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“Don’t Bother to Smile When You Call Me That” —Fighting Words and the First Amendment

BY THOMAS F. SHEA*

According to Owen Wister, certain words, at least when spoken without a disarming smile, are likely to provoke swift physical retaliation.¹ Kipling put it with characteristic clarity: “[Y]ou must not call a man a bastard unless you are prepared to prove it on his front teeth.”²

In order to forestall such violence-prone confrontations, it would seem desirable for society to prevent the insulting utterances which precipitate them in the first instance. Presumably laws effecting that result would advance society’s undeniable interest in preserving the peace in two ways: by initially deterring the employment of abusive language and, where the speaker has not been deterred, by encouraging the recipient to seek redress through the judicial process rather than to rely on more immediate and more primitive means of obtaining satisfaction. Moreover, since experience teaches that face to face insults often, though certainly not invariably, lead to violence on the part of the addressee, a rational basis for the prohibiting legislation is obviously present.

The flaw in this analysis is, however, that it does not consider the fact that even insulting, “fighting words” are a form of speech and as such seem to steer laws punishing them onto a collision course with the first amendment. Because of a failure to discern that such a collision is not inevitable, a majority

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¹ O. WISTER, *When You Call Me That, Smile*, in *THE VIRGINIAN* ch. 2 (1902).

² R. KIPLING, *The Drums of the Fore and Aft*, in *KIPLING’S STORIES* 8 (1931).

of the United States Supreme Court has gradually concluded that fighting words, no matter how narrowly defined, are a protected form of speech and that as a result a mere rational basis is no longer sufficient to justify punitive legislation.³ The anomolous result of this determination is to permit a state to penalize a speaker who insults a burly construction worker while forbidding the punishment of the reviler of a wheelchair-bound quadriplegic.

Constitutional Background

How the Supreme Court came to paint itself into this jurisprudential corner may perhaps best be understood by beginning with an examination of the first amendment itself, which provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."⁴ Although the term "Congress" indicates that the first amendment is directed only against abridgements of speech on the part of the federal government, its mandate, applied through the due process clause of the fourteenth amendment, has been held to require state laws regulating speech to pass constitutional muster.⁵ And despite the use of absolute terms—"Congress shall make *no* law . . ."—the Supreme Court has never assigned an absolute meaning to the first amendment.⁶ Accordingly, it has been deemed self-evident that certain forms of speech may be constitutionally punished. For example, it has never been seriously contended that a verbal agreement to commit murder or to distribute heroin may find immunity through the incantation of the theurgic phrase "freedom of speech".⁷ As Mr. Justice Holmes stated:

³ See notes 34-102 and accompanying text *infra*.

⁴ U.S. CONST. amend. I.

⁵ *Lovell v. Griffin*, 303 U.S. 444 (1938); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936); *Gitlow v. New York*, 268 U.S. 652 (1925).

⁶ Justices Black and Douglas have occasionally contended for an absolute interpretation with respect to some forms of expression. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 449-50, 457 (1969) (concurring opinions); *New York Times Co. v. Sullivan*, 376 U.S. 254, 295 (1964) (concurring opinions); *Beauharnais v. Illinois*, 343 U.S. 250, 275, 286 (1952) (dissenting opinions).

⁷ See generally B. SCHWARTZ, CONSTITUTIONAL LAW 263-64 (1972). Other instances of speech as criminal conduct unprotected by the first amendment are extortion, blackmail and fraudulent representation. *Id.* "What is a threat must be distinguished from what is constitutionally protected speech." *Watts v. United States*, 394 U.S. 705, 707 (1969).

We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counselling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech.⁸

In contrast, laws punishing forms of speech which arguably tend only to communicate ideas, concepts or opinions are more difficult to harmonize with the first amendment. The difficulty can be lessened, however, by an *a priori* determination that the particular expression sought to be punished belongs to a class of utterances which, like speech as an instrumentality of common crime, simply ought not to be protected by the first amendment. The Gordian knot may thereby be cut rather than unraveled. An example of this approach which has occasioned little dispute is the assignment of unprotected status to "commercial" speech. In *Valentine v. Chrestensen*,⁹ the Supreme Court, against a first amendment challenge, upheld a local ordinance totally banning the distribution of advertising handbills in the city streets, saying "[T]he Constitution imposes no [first amendment] restraint on government as respects purely commercial advertising."¹⁰ After the determination that commercial speech was unprotected, the ordinance prohibiting the handbills was readily sustainable because legislation punishing or regulating unprotected speech requires only a "[r]ational connection between the remedy provided and the evil to be curbed"¹¹ Since handbills often become a form of litter, a rational basis for the law existed.

On the other hand, if the speech in question is considered constitutionally protected it may be punished only if it creates a "clear and present danger" of bringing about substantive evils which the government has a right to prevent.¹² Furthermore, since freedom of speech has been said to enjoy a pre-

⁸ *Frohwerk v. United States*, 249 U.S. 204, 206 (1919).

⁹ 316 U.S. 52 (1942).

¹⁰ *Id.* at 54. In *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973), the Court declined to overrule *Chrestensen* and reasserted its basic satisfaction with the treatment of purely commercial speech as unprotected by the first amendment.

¹¹ *Thomas v. Collins*, 323 U.S. 516, 530 (1945). See *Board of Educ. v. Barnette*, 319 U.S. 624, 639 (1943).

