enhancement provision.

A single provision statute prohibiting fighting words on the basis of a select list of characteristics could be modeled after Title VII of the Civil Rights Act of 1964.[333] Title VII prohibits discrimination in the workplace "because of race, color, religion, sex, or national origin."[334] Although Title VII is clearly content-based, the Supreme Court repeatedly has invoked Title VII as an example of a permissible content-based regulation because it restricts conduct, not speech.[335]

> [It] decline[d] to read subsections a and d together to create a single substantive offense akin to that struck down by the Supreme Court in *R.A.V.* [It could not] apply subsection d until a defendant has engaged in the conduct that subsection a proscribes. Accordingly, subsection d applied on top of subsection a d[id] not punish the mere expression of hate, as did the St. Paul ordinance in *R.A.V.*

Id.

332. *See supra* note 187 and accompanying text.

333. *See* 42 U.S.C. § 2000e-17 (1988 & Supp. IV 1992).

334. 42 U.S.C. § 2000e-2(a)(1). The section makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." *Id.*

335. *See Mitchell II*, 113 S. Ct. at 2200 (referring to Title VII as a constitutional regulation of discriminatory conduct); *R.A.V.*, 112 S. Ct. at 2546 (excepting Title VII from its presumptive rule against content-based regulations because it regulates conduct, not speech); Hishon v. King & Spalding, 467 U.S. 69, 78 (1984) (rejecting the claim that Title VII infringes on an employer's First Amendment rights); *see also* State v. Wyant, 597 N.E.2d 450, 456 (Ohio 1992) (distinguishing Title VII as a regulation of conduct from "impermissible" penalty enhancement statutes, which regulate offensive thought), *vacated and remanded*, 113 S. Ct. 2954 (1993), *rev'd*, 624 N.E.2d 722 (1994). *But see* Kingsley R. Browne, *Title VII as Censorship: Hostile Environment Harassment and The First Amendment*, 52 Ohio L.J. 481 (1991) (arguing that Title VII hostile work environment claims contravene the First Amendment); Jules B. Gerrard, *The First Amendment in a Hostile Environment: A Primer on Free Speech and Sexual Harassment*, 68 Notre Dame L. Rev. 1003 (1993) (arguing that the EEOC guidelines regarding harassment under Title VII are probably unconstitutionally overbroad).

Under Title VII, activity including otherwise lawful speech, may be punishable as unlawful conduct[336] when it results in creating a "hostile or abusive work environment."[337] Not all harassment, however, constitutes a violation of Title VII. For example, the " 'mere utterance of an ethnic or racial epithet which engenders offensive feelings' " would not rise to the level of a Title VII violation.[338] To be actionable, the harassment must be sufficiently severe so as " 'to alter the conditions of [the victim's] employment and create an abusive working environment.' "[339] The standard is objective, to the extent that the work environment must be one that a reasonable person would find hostile or abusive.[340] Moreover, the Equal Opportunity Employment Commission's guidelines require that, in determining whether conduct constitutes sexual harassment, a court must consider " 'the record as a whole' " and " 'the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.' "[341]

Similarly, in the context of fighting words, speech that would otherwise be protected may constitute punishable conduct when communicated in a manner and context in which it is likely to engender retaliatory conduct. Offensive words, even when directed to a particular addressee, do not constitute fighting words unless they are likely to result in harmful conduct.[342] Like Title VII, the standard is that of a reasonable person in the place of the addressee.[343] Furthermore, as Justice Stevens emphasized in his concurrence in *R.A.V.*, fighting words are to a great degree determined by the context in which they

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In *Mitchell*, the Court stated that "in *R.A.V. v. St. Paul*, we cited Title VII as an example of a permissible content-neutral regulation of conduct." 113 S. Ct. at 2200. As a statutory matter, however, Title VII is content-based, and the Court so acknowledged that fact in *R.A.V.* 112 S. Ct. at 2546. Nevertheless, to the extent that it regulates conduct, and not speech, Title VII is content-neutral for purposes of First Amendment scrutiny. It is primarily the usage of speech, not its content, that is at issue in determining whether the speech violates Title VII.

