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Fighting Words Today

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Abstract

For some time, the familiar free speech exception known as the "fighting words" doctrine has been subject to severe judicial and scholarly critique. It turns out, though, that the fighting words doctrine, in general, is neither obsolete nor in need of radical limitation. The traditionally neglected "inflict injury" prong of the fighting words doctrine can and should be vitalized, with only a minimal loss, if not an actual net gain, in promoting the basic purposes of freedom of speech in the first place. And the "reactive violence" prong can and should be relieved of its historic biases and dubious assumptions. On that basis, "reactive violence" prong cases can be more thoughtfully and realistically adjudicated.

In all fighting words cases, judicial attention should be paid to the distinction between the abusive or provocative words actually used by the defendant speaker and any underlying message, including the underlying message's naturally associated emotional fervency. Protecting the latter, in undistorted fashion, need not mean protecting the former. In most fighting words cases, any tradeoff between the value of minimal discursive civility and the values underlying freedom of undistorted speech need not be substantial.

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I. INTRODUCTION

The "fighting words" doctrine reflects the idea that words in context can be so provocative, so deeply offensive, or so damaging to a targeted listener as to lose free speech protection. The current status of this idea is, however, deeply unclear.[1] It has recently been observed that "[f]ighting words doctrine is controversial both with respect to its breadth and even to whether it is still a live doctrine."[2] Thus, the fighting words doctrine "remains a persistent source of constitutional confusion."[3] There is, certainly, no shortage of recent fighting words cases at levels below the Supreme Court pointing in various directions.[4]

This Article seeks to survey, clarify, and encourage the reform of the fighting words doctrine.[5] The Article first presents the relevant Supreme Court case law, along with a number of the standard assumptions embodied in the fighting words case law.[6] The Article then examines the widespread tendency to broadly limit, if not abolish, the fighting words doctrine.[7] The problem of reconciling fighting words doctrine with the value of protecting freedom of speech is then addressed.[8]

As it turns out, a focus on the value of speech and its costs has importantly different implications as between the two classically recognized types of fighting words.[9] Attention to both the nature and gravity of particularized speech-injuries and to the optimization of free speech values suggests that the fighting words doctrine should be strongly vitalized in some important kinds of cases and more sensibly reconceived in others.[10]

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1. *See, e.g.*, Burton Caine, *The Trouble with "Fighting Words":* Chaplinsky v. New Hampshire *Is a Threat to First Amendment Values and Should Be Overruled*, 88 MARQ. L. REV. 441, 445 (2004) (asserting that the "fighting words doctrine was ill conceived, is in disarray, and poses a potent danger to speech that should command premier protection").

2. Mark P. Strasser, *Those Are Fighting Words, Aren't They? On Adding Injury to Insult*, 71 CASE W. RSRV. L. REV. 249, 250 (2020) (footnotes omitted).

3. Robert M. O'Neil, *Hate Speech, Fighting Words, and Beyond—Why American Law Is Unique*, 76 ALB. L. REV. 467, 472 (2012) (footnote omitted).

4. *See generally* David L. Hudson, Jr., Essay, *The Fighting Words Doctrine: Alive and Well in the Lower Courts*, 19 U.N.H. L. REV. 1 (2020) (showing that the fighting words doctrine remains frequently litigated in the lower courts).

5. *See infra* Parts III, V.

6. *See infra* Part II.

7. *See infra* Part III.

8. *See infra* Part IV.

9. *See infra* Part IV.

10. *See infra* Parts IV, V.

II. CHAPLINSKY V. NEW HAMPSHIRE AND SOME INITIAL COMPLICATIONS

For good or ill, the fighting words doctrine has a single primary source in the case law.[11] This primary source is the World War II era case of *Chaplinsky v. New Hampshire*.[12] This is not to suggest that the *Chaplinsky* fighting words doctrine was entirely a novel innovation.[13] In fact, much of the logic underlying *Chaplinsky* was anticipated in the then-recent case of *Cantwell v. Connecticut*,[14] as *Chaplinsky* itself acknowledged.[15]

Thus, *Chaplinsky* quotes the *Cantwell* case for the foundational claim that "[r]esort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."[16] Expanding upon the *Cantwell* language, the Court in *Chaplinsky* declared that some utterances "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[17]

The *Chaplinsky* Court, writing prior to the free speech constitutional revolutions in obscenity,[18] profanity,[19] and defamation,[20] determined 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 [c]onstitutional problem."[21] Into this class of supposedly well-defined and narrow exceptions

11. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (establishing the fighting words doctrine).

12. *See id.*; *see also* Strasser, *supra* note 2, at 252–58 (tracing the fighting words doctrine back to *Chaplinsky*); Hudson, Jr., *supra* note 4, at 3 (noting that the "Supreme Court created" the fighting words "doctrine nearly eighty years ago in *Chaplinsky v. New Hampshire*").

13. *See id.* at 572 (citing Cantwell v. Connecticut, 310 U.S. 296, 309–10 (1940)).

14. Cantwell v. Connecticut, 310 U.S. 296, 309–10 (1940).

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

16. *Id.* (quoting *Cantwell*, 310 U.S. at 309–10). This conclusion in *Cantwell* was, however, a matter of dicta rather than of holding, evidenced by the speaker Cantwell's unfailing verbal politeness throughout the incident in question. *See Cantwell*, 310 U.S. at 302–03 (stating that Cantwell "asked, and received, permission" from the two men before "play[ing] the record 'Enemies', which attacked the[ir] religion and church").

17. *Chaplinsky*, 315 U.S. at 572 (footnote omitted).

18. *See, e.g.*, Miller v. California, 413 U.S. 15, 24–26 (1973) (elaborating a four-part test, all elements of which must be proved, in order to restrict pornographic materials).

19. *See, e.g.*, Cohen v. California, 403 U.S. 15, 25–26 (1971) (protecting the public display of a familiar profanity in connection with objecting to the Vietnam War era military draft).

20. *See, e.g.*, New York Times, Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (imposing an actual malice requirement and other evidentiary burdens on public official libel plaintiffs).

21. *Chaplinsky*, 315 U.S. at 571–72.

to protected speech was thought to fall the "fighting words" uttered in *Chaplinsky*.[22]

Initially, the defendant Chaplinsky "was denouncing all religion as a 'racket.'"[23] Such speech could well be protected on the authority of the *Cantwell* case.[24] But Chaplinsky then personally and directly addressed the town's official Marshal in these terms: "You are a God damned racketeer" and "a damned Fascist."[25] Much less directly, and more abstractly, Chaplinsky concluded by declaring that "the whole government of Rochester are Fascists or agents of Fascists."[26]

The Court concluded that New Hampshire had construed the relevant statute in accord with Chaplinsky's free speech rights.[27] In particular, the scope of the statute was confined to words that have "a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed."[28] Thus, Chaplinsky's references to local officials, as an institution, would not constitute fighting words.[29] That Chaplinsky's sole personal addressee was in effect a police officer has provoked later debate over the standards to which police officers, and other categories of public and private actors, should be held.[30]

The *Chaplinsky* Court then relied upon the state's understanding that the relevant offense "is not to be defined in terms of what a particular addressee thinks . . . . The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight."[31] As might be

22. *Id.* at 573–74.

23. *Id.* at 570.

24. *See* Cantwell v. Connecticut, 310 U.S. 296, 308–10 (1940) ("The fundamental law declares the interest of the United States that the free exercise of religion be not prohibited and that freedom to communicate information and opinion be not abridged.").

25. *Chaplinsky*, 315 U.S. at 569; *see, e.g.*, Williams v. Town of Greenburgh, 535 F.3d 71, 77 (2d Cir. 2008) (providing an example of the way courts have treated accusations associated with fascism). In *Williams*, the court held that the characterization of the target as a "Junior Mussolini" using "intimidation tactics" did not constitute fighting words. 535 F.3d at 77.