¹² *Schenck v. United States*, 249 U.S. 47, 52 (1919).

ferred position in the hierarchy of constitutional values,¹³ it is not surprising that the Supreme Court has required that such danger must be extremely serious and very imminent before the speaker or writer may be punished.¹⁴ Even when the speech sought to be penalized involves advocacy of the use of illegitimate force, it remains immune as a communication of ideas unless, under the actual ambient circumstances, it also constitutes the incitement of imminent lawless *action* and is very likely to *produce* that action.¹⁵

Accordingly, when the Supreme Court announced in *Roth v. United States*¹⁶ that "obscenity is not within the area of constitutionally protected speech or press,"¹⁷ it was holding that obscene speech might be prohibited or punished, without the necessity of establishing that the obscene material constitutes a clear and present serious danger to society, if there existed merely a rational basis for doing so.¹⁸ Such a rational basis was found in the belief that obscenity is to some extent at least responsible for antisocial behavior.¹⁹ Unfortunately for the Court, it still remained necessary to determine whether a given expression was, in fact, obscene and the Justices wrestled with that task during the fifteen years following *Roth*.²⁰ Never-

¹³ *Kovacs v. Cooper*, 336 U.S. 77, 88 (1949); *Thomas v. Collins*, 323 U.S. 516, 530 (1945); *Jones v. Opelika*, 316 U.S. 584, 608 (1942), *rev'd*, 319 U.S. 103 (1942).

¹⁴ *Bridges v. California*, 314 U.S. 252, 263 (1941); *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

¹⁵ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). See *Dennis v. United States*, 341 U.S. 494, 510 (1951).

¹⁶ 354 U.S. 476 (1957).

¹⁷ *Id.* at 485.

¹⁸ See *Stanley v. Georgia*, 394 U.S. 557, 567 (1969).

¹⁹ *Paris Adult Theatre I v. Slayton*, 413 U.S. 49, 58 (1973); *Roth v. United States*, 354 U.S. 476, 485 (1957).

²⁰ See, e.g., *Miller v. California*, 413 U.S. 15 (1973); *Ginsberg v. New York*, 390 U.S. 629 (1968); *Mishkin v. New York*, 383 U.S. 502 (1966); *Ginzburg v. United States*, 383 U.S. 463 (1966); *Memoirs v. Massachusetts*, 383 U.S. 413 (1966); *Jacobellis v. Ohio*, 378 U.S. 184 (1964); *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962). The latest definition of obscenity is the most specific:

The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, *Roth v. United States*, *supra*, at 489; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

Miller v. California, *supra* at 24.

theless, despite the problems encountered in defining the elusive subject matter, a majority of the Court has never retreated from the initial determination that obscenity, once discerned, is not to be accorded the protection of the first amendment.²¹

A similar beginning in the area of libel and slander yielded a very different result. In *Near v. Minnesota*,²² the Court struck down a law permitting the enjoining of future libelous publications because such a law would countenance an unconstitutional "previous restraint" on freedom of the press. The Court made it clear that the same libelous utterances might be punished despite the first amendment *after* they had been published:

But it is recognized that punishment for the abuse of liberty accorded to the press is essential to the protection of the public, and that the common law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our constitutions.²³

That the Court remained sure of its ground twenty years after *Near* was made manifest in *Beauharnais v. Illinois*,²⁴ a criminal prosecution for libelling a class of persons rather than an individual. The defendant sought the protection of the first amendment, arguing that he could be punished only if his statements were "likely to produce a clear and present danger of a serious substantive evil"²⁵ Justice Frankfurter replied:

Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary, either for us or for the State courts, to consider the issues behind the phrase "clear and present danger." Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances. Libel, as we have seen, is in the same class.²⁶

²¹ *Miller v. California*, 413 U.S. 15, 23 (1973). The possession and use of obscene material within a private home was held protected in *Stanley v. Georgia*, 394 U.S. 557 (1969), not because the obscene matter deserved protection but because the privacy of the home did.

²² 283 U.S. 697 (1931).

²³ *Id.* at 715.

²⁴ 343 U.S. 250 (1952).

²⁵ *Id.* at 253.

Although a clearer statement of the law would be difficult to imagine, a new departure occurred twelve years later in the celebrated case of *New York Times Co. v. Sullivan*.²⁷ Sullivan, a police commissioner in Montgomery, Alabama, brought a civil libel action against the *New York Times* based on its printing of an advertisement which allegedly defamed him in connection with his supervision of the Montgomery police in their dealings with Martin Luther King. The statements in the advertisement were concededly inaccurate; however, the *Times* argued that the newspaper was protected by the constitutional guaranty of freedom of the press. Sullivan, of course, rejoined that libel was entitled to no such protection, citing *Beauharnais*. It must have come as something of a shock to Sullivan when the Supreme Court, per Justice Brennan, held flatly to the contrary, declaring that "[l]ibel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment."²⁸ The Court went on to state that where a public official's conduct is the target, a false defamatory statement may be punished only when made with malice; that is, made with knowledge that the statement is false or with reckless disregard of whether it is false or not.²⁹ In other words, the Court held that in some circumstances the first amendment guarantees the right to publish falsehood as long as it is not done maliciously.