336. In describing the kinds of sexual harassment that may be actionable under Title VII, Congress included " '[u]nwelcome sexual advances, requests for sexual favors, and other *verbal* . . . *conduct* of a sexual nature.' " Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) (emphasis added) (quoting 29 C.F.R. § 1604.11(a) (1985)).

337. *Id.* at 66.

338. *Id.* at 67 (quoting Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971)).

339. *Id.* (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

340. Harris v. Forklift Systems, Inc., 114 S. Ct. 367, 370 (1993). The Court in *Harris* indicated, however, that the standard is more like a reasonable person of the same gender, race, religion, etc., as the victim. *Id.* at 371. The Court also added that "if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation." *Id.* at 370.

341. *Meritor*, 477 U.S. at 69 (quoting 29 C.F.R. § 1604.11(b) (1985)).

342. *Cf. supra* text accompanying notes 336-38.

343. *See supra* notes 136-38 and accompanying text; *cf. supra* text accompanying note 340.

are expressed.[344] Like Title VII, a court must look to "the totality of the circumstances" surrounding a communication to determine whether a speaker's words, in a particular context, constitute fighting words.

Title VII is statutorily limited to eradicating discrimination in the workplace.[345] Nevertheless, it reflects a general consensus in the law that discrimination on the basis of immutable characteristics like gender or race is unacceptable. In enacting Title VII, Congress sought to reflect, as well as influence, how society treats gender and other differences, by regulating discriminatory conduct that exploits these very differences between people. Similarly, statutes that are constructed to prohibit fighting words based on particular "disfavored topics" mirror the general consensus, whether local, state or national, that these forms of expression are likely to result in uniquely harmful consequences. But, in doing so, fighting words statutes can be drafted so as not to target the expression itself. Rather, like Title VII, which seeks to prevent the pernicious consequences of discrimination in the workplace, they can be aimed at preventing the conduct implications of fighting words—the harmful activity that lies at the core of the fighting words doctrine.

CONCLUSION

As Justice Holmes recognized three quarters of a century ago,[346] words are not merely combinations of letters. The value in a word is not in the thing itself, but in its use as a medium of communication. It is the meaning we imbue to a word that transforms it from a series of letters into an instrument of speech, which we then can use to participate in dialogue, as well as to exchange ideas. Thus, when words are used to engender conduct as opposed to responsive dialogue, we do not value them as "speech," but only as "talk." This empty talk may be regulated, consistent with the First Amendment, because what is being prohibited is merely the conduct implications of harmful fighting words, and not their value as "speech." In other contexts, when these same words are used to produce dialogue or the expression of ideas, they may then be valued as constitutionally protected "speech." Thus, the fighting words doctrine provides the doctrinal framework for outlawing words when they are used as a medium for violence.

The Court's speech/conduct distinction in *O'Brien* makes the Court's analysis in fighting words cases easier to comprehend. *Chaplinsky* and its progeny thus can be understood as a line of consistent jurisprudence, all predicated on the conduct-related doctrine of fighting words. Moreover, the Court's most recent pronouncements

344. *See supra* notes 8, 196 and accompanying text; *see also* pp. 829-30.
345. *See supra* note 334.
346. *See supra* note 1 and accompanying text.

regarding fighting words, in *R.A.V.* and *Mitchell*, finally make explicit the Court's emphasis on the conduct implications of words and not on their value as instruments of "speech."

While penalty enhancement statutes, such as the Wisconsin law in *Mitchell*, combat some types of hate crimes, they do not encompass fighting words directly. On the other hand, the New Jersey statute in *Mortimer*, and laws like it, give credence to the viability of the fighting words doctrine as a means to prohibit the conduct implications of fighting words. Once fighting words are understood as conduct-related, laws prohibiting them may be constructed as either two-provision statutes, like the New Jersey law, or single provision statutes, like Title VII. These models ultimately do not violate the First Amendment precisely because their focus is on regulating conduct, and not on restricting speech.

The lesson to be learned from *Chaplinsky* and its progeny is that the First Amendment, as short a document as it is, means what it says when commanding that speech be free. But not all language counts as speech. Words have great power, but also carry a comparable burden. Those who rely upon and value language are entrusted with the responsibility to use it as speech. Anything less, whether it be deemed a proscribable category, imminent lawless action or harmful conduct, is still, and always has been, subject to regulation.