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

27. *See id.* at 573–74.

28. *Id.* at 573 (citing State v. Brown, 38 A. 731, 732 (N.H. 1895); State v. McConnell, 47 A. 267, 268 (N.H. 1900)). Statutes in other states similarly prohibit speech only if it is directed toward the listener personally. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 432 (1992) (Stevens, J., concurring); Hess v. Indiana, 414 U.S. 105, 107–08 (1973); Cohen v. California, 403 U.S. 15, 20 (1971); Bible Believers v. Wayne Cnty., 805 F.3d 228, 246 (6th Cir. 2015) (en banc).

29. *See supra* notes 21, 26–28 and accompanying text.

30. *See infra* notes 59–63 and accompanying text.

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

imagined, this odd formulation has generated substantial controversy and much critique over time.[32]

Most crucially, the *Chaplinsky* case characterized fighting words in what appears to be a binary and disjunctive fashion.[33] Thus Chaplinsky apparently defined fighting words as words "which by their very utterance inflict injury *or* tend to incite an immediate breach of the peace."[34] A remarkable amount of uncertainty, ambiguity, and important controversy are compressed into this concise formulation.[35] Whatever fighting words are eventually determined to include and exclude, they are not, as the *Chaplinsky* Court asserted, "well-defined."[36]

Chaplinsky, and its assumptions, implications, and interpretation, will in fact largely occupy the remainder of this Article.[37] Initially, though, a few preliminary concerns should be briefly addressed. First, the logic of *Chaplinsky* does not confine its scope to words.[38] Presumably, fighting "words" could, at least in some cases, encompass symbolic or expressive conduct such as Nazi symbols or cross-burnings,[39] and perhaps even physical gestures.[40]

More deeply, there seems to be no reason to assume, as *Chaplinsky* appears to do,[41] that the sole reason for constitutionally protecting speech in general is for the sake of pursuing truth in one context or another. The pursuit of truth is certainly one classically recognized and important value that freedom of speech is thought to promote.[42] But the linkage between free speech and

32. *See infra* Part V.

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

34. *Id.* (emphasis added).

35. *Id.* at 571–72 (setting forth a simplistic binary formulation of the fighting words doctrine).

36. *Id.* at 571.

37. *See infra* Parts III, VI (discussing the fighting words doctrine and its effects).

38. *See infra* note 40 and accompanying text; *see, e.g.*, Virginia v. Black, 538 U.S. 343, 358, 361–63 (2003) (applying the fighting words doctrine in the context of a cross-burning).

39. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 377 (1992) (applying the fighting words doctrine to a cross-burning); Nat'l Socialist Party v. Village of Skokie, 432 U.S. 43, 43 (1977) (per curiam) (applying the fighting words doctrine to a march that contained prominently displayed swastikas); Baribeau v. City of Minneapolis, 596 F.3d 465, 477 (8th Cir. 2010) (applying the fighting words doctrine to the acts of a group of protestors who dressed up as zombies and played loud music as a commentary on American consumer culture).

40. *See* United States v. Perez, 303 F. App'x 193, 195–96 (5th Cir. 2008) (unpublished opinion) (providing a discussion of the application of the fighting words doctrine to physical gestures).

41. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) ("a step to truth").

42. *See, e.g.*, THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6–7 (1970); Irene M. Ten Cate, *Speech, Truth, and Freedom: An Examination of John Stuart Mill's and Justice Oliver Wendell Holmes's Free Speech Defenses*, 27 YALE J.L. & HUMANITIES 35, 36–38 (2013); JOHN STUART MILL, ON LIBERTY 76, 108, 116 (Gertrude Himmelfarb ed., 1974) (explaining Mill's classic focus

the optimal pursuit of truth is contestable.[43]

More clearly, it is certainly possible to protect, or to limit, speech on other grounds not directly linked to the pursuit of truth.[44] Merely among the most commonly cited such grounds would be the role of free speech in promoting meaningful democratic representative government[45] and promoting self-realization, self-fulfillment, and the development and flourishing of the person.[46] Presumably, the scope and limits of any fighting words exceptions to freedom of speech might thus take considerations of democracy, and of self-realization and the flourishing of the person, into proper account as well.[47]

It has also been held that "'fighting words' need not convey an intent to do harm, or instill fear in the listener."[48] This is a sensible understanding, at least if the idea of "harm" is here confined to some physical harm, such as battery, accompanying or in addition to the words in question.[49] And

on the pursuit of truth through free speech).

43. *See, e.g.*, Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 5 (1984) (asserting that "[s]cholarly critics" have identified "state intervention [as] necessary to correct communicative market failures"). Without this intervention, "real world conditions . . . interfere with the effective operation of the marketplace of ideas." *Id.*

44. *See, e.g.*, Vanessa Moore, *Free Speech and the Right to Self-Realisation*, 12 UCL JURIS. REV. 95, 99, 102–04, 106, 108–09 (2005) (providing justifications for freedom of speech protections beyond furthering the pursuit of truth).

45. *See, e.g.*, EMERSON, supra note 42, at 6–7; Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 145–46 (1989) [hereinafter *Free Speech Justifications*] ("Because a decent political process and informed decision-making by citizens are such critical aspects of a model of liberal democracy, and because government suppression of political ideas is so likely to be misguided, the application of a principle of freedom of speech is centrally important."); Alexander Tsesis, *Free Speech Constitutionalism*, 2015 U. ILL. L. REV. 1015, 1016 (2015) (stating that some proponents of free speech argue that it is necessary to "further democratic institutions").

46. *See* Tsesis, *supra* note 45, at 1016 (noting that other proponents of free speech argue that it is necessary to provide individuals with "personal autonomy"); *Free Speech Justifications*, *supra* note 45, at 143–45 (noting that free speech protections can be justified on the grounds of "autonomy" and "personal development").

47. Consider, most obviously, the effects of racial and other epithets on the development and flourishing of the targets of such speech. *See generally* Tasnim Motala, *Words Still Wound: IIED & Evolving Attitudes Towards Racist Speech*, 56 HARV. CIV. RTS.- CIV. LIBERTIES L. REV. 115, 116 (2021) (developing, in part, Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. CIV. RTS.–CIV. LIBERTIES L. REV. 133, 133 (1982)); MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993). *See also* KENT GREENAWALT, FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH 49 (1995); Kent Greenawalt, *Insults and Epithets: Are They Protected Free Speech?*, 42 RUTGERS L. REV. 287, 302 (1990) ("[E]pithets and more elaborate slurs . . . about race, ethnic group, religion, sexual preference, and gender may cause continuing . . . psychological damage.").

48. State v. Tracy, 130 A.3d 196, 209 (Vt. 2015).

49. *Id.* (noting that "the notion that *any* set of words are so provocative that they can reasonably

certainly, while some arguable fighting words may be intended to instill fear,[50] others may be intended to inflict psychological pain and suffering of one sort or another.[51]

As well, not all fighting words need also fall into the category of unprotected speech known as "true threats."[52] Again, the *Chaplinsky* case itself[53] involved no threatened violent harm to the addressee, at least of a sort contemplated by the "true threat" cases.[54] And not all words that qualify, in context, as in some broad sense "abusive," "opprobrious," "insulting," or conveying a sense of disgrace will also amount to fighting words.[55] This may reflect the judgment that the "insultingness" of a speech is a matter of degree, as well of kind.[56] Presumably, some insults could be *de minimis*, or only minimally insulting, and thus fall outside the category of fighting words.[57]

Unresolved by the current case law is whether, or to what extent, fighting words doctrine should take account of the status of the target of the speech as a police officer, or indeed any of a range of other public and even private

be expected to lead an average listener to immediately respond with physical violence is highly problematic").