Subsequently, the *New York Times* rationale was extended to protect false defamatory material aimed at public figures who were not public officials,³⁰ and even at private citizens who had found themselves, voluntarily or not, involved in a single event of public or general interest.³¹ The Supreme Court, however, has recently held that where defamatory, false statements are about a person who is not a public figure, the defamer may not claim the *New York Times* protection even though the statement dealt with an issue of public interest.³²

²⁶ *Id.* at 266.

²⁷ 376 U.S. 254 (1964).

²⁸ *Id.* at 269.

²⁹ *Id.* at 279-80.

³⁰ *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

³¹ *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).

³² *Gertz v. Robert Welch, Inc.*, ___ U.S. ___ (1974), 42 U.S.L.W. 5123 (June 25, 1974).

At present, therefore, a statement falsely defamatory of a private person, even if it concerns a matter of public interest, may be punished without the necessity of establishing the defamer's knowledge of the falsity of his statement or his reckless indifference thereto. But if libelous utterances still enjoy protected status—which requires a showing of clear and present danger of a serious substantive evil before they may be punished—it appears the Court has recognized that the requisite clear and present danger in private libel is the imminent injury to the reputation and good name of the vilified citizen.

The danger, though, is no different in the case of the public official; that is, injury to *his* good name. It seems, therefore, that in *New York Times* the Court was engrafting a balancing concept onto the "clear and present danger" test. The real, imminent, substantive danger of injury to personal reputation is balanced against the importance to the general welfare of the expression sought to be punished. Where the expression is a purely private defamatory falsehood, its value to the public is slight, and the danger to an individual reputation outweighs it. On the other hand, where the expression concerns public officials or public figures, the same danger pales beside the fundamental principle that debate on such matters should be "uninhibited, robust, and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks"³³

Fighting Words

The diverging paths which led from the common starting point of "unprotected speech" to the present treatment of libel on one hand and obscenity on the other may nevertheless serve to illuminate the path traveled by the Supreme Court as it has grappled with the problems posed by laws punishing the vituperative and insulting language commonly called "fighting words". Since fighting words are pure speech, unmixed with action on the part of the speaker—unlike, for example, the burning of a draft card³⁴—it is obvious that either an accommo-

³³ *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). See also *Garrison v. Louisiana*, 379 U.S. 64, 72-73 (1964): ". . . where the criticism is of public officials and their conduct of public business, the interest in private reputation is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth."

³⁴ See, e.g., *United States v. O'Brien*, 391 U.S. 367 (1968).

dition with the first amendment or its total avoidance must occur if these punitive measures are to survive.

A simple solution is always attractive and, as Occam taught, very often correct. Thus the Supreme Court, as it did when first faced with the constitutional issues presented by libel and obscenity, initially held in *Chaplinsky v. New Hampshire*³⁵ that fighting words belonged to a class of expression not protected by the first amendment. Chaplinsky, a member of the Jehovah's Witnesses sect, had been addressing passers-by on a city street when a disturbance occurred. Approached by a city marshal Chaplinsky responded, "[Y]ou are a God damned racketeer" and "a damned fascist",³⁶ whereupon he was charged with violating a statute which prohibited, *inter alia*, calling another person by an "offensive or derisive name" in a public place.³⁷

The Supreme Court noted that any vagueness problem had been cured by prior interpretations of the statute by the New Hampshire courts which had made clear that the only words condemned were:

[S]uch as have a direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed. [T]he word "offensive" is not to be defined in terms of what a particular addressee thinks The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight³⁸

It is apparent from the italicized language that the "clear and present danger" test was not being applied. That is, it was not an element of the offense that the particular addressee would himself be likely to respond with violence to the fighting words but only that an average person would be likely to do so. The basis for applying this less stringent standard was simply that the speech involved was not constitutionally protected. As Justice Murphy stated for the Court:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.

³⁵ 315 U.S. 568 (1942).

³⁶ *Id.* at 569.

³⁷ *Id.*

³⁸ *Id.* at 573 (emphasis added).

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.³⁹

The Court had no difficulty in holding that Chaplinsky's remarks to the marshal fell within the fighting words classification and sustained his conviction.

The rationale for assigning unprotected status was that fighting words as defined by the New Hampshire courts were not a form of communicative speech but rather a medium of something approaching a physical assault. In support of this reasoning the *Chaplinsky* Court cited the opinion rendered two years earlier in *Cantwell v. Connecticut*.⁴⁰ Cantwell, another Jehovah's Witness, had played a record which described the Roman Catholic Church in offensive, derogatory terms before two bystanders who happened to be Catholics. He was charged with "inciting a breach of the peace"⁴¹ although no violence actually occurred. In overturning Cantwell's conviction, the Court distinguished the expression of offensive ideas and beliefs from "profane, indecent, or abusive remarks directed to the *person* of the hearer."⁴² Such personal invectives could be punished without more because "resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."⁴³ In contrast, Cantwell's expression of beliefs, even though unpopular and strongly at variance with those held by his listeners, was protected. Even had he exhorted his hearers to an immediate violent attack on any Catholics who could be found in the vicinity, his conviction would be upheld only if there existed a "clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order" Cantwell's speech did not constitute fighting words because it was not personally directed to his listeners. Since his utter-

³⁹ *Id.* at 571-72.

⁴⁰ 310 U.S. 296 (1940).

⁴¹ *Id.* at 300.

⁴² *Id.* at 309 (emphasis added).

⁴³ *Id.* at 309-10.

⁴⁴ *Id.* at 308.

ances were constitutionally protected, only a clear and present danger that his audience would proceed to take illegal action would justify his punishment, and that danger was not present.

The Court reaffirmed the doctrine that fighting words were unprotected speech in deciding *Terminiello v. Chicago*⁴⁵ seven years later, although therein it reversed the conviction of the defendant, a suspended Catholic priest, who had called his adversaries (some of whom were inside the auditorium while others were rioting outside) "slimy scum", "bedbugs", "snake[s]" and "atheistic communistic jews".⁴⁶ The ground for reversal was not that the defendant's statements were not fighting words, but rather that the "breach of the peace" statute under which he had been convicted was unconstitutionally overbroad because, as construed by the Illinois courts, it permitted conviction not only for fighting words, but also for speech which "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance. . . ."⁴⁷ A conviction under a statute so broadly construed could not stand since:

a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.⁴⁸

Thus, the Court failed to reach the question of whether *Terminiello* might have been properly convicted under a law narrowly drawn to prohibit only fighting words.

Two years later, in *Feiner v. New York*,⁴⁹ the Court reiter-

⁴⁵ 337 U.S. 1 (1949).

⁴⁶ *Id.* at 20-21 (facts in dissenting opinion).

⁴⁷ *Id.* at 4 (quoting from the jury instructions).

⁴⁸ *Id.*

⁴⁹ 340 U.S. 315 (1951).

⁵⁰ The incitement to unlawful action which is punishable under the "clear and present danger" test connotes violent action which is deliberately encouraged by the speaker, as where he intentionally foments a fight between factions in his audience or urges his listeners to go forth and burn down churches. The term does not refer to violent action which may be inspired by the audience's hostility toward the speaker or his message and the desire to summarily silence him. *Gregory v. Chicago*, 394 U.S. 111 (1969). See *Feiner v. New York*, 340 U.S. 315 (1951); *Hague v. CIO*, 307 U.S. 496 (1939). That it is sometimes difficult to distinguish between the two is demonstrated in *Feiner* where the majority found that the defendant had incited an imminent riot and the three dissenters contended that he had been punished for his listeners' hostile reaction to the content of his message. *Feiner*, addressing a crowd of negroes

ated that a speaker who incites his listeners to take riotous action against others, as opposed to personally insulting his addressees, may be constitutionally punished only if there exists a clear and present danger that unlawful action will actually occur. A pure "fighting words" issue, however, was not presented in *Feiner*.

Accordingly, as of January, 1951, the date of the *Feiner* decision, the law with respect to fighting words might be summarized as follows: (1) expressions of opinion or belief, no matter how unorthodox or hateful to the speaker's audience, were constitutionally protected and could not be punished; (2) encouraging an audience to lawless action against others was also protected unless there existed a clear and present danger that the action would in fact occur;⁵⁰ and (3) fighting words, a form of unprotected speech, could be punished under a statute narrowly drawn or narrowly interpreted to forbid face to face personal insults likely to cause the average person to react violently, whether or not the *actual* addressee was likely to so react. Since fighting words, so defined, were not constitutionally protected, only a rational basis for their prohibition was required. That basis could be found in the fact that the sensibilities of the addressees would be hurt by such statements as well as in the likelihood that some addressees would reply with force.⁵¹

Almost twenty years after *Feiner* the Court indicated in *Street v. New York*⁵² that it was still satisfied with the treatment of fighting words as speech unprotected by the first amendment. *Street* was convicted under a statute which made it a misdemeanor to ". . . publicly . . . mutilate, deface, de-

and whites, made derogatory remarks concerning the president, the mayor and other local officials and urged that the negroes rise up in arms to fight for equal rights. The crowd grew excited and one of them threatened violence, apparently against *Feiner*. *Feiner* was convicted of inciting a breach of the peace. Justice Douglas, dissenting, said:

A speaker may not, of course incite a riot any more than he may incite a breach of the peace by the use of "fighting words" . . . But this record shows no such extremes. It shows an unsympathetic audience and the threat of one man to haul the speaker from the stage. It is against that kind of threat that speakers need police protection.

Feiner v. New York, 340 U.S. 315, 331 (1951) (Douglas, J., dissenting).

⁵¹ See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942): "'fighting words' - those which by their very utterance inflict injury"

⁵² 394 U.S. 576 (1969).

file, or defy, trample upon, or cast contempt upon either by words or act . . ." any American flag.⁵³ The defendant had burned an American flag while saying, *inter alia*, "We don't need no damn flag."⁵⁴ The Court reversed on the ground that Street's conviction might have been based in part on the words which he had uttered—words which, under the circumstances, could not have been constitutionally punished. Justice Harlan, writing for the majority of the Court, noted that Street's words did not seek to incite others to violent acts⁵⁵ and did not constitute fighting words under the *Chaplinsky* test:

[W]e cannot say that appellant's remarks were so inherently inflammatory as to come within that small class of "fighting words" which are "likely to provoke the *average* person to retaliation, and thereby cause a breach of the peace."⁵⁶

By its verbatim quotation from *Chaplinsky* the court also reaffirmed the view that if a declaration constitutes fighting words no clear and present danger of actual retaliation by the particular addressee need be shown as long as an average addressee would be likely to react violently.⁵⁷

In 1971 the Court began to wrestle with the problems created by the use of vulgar language in public places, which at first glance seemed to be beyond first amendment protection because it amounted to obscenity or fighting words, or both. In *Cohen v. California*,⁵⁸ the defendant was convicted of disturbing the peace by "offensive conduct" for wearing, in a courthouse corridor, a jacket which bore the plainly visible words "Fuck the Draft."⁵⁹ In reversing, the Court, through Justice Harlan, pointed out that Cohen's expression constituted pure speech, not action, and did not "fall within those relatively few categories of instances where prior decisions have established

⁵³ *Id.* at 578.