50. Nat'l Socialist Party of Am. v. Village of Skokie, 432 U.S. 43, 45 (1977) (per curiam) (applying the fighting words doctrine to a march that contained prominently displayed swastikas); *see also* Collin v. Smith, 578 F.2d 1197, 1199 (7th Cir. 1978) (discussing the Nationalist Socialist Party of America's attempt to obtain a permit to march through a town home to many Holocaust survivors).

51. Presumably, the words in *Chaplinsky* itself were not intended to instill fear. *See supra* notes 25–26 and accompanying text. Nor is fear a necessarily intended response to abusive racial or ethnic epithets.

52. *See generally* Dan Korobkin, *"True Threats" Case*, ACLU MICHIGAN, https://www.aclumich.org/en/cases/true-threats-case (last visited Jan. 13, 2022) (stating that the "'true threats' doctrine holds that allegedly threatening speech cannot be punished unless the government can prove that the speaker meant to communicate a serious expression of intent to commit an act of unlawful violence to a particular individual").

53. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 569–70 (1942).

54. *See, e.g.*, Watts v. United States, 394 U.S. 705, 706 (1969) (per curiam) ("If they ever make me carry a rifle the first man I want to get in my sights is L.B.J."); *see also* Virginia v. Black, 538 U.S. 343, 359 (2003) (cross-burning case); United States v. Dutcher, 851 F.3d 757, 759 (7th Cir. 2017) (discussing repeated verbal threats to assassinate President Obama); Lipp v. State, 227 A.3d 818, 821(Md. Ct. Spec. App. 2020). *See generally* R. George Wright, *Cyber Harassment and the Scope of Freedom of Speech*, 53 U.C. DAVIS L. REV. ONLINE 187 (2020).

55. *See* Gooding v. Wilson, 405 U.S. 518, 525 (1972) (stating that the "dictionary definition of 'opprobrious' and 'abusive' give them greater reach than 'fighting' words").

56. *Id.*

57. Imagine, for example, a case in which a generally distinguished and widely respected figure is personally addressed in overly familiar, unduly casual, and thus disrespectful terms. For a police officer target case, see *Trammell v. State*, 851 S.E.2d 834, 837 (Ga. Ct. App. 2020) (holding that the use of profane language towards a police officer cannot "rise to the level of criminal conduct that would constitute 'fighting words'").

statuses.[58] It has been held that the fighting words category is narrowed in cases of words addressed to a police officer, as "a properly trained officer may reasonably be expected to 'exercise a higher degree of restraint' than the average citizen."[59] The First Amendment, it is thought, "protects a significant amount of verbal criticism and challenge directed at police officers."[60] In particular, "nonaggressive questioning of police officers"[61] is protected as long as it does not "cross the line into fighting words or disorderly conduct."[62] But this is certainly not to imply that abusive language directed at on-duty police officers is always protected.[63]

Also unresolved is whether the logic of narrowing the class of fighting words addressed to trained, disciplined police officers should apply as well to other public officials,[64] or to private actor addressees.[65] After all, police officers are not the only parties—public or private—from whom we expect exceptional self-restraint in the face of verbal provocation.[66] Any public employee whose job description includes direct in-person contact with the

58. *See generally* Dawn Christine Egan, *"Fighting Words" Doctrine: Are Police Officers Held to a Higher Standard, or per* Bailey v. State, *Do We Expect No More from Our Law Enforcement Officers than We Do from the Average Arkansan?*, 52 ARK. L. REV. 591 (1999).

59. *See* City of Houston v. Hill, 482 U.S. 451, 462 (1987) (quoting Lewis v. City of New Orleans, 415 U.S. 130, 135 (1974)); *see also* Provost v. City of Newburgh, 262 F.3d 146, 159–60 (2d Cir. 2001).

60. *Hill*, 482 U.S. at 461; *see also* Skop v. City of Atlanta, 485 F.3d 1130, 1139 (11th Cir. 2007) ("Indeed, the idea that Skop's brief inquiry to the officer somehow provided a basis for arrest collides head-on with the First Amendment, which 'protects a significant amount of verbal criticism and challenge directed at police officers.'" (quoting *Hill*, 482 U.S. at 461)).

61. Patrizi v. Huff, 690 F.3d 459, 467 (6th Cir. 2012).

62. *Id.* For an interesting disorderly conduct case involving a photojournalist's dispute with a police officer at an accident scene, see *State v. Lashinsky*, 404 A.2d 1121, 1124 (N.J. 1979).

63. For upheld fighting words convictions where the addressee was a police officer, see, e.g., *Person v. State*, 425 S.E.2d 371, 372 (Ga. Ct. App. 1992) (upholding a conviction under the fighting words doctrine where the defendant told a police officer that he was going to "blow [the officer's] head off"); *Evans v.State*, 373 S.E.2d 52, 53–54 (Ga. Ct. App. 1988) (upholding a conviction under the fighting words doctrine where the defendant used explicit language when addressing a police officer); *State v. Hale*, 110 N.E.3d 890, 894 (Ohio Ct. App. 2018) (holding that explicit language directed at a police officer fell within the fighting words doctrine); and *State v. Wood*, 679 N.E.2d 735, 741 (Ohio Ct. App. 1996) (applying the fighting words doctrine to explicit language directed at two police officers).

64. *See* United States v. Poocha, 259 F.3d 1077, 1081 (9th Cir. 2001) (stating that "fighting words is at its narrowest, if indeed it exists at all, with respect to criminal prosecution for speech directed at public officials" (citing Garrison v. Louisiana, 379 U.S. 64, 73–74 (1964))).

65. *See, e.g.*, State v. Baccala, 163 A.3d 1, 14–15 (Conn. 2017) (presenting a situation where a defendant used cruel and offensive language directed at a private store manager).

66. *Cf.* Strasser, *supra* note 2, at 288–90 (discussing how the Arizona Supreme Court held a teacher to a reasonable teacher standard, rather than just the reasonable person standard).

general public might be expected to exercise distinctive self-restraint. But then, why not expand this category to include public school teachers,[67] emergency room employees, public-facing supervisors and managers at large retail facilities,[68] nurses, social workers, repossessors of vehicles, and clergy?

There is, thus, an argument to be made that narrowing the scope of fighting words addressed to police officers carries over, by its own logic, to a wide range of public and private addressees.[69] The question of whether the scope of the fighting words category should be restricted is, however, impossible to contain within the context of which addressees are relevantly similar to police officers.[70] As it turns out, narrowing the scope of—if not abolishing entirely—the category of fighting words is the dominant trend in contemporary case law and in scholarly discussions.[71]

67. *See, e.g.*, In re Nickolas S., 245 P.3d 446, 447 (Ariz. 2011) (discussing an incident where a student used explicit language directed at a public school teacher).

68. *See Baccala*, 163 A.3d at 14–15.

69. *See generally* DUPAGE CNTY. BAR ASS'N, FIGHTING WORDS, AND THE FIRST AMENDMENT: IT'S TIME TO TAKE THE PUNCH OUT OF THEIR PROTECTION 5–6 (1992), https://www.stephenbrundagelaw.com/images/pdf/FightingWords1992September.pdf (showing that those courts which do apply a higher standard for application of the fighting words doctrine to police officers also do so "in a variety of different factual contexts").

70. *See generally id.*

71. *See* Note, *The Demise of the* Chaplinsky *Fighting Words Doctrine: An Argument for Its Interment*, 106 HARV. L. REV. 1129 (1993) (arguing that the fighting words doctrine should be "eliminate[d] entirely").