⁵⁴ *Id.* at 579.

⁵⁵ *Id.* at 591.

⁵⁶ *Id.* at 592 (emphasis added). A similar result was reached in *Bachellar v. Maryland*, 397 U.S. 564 (1970).

⁵⁷ The Court also noted that even if Street's utterances could be deemed fighting words, the New York statute was not drawn narrowly enough to punish only words of that character and there was no evidence that it had been so narrowly construed by the New York courts. *Street v. New York*, 394 U.S. 576, 592 (1969).

⁵⁸ 403 U.S. 15 (1971).

⁵⁹ *Id.* at 16.

the power of government to deal more comprehensively with certain forms of individual expression simply upon a showing that such a form was employed."⁶⁰ Cohen's words were found not to be obscene because their meaning was not, in the circumstances, erotic; and they were not fighting words because they were not directed to any particular person. Thus, as recently as 1971, the Court saw no reason to vary the definition of fighting words and confidently reasserted it:

[T]he States are free to ban the simple use, *without a demonstration of additional justifying circumstances*, of so-called "fighting words," those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.⁶¹

Finding that Cohen had not deliberately attempted to incite imminent violent action and that in fact none had occurred, the Court then considered a new issue: whether Cohen's slogan, though not constituting fighting words, might be punished because it was an extremely distasteful mode of expression thrust upon unwilling watchers whose sensitivities deserved protection. Noting that the expression was communicated in a public place and did not involve an invasion into the viewers' homes, the Court answered in the negative, saying, "[W]ords are often chosen as much for their emotive as their cognitive force."⁶² The majority was also disturbed by the broadness and vagueness of the statutory prohibition of "offensive conduct," observing that "it is nevertheless often true that one man's vulgarity is another's lyric."⁶³

In the aftermath of *Cohen*, therefore, the concept of fighting words as unprotected by the first amendment remained intact, while vulgar language in general was deemed protected speech. If Cohen had addressed similar expletives to the persons of passers-by in that courthouse corridor, his conviction under a narrowly drawn fighting words statute would apparently have earned the approval of both the majority and the dissenters.

⁶⁰ *Id.* at 19-20.

⁶¹ *Id.* at 20 (emphasis added).

⁶² *Id.* at 26.

⁶³ *Id.* at 25.

Within a year of the *Cohen* decision, however, a majority of the Supreme Court was ready to alter the traditional definition of unprotected fighting words. In *Gooding v. Wilson*,⁶⁴ the defendant, while picketing a U. S. Army headquarters building in protest of the Viet Nam conflict, blocked the entrance so that arriving inductees could not enter. When two policemen attempted to remove him, Wilson said to one of them, "White son of a bitch, I'll kill you," and "You son of a bitch, I'll choke you to death." To the other he said, "You son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces."⁶⁵

If "God damned racketeer" could turn the trick,⁶⁶ then Wilson's language, employed in a face-to-face encounter, should have been sufficient to constitute fighting words. However, the Court did not decide that point because, in the majority's view, the crucial question was whether the Georgia statute involved was narrow enough to condemn fighting words without condemning protected speech along with them.⁶⁷ The statute provided:

Any person who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor.⁶⁸

Surprisingly, the Court found the law overbroad because the statutory language did not go on to explain that the prohibition was limited to (a) fighting words that were (b) likely to cause acts of violence by the *actual* addressee.⁶⁹ Justice Brennan, writing for the five-man majority, further stated that such a narrow interpretation had never been applied to the ordinance by the Georgia courts. In arriving at these conclusions the majority adopted a definition of fighting words which, for

⁶⁴ 405 U.S. 518 (1972).

⁶⁵ *Id.* at 519, 520 n.1.

⁶⁶ *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

⁶⁷ A statute affecting speech which is overbroad on its face or as construed cannot stand even if the words to which it is applied might have been constitutionally punished under a narrowly drawn law. This is contrary to the rule in non-first amendment cases and is deemed necessary to discourage the enactment of sweeping prohibitions which by their very existence might chill the exercise of free expression. *Gooding v. Wilson*, 405 U.S. 518, 521 (1972); *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965).

⁶⁸ *Gooding v. Wilson*, 405 U.S. 518, 519 (1972).

⁶⁹ *Id.* at 523.

all practical purposes, removed them from unprotected status and placed them under the guardianship of the first amendment.

As previously noted, protected speech may not be constitutionally punished unless it creates a clear and present danger of serious substantive evil in the circumstances in which it occurs. Even a deliberate incitement to violent action is a form of protected speech because it seeks to communicate an idea and as such may be penalized only if it is likely that such action will take place.⁷⁰ Thus, exhorting a mob of infuriated hockey fans to attack a referee as he leaves the arena would probably be punishable, while urging a synod of bishops to burn down a nearby synagogue would probably not be. In contrast, when the *Chaplinsky* Court determined that fighting words were unprotected, it held that as a result they could be punished irrespective of a clear and present danger that the actual addressee would become violent. To quote again from *Chaplinsky* in language curiously absent from the majority's opinion in *Gooding v. Wilson*: "[t]he word 'offensive' is not to be defined in terms of what a particular addressee thinks."⁷¹

In *Gooding*, the majority found that an essential defect in the statute, as interpreted by the Georgia courts, was a failure to require the likelihood of a violent reaction on the part of the actual addressee. Justice Brennan's opinion for the Court pointed out disapprovingly that the Georgia courts would have sustained a conviction where abusive language was directed to "[o]ne who, on account of circumstances or by virtue of the obligations of office, cannot actually then and there resent the same by a breach of the peace. . . ."⁷² The Georgia courts were wrong, according to the majority, in applying the statute to cases where the actual addressee presented no likelihood of violence because, for example, he was locked in a cell or stood on the opposite bank of an impassable torrent.⁷³ Thus, though purporting to apply *Chaplinsky*, the Court in *Gooding* in fact overruled it. As Justice Blackmun stated in dissent: "[T]he

⁷⁰ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

⁷¹ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942), citing *Elmore v. State*, 83 S.E. 799 (Ga. Ct. App. 1914).

⁷² *Gooding v. Wilson*, 405 U.S. 518, 526 (1972).

⁷³ *Id.*

Court, despite its protestations to the contrary, is merely paying lip service to *Chaplinsky*.⁷⁴

Only three months after *Gooding*, three more abusive language cases were considered by the Court. In *Rosenfeld v. New Jersey*,⁷⁵ the defendant used the term "m----- f-----"⁷⁶ before a public school board meeting in reference to the board and the area's teachers. The audience consisted of about 150 people, including approximately twenty-five women and forty children. For his utterance, Rosenfeld was convicted of disorderly conduct under a statute prohibiting "loud and offensive or profane or indecent language in any . . . public place . . ."⁷⁷ New Jersey courts had previously narrowed the statute, by interpretation, to proscribe only words

likely to incite the hearer to an immediate breach of the peace or to be likely, in the light of the gender and age of the listener and the setting of the utterance, to affect the sensibilities of a hearer.⁷⁸

The majority vacated Rosenfeld's conviction without opinion and remanded for reconsideration in the light of *Cohen* and *Gooding*. Based on the previous analysis of the majority position in those cases, it appears that the unexpressed reasoning of the majority was that since words which merely offend the sensibilities of the listeners may not be constitutionally punished (*Cohen*), the New Jersey statute was overbroad; and, if there was in fact no clear and present danger of violent reprisal on the part of the teachers and board members, a conviction under even a narrowly drawn fighting words statute could not stand (*Gooding*).

Justice Powell, though dissenting, agreed that a fighting words conviction probably could not have been upheld because ". . . the good taste and restraint of such an audience may have made it unlikely that physical violence would result."⁷⁹ Thus, even the spokesman for three dissenting Justices apparently agreed that the "clear and present danger" test must be

⁷⁴ *Id.* at 537.

⁷⁵ 408 U.S. 901 (1972).

⁷⁶ 408 U.S. at 904 (facts in dissenting opinion of Powell, J.).

⁷⁷ N.J. Rev. Stat. § 2A:170-29(1) (1971).

⁷⁸ *Rosenfeld v. New Jersey*, 408 U.S. 901, 904 (1972) (Powell, J., dissenting).

⁷⁹ *Id.* at 905.

applied to fighting words. Justice Powell took a different tack in arguing for affirmance. Harkening back to the condemnation in *Chaplinsky* of words "which by their very utterance inflict injury . . .,"⁸⁰ he contended that "a verbal assault on an unwilling audience may be so grossly offensive and emotionally disturbing as to be the proper subject of criminal proscription"⁸¹ In short, such language should be treated as a public nuisance whether or not it constitutes fighting words.

The majority disposed of the second case, *Brown v. Oklahoma*,⁸² in the same manner as it had *Rosenfeld*—a remand without opinion in the light of *Cohen* and *Gooding*. Brown had been invited to a meeting held in the chapel of the University of Tulsa to present the viewpoint of the Black Panthers. The audience consisted of both men and women. In answer to certain questions Brown referred to various policemen who apparently were not present as "m----- f----- fascist pig cops."⁸³ He was convicted under a statute prohibiting the use of "any obscene or lascivious language or word in any public place, or in the presence of females. . . ."⁸⁴ The majority probably concluded that fighting words were not involved since the appellation was not used in the presence of the target policemen and that the expression was not obscene because not erotic. Therefore, Brown had used merely offensive language which is not punishable under any statute.

The final case of the trilogy, *Lewis v. New Orleans*,⁸⁵ presented a sharp fighting words issue. Mrs. Lewis, while her son was being arrested, intervened and called the arresting officers "g-- d--- m----- f----- police."⁸⁶ As a result she was herself charged under an ordinance making it a breach of the peace

wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty.⁸⁷

The majority again remanded without opinion, but this time

⁸⁰ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

⁸¹ *Rosenfeld v. New Jersey*, 408 U.S. 901, 906 (1972) (Powell, J., dissenting).