III. THE MOVEMENT TO LIMIT, IF NOT ABOLISH, THE FIGHTING WORDS CATEGORY

The shrinkage, in practice, of the prohibitable fighting words category in general is widely recognized.[72] In the words of one Ohio court: "That the category of 'fighting words' has been shrinking is obvious—the Supreme Court has overturned every single fighting words conviction it has reviewed since *Chaplinsky* was decided in 1942."[73] At the very least, the continued vitality of *Chaplinsky* has been subject to academic debate[74] in the absence of any explicit guidance from the Court. It seems fair to say that "[i]n recent years . . . *Chaplinsky*'s 'fighting words' doctrine has become 'very limited.'"[75]

It is then natural to ask why this trend toward limiting the scope of the fighting words doctrine has developed.[76] As it turns out, the most prominent explanations refer to broader cultural developments.[77] A popular account has it that "due to changing social norms, public discourse has become coarser in the years following *Chaplinsky*."[78] On this approach, "[s]tandards of decorum have changed dramatically since 1942."[79] The inference is, on this basis, then drawn, by way of remarkable understatement, that "indelicacy no longer places speech beyond the protection of the First Amendment."[80] And so on this approach, "there are [far] fewer combinations of words and circumstances

72. *See* People *ex rel.* R.C., 411 P.3d 1105, 1110 (Colo. App. 2016) (highlighting the widespread belief that the fighting words category is shrinking, as evidenced by contemporary Supreme Court jurisprudence).

73. *See id.* (citing Caine, *supra* note 1, at 536).

74. *See, e.g.*, Wood v. Eubanks, 459 F. Supp. 3d 965, 975 (S.D. Ohio 2020) (similarly citing Burton Caine to support the assertion that modern scholars have "debate[d] the continued vitality of *Chaplinsky*"); *see also* Stephen W. Gard, *Fighting Words as Free Speech*, 58 WASH. U. L.Q. 531, 580–81 (1980) (advocating for the abandonment of the fighting words doctrine).

75. Greene v. Barber, 310 F.3d 889, 896 (6th Cir. 2002) (quoting Sandul v. Larion, 119 F.3d 1250, 1255 (6th Cir. 1997)); *see also* Barnes v. Wright, 449 F.3d 709, 718 (6th Cir. 2006) (noting that "[t]he fighting-words doctrine has become 'very limited'" (quoting *Greene*, 310 F.3d at 896)); State v. Drahota, 788 N.W.2d 796, 802 (Neb. 2010) (stating that "the Supreme Court has largely abandoned *Chaplinsky*'s 'inflict injury' standard").

76. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 409 (1989) (limiting the fighting words doctrine to statements of "direct personal insult or an invitation to exchange fisticuffs").

77. *See generally* David L. Hudson Jr., *Fighting Words*, FREEDOM FORUM INST., https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-speech-2/personal-public-expression-overview/fighting-words/ (July 2009).

78. State v. Liebenguth, 250 A.3d 1, 12 (Conn. 2020).

79. *Barnes*, 449 F.3d at 718 (quoting *Greene*, 310 F.3d at 896); *Greene*, 310 F.3d at 896; State v. Baccala, 163 A.3d 1, 7–8 (Conn. 2017).

80. *Barnes*, 449 F.3d at 718 (quoting *Greene*, 310 F.3d at 896); *Greene*, 310 F.3d at 896.

that are likely to fit within the fighting words exception"[81] to freedom of speech.

No doubt, the sense of a generally reduced civility of discourse is widespread.[82] Let us simply assume a reduction of civility, since the time of *Chaplinsky*, in the relevant contexts.[83] Public discursive encounters are thus, on this assumption, less civil, in general, than formerly.[84]

The question then becomes one of how free speech law should address this cultural shift.[85] It is certainly possible to pursue the popular line, according to which we are now used to increasing incivility and thus inured, or desensitized, to insulting and abusive language.[86] This could be so even if the insulting and abusive language is in some instances more severe than was earlier common.[87] The sensible response to increasingly frequent incivility and abuse is, on this approach, to diminish our expectations accordingly and to legally accommodate increasingly frequent interactive verbal abuse.[88]

It is also possible, however, to view such an approach as passivist, defeatist, and essentially decadent. Presumably, the proper response to a long-term

81. *Liebenguth*, 250 A.3d at 12–13.

82. *See, e.g.*, TERESA M. BEJAN, MERE CIVILITY: DISAGREEMENT AND THE LIMITS OF TOLERATION (2017); A CRISIS OF CIVILITY? POLITICAL DISCOURSE AND ITS DISCONTENTS (Robert G. Boatright et al. eds., 1st ed. (2019)); KEITH J. BYBEE, HOW CIVILITY WORKS (2016); STEPHEN L. CARTER, CIVILITY: MANNERS, MORALS, AND THE ETIQUETTE OF DEMOCRACY (1998); SUSAN HERBST, RUDE DEMOCRACY: CIVILITY AND INCIVILITY IN AMERICAN POLITICS (2020); ALEX ZAMALIN, AGAINST CIVILITY: THE HIDDEN RACISM IN OUR OBSESSION WITH CIVILITY (2021) (discussing modern civility more critically). *See generally* BENET DAVETIAN, CIVILITY: A CULTURAL HISTORY (2009).

83. *See, e.g.*, Richard Carufel, *Civility Remains a "Major" Problem in America—and Social Media Is Only Making It Worse*, AGILITY PR SOLUTIONS (July 8, 2019), https://www.agilitypr.com/pr-news/public-relations/civility-remains-a-major-problem-in-america-and-social-media-is-only-making-it-worse/.

84. *See generally id.* (discussing a rising civility problem in America).

85. *Cf.* R. George Wright, *Freedom of Speech as a Cultural Holdover*, 40 PACE L. REV. 235, 263–69 (2019) (discussing free speech under present cultural conditions).

86. *See id.* at 270 (arguing that the trend towards increased incivility in our society has decreased the "meaningfulness" of "protecting speech" while increasing "some key cultural costs of freedom of speech" protections).

87. *See* Qiusi Sun et al., *Over-Time Trends in Incivility on Social Media: Evidence from Political, Non-Political, and Mixed Sub-Reddits over Eleven Years*, FRONTIERS IN POL. SCI. (Nov. 2, 2021), https://www.frontiersin.org/articles/10.3389/fpos.2021.741605/full (conducting a statistical study of online incivility and noting that, since 2015, "incivility has been gradually increasing" online).

88. Wright, *Freedom of Speech as a Cultural Holdover*, *supra* note 85, at 270 ("[T]he traditionally cited free speech values of the pursuit of knowledge and truth, meaningful democratic self-government, and the promotion of genuine autonomy and self-realization have gradually evolved, in our culture, in ways that have reduced their meaningfulness and their power to justify constitutionally protecting speech generally at the expense of significant and more elemental values.").

increase in any interpersonal crime, such as assault or battery, is not to counsel, out of a sense of fatalistic realism, greater tolerance on the part of the victims.[89] And it seems especially dubious to require racial, and a range of other, minority group members to recognize the ongoing coarsening of public discourse and defensively adjust their psychological responses accordingly.[90] Perhaps the recommendation, on this dubious theory, would thus be for the most vulnerable group members to read and follow the great Stoics, if not to develop some sort of defensive psychological carapace. Why such an evidently defeatist and regressive approach is optimal is left largely unexplained.[91]

The courts have, however, asserted more broadly that "[t]he fighting words exception is very limited because it is inconsistent with the general principle of free speech recognized in our First Amendment jurisprudence."[92] This claim is thought to be supported in particular by the classic rhetoric of the *Terminiello*[93] heckler's veto case. In the words of the *Terminiello* case, "a [principal] function of free speech . . . 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."[94]

The logic of *Terminiello*, however, hardly supports any general narrowing of the fighting words doctrine.[95] It is true that fighting words often, but hardly always, stir the target to anger.[96] But it is rather a stretch to claim that fighting words induce a condition of unrest in the target in the sense plainly intended

89. *See* Richard Stengel, *Opinion: Why America Needs a Hate Speech Law*, WASH. POST (Oct. 29, 2019), https://www.washingtonpost.com/opinions/2019/10/29/why-america-needs-hate-speech-law/ (arguing for the implementation of hate speech laws that would protect individuals from verbal abuse online).