⁸² 408 U.S. 914.

⁸³ 408 U.S. at 911 (facts in dissenting opinion of Rehnquist, J.).

⁸⁴ *Id.*

⁸⁵ 408 U.S. at 913.

⁸⁶ 408 U.S. at 909 (facts in dissenting opinion of Rehnquist, J.).

⁸⁷ *Id.* at 909-10.

for reconsideration only in light of *Gooding*. Apparently the majority believed that the epithets directed to the officers might have qualified as fighting words but considered the New Orleans ordinance overbroad because it had not been interpreted to require a clear and present danger of violent reaction by the particular addressees.

Perhaps the majority also believed that such a factual showing could never be made where a police officer is the addressee because, as a result of his training, he is as a matter of law unlikely to respond with violence no matter what the provocation. Indeed, Justice Powell concurred in the result in *Lewis* precisely on the basis of this possibility, saying:

If these words had been addressed by one citizen to another, face to face and in a hostile manner, I would have no doubt that they would be "fighting words." But the situation may be different where such words are addressed to a police officer trained to exercise a higher degree of restraint than the average citizen.⁸⁸

Chief Justice Burger and Justices Blackmun and Rehnquist dissented in *Lewis* as well as in *Brown* and *Rosenfeld*, but they did not take issue with the implied application of the "clear and present danger" test to fighting words. Instead, in agreement with Justice Powell's dissent in *Rosenfeld*, they contended that the statutes involved were not overbroad because under *Chaplinsky* both fighting words and "'lewd and obscene' and 'profane'"⁸⁹ language might properly be punished. Thus, the dissenters were primarily interested in reasserting what they felt had been part of the original *Chaplinsky* holding from its inception—that offensive language constitutes a separate unprotected class of expression when used before unwilling hearers in public places even though it is not directed to the person of a particular listener and therefore does not constitute fighting words. Unfortunately, in directing their arguments to this proposition, which the five-man majority summarily rejected, the four dissenters let pass without clear objection the newly evolved doctrine that even face-to-face insulting lan-

⁸⁸ *Lewis v. New Orleans*, 408 U.S. 913 (1972) (Powell, J., concurring).

⁸⁹ 408 U.S. 911 (Rehnquist, J., dissenting). See also *Id.* at 902 (Burger, C.J., dissenting).

guage is immune from punishment in the absence of a likelihood of violent response by the actual addressee.

The Court however had not heard the last of Mrs. Lewis. After the remand for reconsideration in the light of *Gooding*, the Louisiana Supreme Court again affirmed her conviction, stating that the New Orleans ordinance applied only to " 'fighting words' uttered to specific persons at a specific time" ⁹⁰ The United States Supreme Court once again reversed and remanded. ⁹¹ A five-man majority, consisting of Justices Brennan, Douglas, Marshall, Stewart and White, held that the state court's attempt at a narrowing interpretation had failed because, although couched in terms of fighting words, it was still apparent that the Louisiana Supreme Court would sustain a conviction for the use of opprobrious language directed to any police officer without a requirement that the words "by their very utterance inflict injury or tend to incite an immediate breach of peace." ⁹² In short, the majority demanded an interpretation of the ordinance which requires a clear and present danger of violent reaction by the particular officer-addressee. Justice Powell, again concurring in the result, expressed the concept more clearly:

Quite apart from the ambiguity inherent in the term "opprobrious", words may or may not be "fighting words" depending upon the circumstances of their utterance. It is unlikely, for example, that the words said to have been used here ⁹³ would have precipitated a physical confrontation between the middle-aged woman who spoke them and the police officer in whose presence they were uttered. The words may well have conveyed anger and frustration without provoking a violent reaction from the officer. ⁹⁴

Within two months of the second *Lewis* decision, four more

⁹⁰ *New Orleans v. Lewis*, 269 So. 2d 450, 456 (La. 1972).

⁹¹ *Lewis v. New Orleans*, 415 U.S. 130 (1974).

⁹² 415 U.S. at 132. It is unlikely in the context of *Lewis II* that the majority, by including the *Chaplinsky* language ("those [words] which by their very utterance inflict injury . . .") as a disjunctive definition of fighting words, intended to permit the punishment of speech which merely hurts the feelings or sensibilities of the addressees. A similar argument, as has been noted, was made without success by the dissenters in *Rosenfeld*, *Brown* and *Lewis I*.

⁹³ "[G]- d-- m----- f----- police." Cited in *Rosenfeld v. New Jersey*, 408 U.S. 901, 909 (1972) (Rehnquist, J., dissenting).