90. *See* sources cited *supra* note 47.

91. *Cf.* Stengel, *supra* note 89 (asserting that legislators should implement hate speech laws in the United States to avoid creating a society that is increasingly tolerant to incivility).

92. Sandul v. Larion, 119 F.3d 1250, 1255 (6th Cir. 1997); Baskin v. Smith, 50 F. App'x 731, 736 (6th Cir. 2002) (unpublished opinion).

93. Terminiello v. City of Chicago, 337 U.S. 1, 3 (1949).

94. *Id.* at 4 (quoted in *Sandul*, 119 F.3d at 1255).

95. *See generally* Toni-Ann Williams, *The Fighting Words Doctrine*, FOUNDS. OF L. & SOC'Y (Dec. 7, 2018), https://foundationsoflawandsociety.wordpress.com/2018/12/07/the-fighting-words-doctrine/ (stating that the *Terminiello* Court held that language that merely "causes public anger" cannot be prohibited without running afoul of the First Amendment).

96. *See* Linda Friedlieb, *The Epitome of an Insult: A Constitutional Approach to Designated Fighting Words*, 72 U. CHI. L. REV. 385, 408–10 (2005) (noting that the current confines of the fighting words doctrine are determined by looking to "traditional concepts of which insults would provoke which listeners into breaching the peace").

in *Terminiello*.[97] Nor do fighting words typically create, within their target or more broadly, "dissatisfaction with conditions as they are"[98] in the sense that *Terminiello* envisions.

It is certainly possible that, for example, personally targeted victims of racial epithets may, as a result of one or more such incidents, become angry and dissatisfied with conditions as they are, including, indeed, a culture of constitutionally protected overtly racist and otherwise discriminatory personalized speech.[99] But this form of reactionary anger is hardly what *Terminiello* contemplates.[100] Coarse personal insults do not generally prompt political reassessment on the part of the target thereof. *Terminiello* instead envisions a speaker whose forceful rhetoric persuades some listeners to seriously consider, if not subscribe to, the underlying message of the speech in question.[101]

The logic, and perhaps the breadth, of the fighting words doctrine has also been attacked from another perspective.[102] Feminists have understandably characterized the fighting words doctrine, or some elements thereof, as stereotypically masculinist and anachronistic at best.[103]

The doctrine's focus on words likely to provoke either an "average" or some more particularized, non-hypersensitive person to immediately fight is not merely selective but is unjustifiably biased, and indeed perversely so.[104] On its own logic, this prong of the fighting words doctrine protects even the

97. *See Terminiello*, 337 U.S. at 3–4 (stating that speech "is . . . protected against censorship or punishment unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest").

98. *Id.* at 4.

99. *See* Robert J. Boeckmann & Jeffrey Liew, *Hate Speech: Asian American Students' Justice Judgments and Psychological Responses*, 58 J. SOC'Y ISSUES 363 (2002) (describing and analyzing experiments that measured the psychological response of racist hate speech victims).

100. *See Terminiello*, 337 U.S. at 13 (discussing concerns that fighting words would incite anger, leading to riots and disorderly mobs).

101. *Id.* at 4.

102. *See The Demise of the* Chaplinsky *Fighting Words Doctrine*, *supra* note 71, at 1146.

103. *See, e.g.*, Kathleen M. Sullivan, *Foreword: The Justice of Rules and Standards*, 106 HARV. L. REV. 22, 42 (1992); *The Demise of the* Chaplinsky *Fighting Words Doctrine*, *supra* note 71, at 1146 (noting and critiquing the anachronistic, reactive, violence-focused, and stereotypically male bias of the fighting words cases); Wendy B. Reilly, Note, *Fighting the Fighting Words Standard: A Call for Its Destruction*, 52 RUTGERS L. REV. 947, 948 (2000) ("[T]he current fighting words standard fails to protect the interests of women, people of color, gay men, lesbians, bisexuals, or transgendered people."); Jeffrey Rosen, "*Fighting Words*," LEGAL AFFS., https://legalaffairs.org/issues/May-June-2002/scene_rosen_mayjun2002.html (last visited Mar. 11, 2022).

104. *See* Reilly, *supra* note 103, at 947 ("By focusing on imminent violence as the harm to be avoided, the doctrine inherently discriminates among victims based on their perceived propensity to become violent.").

most sustained and severely abusive language where the addressee is of a class that is predictably unwilling, or unable, for any reason, to respond with a physical battery.[105] So, perversely, women, frail and elderly people, and persons with various disabilities, among other groups, receive categorically less protection from abusive targeted speech than do those persons who are more willing and able to react with immediate violence.

This perverse result can be thought of as a vestige of historic masculinist[106] conceptions of violence, of one sort or another, as a response to perceived slights, affronts, and indignities.[107] The result, however, hardly displays even any classical chivalric concern for the well-being of those persons who are unable or unwilling to employ immediate reactive violence.[108]

One obvious, and quite sensible, response to the dubious logic of the reactive violence prong of the fighting words doctrine is to instead emphasize

105. *See id.* at 948 ("The effect of focusing on potential violence is that the same words become regulable when directed at someone who would be likely to react violently to a verbal assault, but *not* regulable when directed at someone who would be unlikely to react violently.").

106. *See generally* Scott Atkinson, *Why Men Fight—And What It Says About Masculinity*, GUARDIAN, https://www.theguardian.com/world/2017/sep/12/modern-masculinity-men-fighting-scott-atkinson (Oct. 2, 2017, 1:52 PM); Alan Booth et al., *Testosterone and Social Behavior*, 85 SOC. FORCES 167 (2006); *Harmful Masculinity and Violence*, AM. PSYCH. ASS'N, www.apa.org/pi/about/newsletter/2018/09/harmful-masculinity (last visited Mar. 11, 2022); Ellen Hendrickson, *How To Fight Toxic Masculinity*, SCI. AM. (July 26, 2019), www.scientificamerican.com/article/how-to-fight-toxic-masculinity; Jesse Prinz, *Why Are Men So Violent?*, PSYCH. TODAY (Feb. 3, 2012), https://www.psychologytoday.com/us/blog/experiments-in-philosophy/201202/why-are-men-so-violent; Anne Harding, *Men's Testosterone Levels Declined in Last Twenty Years*, REUTERS (Jan. 19, 2007, 3:21 AM), https://www.reuters.com/article/health-testosterone-levels-dc/mens-testosterone-levels-declined-in-last-20-years-idUKKIM16976320061031; George Herrera, *Medical Study: Generational Decrease of Testosterone Levels in Men*, BODY RX (Oct. 15, 2020, 3:55 PM), https://www.bodyrxantiaging.com/medical-studies/medical-study-generational-decrease-testosterone-levels-men/.

107. *See generally* KWAME ANTHONY APPIAH, THE HONOR CODE: HOW MORAL REVOLUTIONS HAPPEN (2010); JOHN NORRIS, PISTOLS AT DAWN: A HISTORY OF DUELING (2009); VINCENTO SAVIOLO, A GENTLEMAN'S GUIDE TO DUELLING (2013); JOHN LYDE WILSON, THE CODE OF HONOR; OR RULES FOR THE GOVERNMENT OF PRINCIPALS AND SECONDS IN DUELING (1858). Honor-based dueling cases, of course, involve some lapse of time between the alleged affront and any ritualized response thereto. *See generally* R. George Wright, "*What Is That Honor?": Re-Thinking Free Speech in the 'Stolen Valor' Case*, 60 CLEV. ST. L. REV. 847, 847 n.2 (2013) (historical cross-cultural survey).

108. *See* Reilly, *supra* note 103, at 947–49. The law does indeed take categories such as gender, age, and disability into account in assessing the likelihood of physical retaliation by a non-hypersensitive victim. *See, e.g.*, State v. Baccala, 163 A.3d 1, 8–9 (Conn. 2017) ("A proper examination of context also considers those personal attributes of the speaker and the addressee that are reasonably apparent because they are necessarily a part of the objective situation in which the speech was made."); Jennifer Wollock, *Chivalry Is Not About Opening Doors, but Protecting Society's Most Vulnerable from Attack*, THE CONVERSATION (Mar. 23, 2021, 8:32 AM), https://theconversation.com/chivalry-is-not-about-opening-doors-but-protecting-societys-most-vulnerable-from-attack-157116.

the alternative *Chaplinsky* prong.[109] Persons who are unable or unwilling to respond to grave insults with an immediate battery may well undergo some cognizable injury as a result of the utterance of the language in question.[110] However sensible such a shift in emphasis might be, it unfortunately runs counter to a dominant case law trend.[111]

Specifically, it has been observed that even the *Chaplinsky* case itself did not, and had no occasion to, develop the "words that 'by their very utterance inflict injury'" prong of fighting words.[112] It has been said that after *Chaplinsky* itself, "the Court has either dropped the 'inflict-injury' alternative altogether or simply recited the full *Chaplinsky* definition without further reference to any distinction between merely hurtful speech and speech that tends to provoke an immediate breach of the peace."[113] More concisely, it is said that "the Court has effectively eliminated the 'inflict injury' prong of the 'fighting words' analysis."[114]

Certainly, a number of Supreme Court cases have continued to refer explicitly, if only in dicta, to the 'inflict injury' prong.[115] The lower courts have often done so as well.[116] But there is, equally, a tendency on the part of the

109. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (defining fighting words as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace").

110. *See supra* note 47 and accompanying text.

111. *See supra* Parts II, III (discussing the evolution of case law evolving from the *Chaplinsky* case); *see infra* notes 120–22 and accompanying text.

112. *See, e.g.*, Purtell v. Mason, 527 F.3d 615, 623 (7th Cir. 2008) (quoting *Chaplinsky*, 315 U.S. at 572).

113. *Id.* (citing Virginia v. Black, 538 U.S. 343, 359 (2003) (cross-burning case decided without reference to the inflict-injury prong)); *see also The Demise of the* Chaplinsky *Fighting Words Doctrine*, *supra* note 71, at 1129; Clay Calvert, *Fighting Words in the Era of Texts, IMs and E-Mails: Can a Disparaged Doctrine Be Resuscitated To Punish Cyber-Bullies?*, 21 DEPAUL J. ART, TECH. & INTELL. PROP. L. 1, 3 (2010).

114. United States v. Bartow, 997 F.3d 203, 207 (4th Cir. 2021); *see also Purtell*, 527 F.3d at 625 ("We see nothing in the Supreme Court's more recent iterations of the fighting-words doctrine that would presage a revitalization of the 'inflict injury' alternative in the *Chaplinsky* definition.").

115. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 430 (1989) (Rehnquist, J., dissenting) (public flag-burning demonstration case); Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 56 (1988) (intentional infliction of emotional distress via magazine ad parody case); City of Houston v. Hill, 482 U.S. 451, 461–62 (1987); Rosenfeld v. New Jersey, 408 U.S. 901, 903 (1972) (Powell, J., dissenting); Gooding v. Wilson, 405 U.S. 518, 522 (1972); Kunz v. New York, 340 U.S. 290, 298 (1951) (Jackson, J., dissenting).

116. *See* Hoyland v. McMenomy, 869 F.3d 644, 655 (8th Cir. 2017); Dariano v. Morgan Hill Unified Sch. Dist., 767 F.3d 764, 770 (9th Cir. 2014) (O'Scannlain, J., dissenting); Barnes v. Wright, 449 F.3d 709, 717 (6th Cir. 2006); Gower v. Vercler, 377 F.3d 661, 670 (7th Cir. 2004); State v. Hoffman, 387 N.E.2d 239, 242 (Ohio 1979).

Supreme Court,[117] and of the lower courts,[118] to elide, ignore, or abandon the Chaplinsky "inflict injury" alternative prong.

Thus the Court has selectively declared that "[i]t is clear that 'fighting words'—those that provoke immediate violence—are not protected by the First Amendment."[119] A bit more elaborately, the Tenth Circuit has declared that "[w]e define 'fighting words' as 'epithets (1) directed at the person of the hearer, (2) inherently likely to cause a violent reaction, and (3) playing no role in the expression of ideas.'"[120] And the Connecticut Supreme Court has announced, explicitly, that "'[f]ighting words' are defined as speech that has 'a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed.'"[121] The "inflict injury" alternative prong thus drops out.

This downgrading, if not abandonment, of any concern for words which by their very utterance inflict a sufficiently serious injury is ill-considered.[122] It is hardly as though the problem of epithet-based direct verbal abuse, on grounds of personal or group identity, has evaporated since *Chaplinsky*.[123] In contrast, it is instead the reactive violence prong in *Chaplinsky* that may well

117. *See, e.g.*, Elonis v. United States, 575 U.S. 723, 766 (2015) (Thomas, J., dissenting) (citing Cohen v. California, 403 U.S. 15, 20 (1971)) (true threat case); *Black*, 538 U.S. at 359 (apparently characterizing fighting words in general, but referring only to the reactive violence prong); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927 (1982).

118. *See, e.g.*, Nuxoll *ex rel.* Nuxoll v. Indian Prairie Sch. Dist., 523 F.3d 668, 670 (7th Cir. 2008) (stating that "'fighting words,' words [are] likely to provoke a violent reaction and hence a breach of the peace"); Leonard v. Robinson, 477 F.3d 347, 358 (6th Cir. 2007) (citing *Black*, 538 U.S. at 358–59; *Barnes*, 449 F.3d at 717); Burns v. Bd. of Cnty. Comm'rs of Jackson Cnty., 330 F.3d 1275, 1285 (10th Cir. 2003); State v. Parnoff, 186 A.3d 640, 646 (Conn. 2018).

119. *Claiborne Hardware Co.*, 458 U.S. at 927 (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)). Of course, this formulation oversimplifies even the reactive violence prong. *See id.*

120. *Burns*, 330 F.3d at 1285 (quoting Cannon v. City of Denver, 998 F.2d 867, 873 (10th Cir. 1993)). There seems no reason, incidentally, why only "epithets" can qualify as fighting words. *See* Klen v. City of Loveland, 661 F.3d 498, 509 (10th Cir. 2011).

121. *Parnoff*, 186 A.3d at 646 (quoting State v. Baccala, 163 A.3d 1, 4 (Conn. 2017)). This formulation, incidentally, ignores the distinction between the actual addressee and some presumed average addressee, however conceived and particularized, as contemplated by *Chaplinsky* itself. *See id.*; Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942).

122. *See* Reilly, *supra* note 103, 947–49 (asserting that the current approach to the fighting words doctrine is "inadequa[te] . . . to address contemporary social hatred").

123. *See id.* at 948 (citations omitted) (stating that the "current fighting words standard fails to protect the interests of women, people of color, gay men, lesbians, bisexuals, or transgendered people"). One might even assume that as some categories and statuses come to be increasingly salient in the public mind, the incidence of direct verbal abuse on those grounds may increase.

be of diminishing current importance.[124]

Merely for example, as of 2013 the Westboro Baptist group had engaged in emotionally provocative protests at perhaps 500 military funerals.[125] One might well think of such exceptionally controversial protest demonstrations as fraught with the possibility of a reactive violence fighting words incident.[126] Yet, the Eighth Circuit reported that, as of 2013, "[i]n truth, there have been few to no reported instances of violence associated with Westboro's 500 protests at military funerals."[127] Of course, this absence of reactive violence says little about any personal injuries directly inflicted by the speech in question and, thus, about *Chaplinsky*'s alternative prong.[128]

The case for abandoning the *Chaplinsky* fighting words doctrine, at least with respect to the "inflict injury" prong thereof, is, thus, far weaker than one might have imagined.[129] But before we can reach a definitive conclusion to that effect, we must take fuller account of the free speech side of the question.[130] The fighting words doctrine, and the "inflict injury" prong in particular, is on its strongest foundation only to the extent that the doctrine fully accommodates all legitimate free speech interests.[131] How an accommodation of free speech interests with the interests of the targets of fighting words might be reached is discussed in Part IV.[132]

124, *See supra* notes 106–08 and accompanying text (highlighting the problematic underpinnings of this prong in particular).