⁹⁴ *Lewis v. New Orleans*, 415 U.S. 130, 135 (1974).

convictions based on abusive language were considered by the Court. All of the judgments were vacated, and the cases remanded without opinion for further consideration in the light of *Lewis II*.⁹⁵ Apparently the majority considered each of the statutes involved to be fatally overbroad in one particular or another. Justice Douglas dissented in each case but only on the ground that the majority's action was insufficiently strong. Reasoning that the state courts had already received adequate guidance as to the principles involved, he simply would have reversed all four cases without remanding them.⁹⁶

Only one of the cases, *Lucas v. Arkansas*,⁹⁷ drew a dissent on the merits. In *Lucas*, a Little Rock policeman on night patrol was variously addressed by the defendants as one of the "big, bad mother fucking cops," a "chicken shit mother fucker" and a "sorry son-of-a-bitch".⁹⁸ The speakers were convicted under an Arkansas statute which states that a punishable breach of the peace occurs

[i]f any person shall make use of any profane, violent, vulgar, abusive language toward or about any other person in his presence or hearing, which language in its common acceptation [sic] is calculated to arouse to anger the person about or to whom it is spoken or addressed, or to cause a breach of peace or assault⁹⁹

Justice Douglas probably expressed the majority's view-

⁹⁵ *Karlan v. Cincinnati*, *Kelly v. Ohio*, *Rosen v. California* and *Lucas v. Arkansas*, 416 U.S. 924, 923, 924, 919 (1974).

⁹⁶ *Karlan v. Cincinnati*, 416 U.S. 924 (1974) (dissenting opinion). Justice Douglas explained the statutory defects. In *Karlan*, the Cincinnati ordinance forbade "noisy, boisterous, rude, insulting or other disorderly . . ." conduct with the intent "to abuse or annoy any person . . ." The ordinance was overbroad because, as interpreted by the Ohio courts, it prohibited words which were merely rude and it was not limited to "words which by their very utterance inflict injury or tend to incite an immediate breach of the peace." In *Kelly*, the ordinance of the City of Kent, Ohio, prohibited "noisy, boisterous or other disorderly . . ." conduct which "disturb[s] the good order and quiet of the Municipality." Although the Ohio court found that Kelly's language in fact constituted fighting words, it did not limit the statute to proscribe only fighting words. In *Rosen*, the California statute prohibited, *inter alia*, the use of "vulgar, profane, or indecent language within the presence or hearing of women or children . . ." The California court interpreted the law to permit the punishment of "coarse", "illbred" or "hardly suitable" language and as such the statute was unconstitutionally overbroad.

⁹⁷ 416 U.S. 919 (1974).

⁹⁸ 416 U.S. at 919 (Blackmun, J., dissenting).

⁹⁹ ARK. STAT. ANN. § 41-1412 (1964).

point when he noted that the construction of the statute by the Arkansas court "does not even require that the words be calculated to cause a breach of the peace; it is enough that they are calculated to arouse anger in the addressee."¹⁰⁰ As such, he contended, the statute was unconstitutionally overbroad. His position in this regard was, of course, correct under *Terminiello* if the Arkansas court had in fact so construed the statute.

Justice Blackmun, joined by Chief Justice Burger and Justice Rehnquist, however, would have affirmed Lucas' conviction. Apparently finding the majority's objections to be based on an unduly technical reading of the statute as construed, they deemed the law sufficiently narrow because it "restricts the fact finder to language that would, in its common or ordinary acception [sic], be calculated to cause a breach of the peace."¹⁰¹ Justice Blackmun's dissent is particularly noteworthy because at long last he expressly stated that the proper test for determining whether punishable fighting words have been spoken is whether the *average* addressee would be likely to respond to them with violence. Justice Blackmun found that the Arkansas statute correctly codified this test, stating:

The statute on its face does not permit or require an inquiry into the respective boiling points of the particular individuals or groups involved in each case. . . . In *Chaplinsky*, the Court accepted a limiting construction which held that the statute was "not to be defined in terms of what a particular addressee thinks. . . . The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight."¹⁰²

It would seem, therefore, that three Justices now recognize that to require a clear and present danger of violence in each instance has no proper place where fighting words are concerned. Unfortunately, the articulation of this point has apparently come too late to persuade what is now a clear majority of six.

Conclusion

The Justices who authored *Chaplinsky* in 1942 wrote

¹⁰⁰ Lucas v. Arkansas, 416 U.S. 919, 930 (1974).

¹⁰¹ *Id.* at 921 n.2.

¹⁰² *Id.*

wisely when they initially held that fighting words constitute a class of speech which lies beyond the pale of the first amendment. Their logic was faultless—the first amendment protects communication and fighting words are not communication. Rather, they are instruments of assault and as such their punishment “would raise no question under [the Constitution].”¹⁰³

The current rationale, that fighting words may be punished only if there is a showing that a violent reaction is likely to result, leads the Court to absurd results. Strong men who are unfettered by inhibitions against violence arising from position, training or self-control may be insulted only at the risk of criminal punishment. But a legless cripple, a feeble old woman and a dedicated police officer are fair game for the vilest personal verbal abuse because they are unable or unlikely to retaliate physically. Indeed, the Court may find itself in the uncomfortably inconsistent position of applying the standard of the response of the average addressee, rather than that of the actual victim, when it believes that a given listener's violent reaction was unjustified in light of the relatively mild language used. Further, the application of the “actual addressee” test may well tend to beg the question; if the addressee did not in fact respond with violence, he was unlikely to have done so. Only in the case of an actual violent response is a successful prosecution of the speaker probable.

It would have been as logical for the Court to require a finding that the actual addressee of an extortioner's threat was likely to yield to it before the extortioner may be prosecuted. Fortunately for our society no court has ever held such threats protected by the first amendment, no matter how unsuccessful they were likely to be. Fighting words deserve no better treatment.

¹⁰³ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).