125. *See* Phelps-Roper v. Koster, 713 F.3d 942, 948 (8th Cir. 2013).

126. *See id.*

127. *Id. See generally* Snyder v. Phelps, 562 U.S. 443 (2011) (providing a broader discussion of the Westboro Baptist military funeral protest phenomenon).

128. *See Phelps-Roper*, 713 F.3d at 947–49 (failing to discuss *Chaplinsky*'s personal injury prong in applying the fighting words doctrine).

129. *See supra* Parts II, III.

130. *See infra* Part IV.

131. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 383–84 (1992) (highlighting that the protections of the First Amendment only allow regulation of speech that has no legitimate "social value").

132. *See infra* Part IV.

IV. RECONCILING THE FIGHTING WORDS DOCTRINE AND THE VALUE OF FREEDOM OF SPEECH

Typically, language that arguably amounts to fighting words conveys, however inarticulately, some more or less coherent message.[133] Some sort of message, idea, opinion, or other substantive content is thus assumedly present.[134] Whatever the logic of regulating fighting words may be, that logic cannot generally assume that no cognizable underlying idea or opinion is present. Free speech, and the crucial reasons for protecting speech in the first place, must therefore be accommodated by any sound fighting words doctrine.[135]

Chaplinsky itself intriguingly suggests that fighting words in general pose only a minimal free speech problem because "such utterances are no essential part of any exposition of ideas."[136] This argument, and this test, can stand on its own.[137] The *Chaplinsky* court, however, then goes on to engage in a balancing test.[138] In particular, the Court suggests that actionable fighting words "are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and

133. *See* Snyder v. Phelps, 562 U.S. 443, 454 (2011) (holding that the signs used by protestors which contained derogatory language directed at gay people "relate[d] to broad issues of interest to society at large"). There are, however, close cases in which the extreme offensiveness of the language does not seem at all proportionate to any evident underlying grievance or other message. *See, e.g.*, United States v. Bartow, 997 F.3d 203, 207 (4th Cir. 2021) (describing an incident where the defendant, a member of the Marine Corps, addressed a female Marine Corps member in a demeaning manner); State v. Baccala, 163 A.3d 1, 14 (Conn. 2017) ("The defendant's angry words were an obvious expression of frustration at not being able to obtain services to which she thought she was entitled."); State v. Broadstone, 447 N.W.2d 30, 33 (Neb. 1989) (an underlying message or grievance as not especially evident).

134. *See, e.g.*, Iancu v. Brunetti, 139 S. Ct. 2294, 2314 (2019) (Sotomayor, J., concurring in part and dissenting in part) (stating that "obscenity," "lewd" statements, and "defamation" may be regulated because they are "viewpoint neutral"); Klen v. City of Loveland, 661 F.3d 498, 509 (10th Cir. 2011) ("[M]ost if not all of the Klens' offensive epithets were not fighting words, because they did express ideas—chiefly that city building department officials were incompetent and were taking too long in processing plaintiffs' application for a building permit.").

135. *See* Michael J. Mannheimer, *The Fighting Words Doctrine*, 33 COLUM. L. REV. 1527, 1550 (1993) (citations omitted) ("[R]egulations on speech are accorded a different level of scrutiny than ordinary economic or social legislation, owing to the underlying values of speech and the prominent place free speech holds in our constitutional scheme.").

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

137. *See* FCC v. Pacifica Found., 438 U.S. 726, 743 n.18 (1978) (plurality opinion) (stating that determining whether the use of profane language is protected by considering the language itself, rather than the underlying context, would be a standard of "form, rather than" substance).

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

morality."[139]

It is certainly possible to argue that the value, in any relevant sense, of, say, personally targeted hostile racial epithets is indeed outweighed, categorically or at some particularized level, by whatever we take the social interest in order and morality to be.[140] As the Supreme Court has more recently declared, there can be categories of speech in which "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication [within the category] is required."[141]

For our purposes, we need take no issue with the claim, made in the animal cruelty video case of *United States v. Stevens*,[142] that "free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits."[143] The *Stevens* case quotes, without repudiating, the crucial language of *Chaplinsky* itself.[144] Stevens leaves the category of fighting words, as a general exception to free speech, intact.[145] And this is perfectly sensible, as balancing, whether categorical or more particularized, is really not of the essence of *Chaplinsky*.[146]

More specifically, under *Chaplinsky* the crucial focus of attention is on whether the utterance—whether on its own, in ad hoc fashion, or as an instance of some broader category of speech—is "no essential part of any exposition of ideas."[147] And the popularity of any relevant idea or opinion, or lack thereof, is of course irrelevant.[148]

In a typical case of alleged fighting words, the speech at issue involves two judicially distinguishable elements. The separability of these two elements may well be imperfect, and any separation of these two elements may

139. *Id.*; *see also* Leonard v. Robinson, 477 F.3d 347, 357–58 (6th Cir. 2007); Chaker v. Crogan, 428 F.3d 1215, 1223–24 (9th Cir. 2005).

140. *See, e.g.*, New York v. Ferber, 458 U.S. 747, 763–64 (1982) (child pornography case).

141. *Id.*

142. 559 U.S. 460, 470 (2010).

143. *Id.*

144. *See id.* at 470–71.

145. *See id.*

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

147. *Id.*

148. *See* Shawn Francis Peters, *Re-hearing "Fighting Words":* Chaplinsky v. New Hampshire *in Retrospect*, 24 J. SUP. CT. HIST. 282, 285 (1999) (stating that "[t]he law knows no finer hour than when it cuts through formal concepts and transitory emotions to protect unpopular citizens against discrimination and persecution" (quoting Falbo v. United States, 320 U.S. 549, 561 (1944) (Murphy, J., dissenting))).

be more or less readily performed in any particular case.[149] But the courts actually perform this act of forensic separation in practice without, ordinarily, undue difficulty. Thus, one arguable instance of fighting words was judicially found to express frustration at "not being able to obtain services to which [the defendant] thought she was entitled."[150] That would, thus, be the idea or opinion at issue. And in another such arguable instance, the relevant idea or opinion was found to be that particular city officials "were incompetent and were taking too long in processing plaintiffs' application for a building permit."[151]

Thus, where there is some minimally intelligible message to be found, courts can typically ascertain, with reasonable fidelity, the intended message, opinion, or idea. The Supreme Court has, accordingly, recently validated the distinction between the message underlying the alleged fighting words, or the content of that message, and the "particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey."[152]

We need not go so far as to claim that the objectionable mode of speech—the fighting words themselves—are, unlike the underlying message, essentially "nonspeech."[153] The question is really one of any incremental value, in any relevant free speech terms, of choosing the mode of fighting words to express the underlying, more or less distinct, message or idea. That is, what, if anything, do the fighting words and their abusiveness themselves add—or subtract—from the overall free speech value of the speaker's underlying message?[154] And then, in many cases, we must consider the costs of the particular fighting words themselves, in terms of the free speech values associated with any relevant speech by the target of the fighting words.[155] The targets of fighting words may well have their own free speech interests. After all, any

149. *See* Eric John Neis, *The Fiery Cross:* Virginia v. Black, *History, and the First Amendment*, 50 S.D. L. REV. 182, 195–96, 216 (2005).

150. State v. Baccala, 163 A.3d 1, 14 (Conn. 2017).

151. Klen v. City of Loveland, 661 F.3d 498, 509 (10th Cir. 2011).

152. Iancu v. Brunetti, 139 S. Ct. 2294, 2314 (2019) (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 393 (1992)); *see also* Wisconsin v. Mitchell, 508 U.S. 476, 487 (1993) (commenting on *R.A.V.*); Swiecicki v. Delgado, 463 F.3d 489, 499 (6th Cir. 2006) (per *R.A.V.*, the underlying message may well be protectable "even though a particular 'mode of speech' (such as fighting words) may not be").

153. R.A.V. v. City of St. Paul, 505 U.S. 377, 385 (1992) (apparently reflecting on the "expressive" character of many fighting words).

154 *See* Mannheimer, *supra* note 135, at 1558–59 (stating that "there is still no general First Amendment *protection* for fighting words" because "the mode of expression is entirely severable from the ideas expressed").

155. *See id.* (noting that, where the "value" of the speech is "slight," the speech is more likely to be regulable).

incremental value of the abusiveness of fighting words to the speaker may undermine or impair the free speech values of, and the speech-related opportunities realistically available to, the target of such speech.[156]

Let us thus assume that in a typical fighting words context the speaker, and perhaps the target of the speech in question, can make some sort of claim to advancing the basic purposes underlying free speech in the first place.[157] We may assume the basic purposes, or reasons, for constitutionally protecting speech to be plural. Most typically, freedom of speech is thought to optimally promote the pursuit of truth; the goal of autonomy, self-realization, or personal flourishing; and a genuinely meaningful representative democratic process.[158] These considerations should therefore be jurisprudentially important.[159]

This is not to suggest that judges in any given fighting words case should directly determine whether the distinctive fighting words in the case, above and beyond any discernible underlying message, promote, fail to promote, or undermine, from the perspective of the speaker or the target, any or all of these three basic free speech values.[160] But the nature, scope, and limits of the basic reasons for protecting speech should, plainly, ultimately guide the scope of what we determine to be unprotected fighting words.[161]

At least one basic reason for protecting speech was discussed in the anti-military-draft-jacket case of *Cohen v. California*.[162] *Cohen* focuses on the realm of "public discussion."[163] The hope is that freedom of discussion "will ultimately produce a more capable citizenry and more perfectly polity,"[164] on the assumption that "no other approach would comport with the premise of individual dignity and choice upon which our political system rests."[165] And

156. *See* EMERSON, *supra* note 42, at 6.

157. *See, e.g.*, State v. Baccala, 163 A.3d 1, 28 (Conn. 2017).

158. *See, e.g.*, EMERSON, *supra* note 42, at 6–7; FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY (1982); *Free Speech Justifications*, *supra* note 45, 130–47.

159. *See supra* notes 46–49 and accompanying text.

160. Friedlieb, *supra* note 96, at 411–13 (discussing whether it is legislatively possible to create a comprehensive "list of fighting words" based on the principles underlying the doctrine).

161. *See id.*

162. 403 U.S. 15 (1971).

163. *Id.* at 24.

164. *Id.*

165. *Id.* (citing the classic opinion of Justice Brandeis in *Whitney v. California*, 274 U.S. 357, 375–77 (1927) (Brandeis, J., concurring), *overruled on other grounds by* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam)).

what *Cohen* seems to focus on, as potential concerns, are "tumult,"[166] "discord,"[167] "verbal cacophony,"[168] annoyance,[169] distastefulness,[170] squeamishness,[171] "vulgarity," "taste and style,"[172] emotivism,[173] and immoderation[174] in discussing "public men and measures"[175] in particular.

Cohen nicely illustrates the basic disjunction between recourse to typical fighting words and the crucial reasons for distinctively protecting speech in general.[176] The objection to actual fighting words—think of directed hostile racial epithets, for example—is not a concern, as *Cohen* would have it, for tumult, verbal discord, verbal cacophony, mere annoyance, mere distastefulness, squeamishness in the face of profanity, vulgarity, distastefulness of style, emotivism, or lack of moderation.[177] To try to reduce the concern for abusive racial epithets,[178] for example, to categories such as policy disagreement, sound versus noise, squeamishness, or distaste is to trivialize the effects, as well as the likely underlying intentions, of such speech.

More directly, typical fighting words incidents do not qualify as some sort of minimally reciprocal, mutualist, dialogic, interactive "public discussion."[179] How fighting words in particular, above and beyond their underlying non-abusive, if forceful or strongly emotional, message would generally contribute to the goal of "a more capable citizenry and more perfect polity"[180] is utterly mysterious at best. And to suggest that fighting words in general contribute, overall, to the individual dignity of the speaker, let alone of the target,[181] would be absurd.

166. *Id.*
167. *Id.*
168. *Id.* at 25.
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.* at 26.
174. *Id.*
175. *Id.*
176. *See id.* at 25 ("We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, . . . fundamental societal values are truly implicated.").
177. *See id.*
178. *See supra* note 47 and accompanying text.
179. *Cohen*, 403 U.S. at 24.
180. *Id.*
181. *See id.*

None of this is to deny that the overall, perhaps partly illocutionary, meaning of typical fighting words may well be different from an equally emotionally fervent but non-abusive expression of a message. But as the case law recognizes, including in the context of *Chaplinsky*'s fighting words,[182] protecting even the strongly emotional expression of the underlying idea, but not the personally abusive expression thereof, need hardly involve anything remotely like any invidious censorship.[183]

In typical cases, incentivizing the avoidance of fighting words may well advance, rather than impair, any relevant search for truth; the value of democratic political functioning; or the goal of self-realization, the presumed basic purposes of free speech in the first place.[184] It is perhaps technically possible to claim that, say, racially, sexually, or otherwise basic identity-focused epithets might somehow promote the self-realization and flourishing of the speaker.[185] But even if such a claim could ever be at all plausible, the courts would then be logically bound to consider whether, much more plausibly, the target's being subjected to central identity-based vilification tends to impair the target's own self-realization and flourishing.[186]

This approach to the regulation of fighting words, thus, does not fall afoul of the court's general rejection or disfavoring of content-based restrictions on speech.[187] Some, but not all, fighting words restrictions could well pass a strict scrutiny constitutional test.[188] But on our approach, restrictions on fighting words need not pass any such test because the restriction should be essentially

182. *See* FCC v. Pacifica Found., 438 U.S. 726, 746 (1978) (plurality opinion) (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

183. *See id.* at 743 n.18 ("A requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language.").

184. *See supra* note 158 and accompanying text.

185. *See* Motala, *supra* note 47, at 116–17 (providing an example of an interaction that led to the utterance of a race-based epithet).

186. *See id.* (describing the emotional effects of a race-based verbal attack on the speech's target); sources cited *supra* note 47.

187. *See, e.g.*, Reed v. Town of Gilbert, 576 U.S. 155, 171 (2015) (internal citation omitted) ("[C]ontent-based restrictions on speech . . . can stand only if they survive strict scrutiny, 'which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.'").

188. *See id.* at 160–61, 171–72 (holding that a statute which prohibited the display of "Ideological" and "Political Sign[s]" could not survive strict scrutiny because it was not sufficiently "narrowly tailored" to promote the government interest of "preserving the Town's aesthetic appeal and [maintaining] traffic safety").

message-insensitive.[189] The aim is, again, not to suppress any political or other cognizable idea.[190] Essentially, sensible regulations of fighting words allow the speaker to convey any cognizable message or idea, however emotionally, but to do so without severe personal abuse, which typically undermines the free speech values associated with the target's own speech (if not also, ironically, those of the speaker).[191]

V. THE REAL WORLD OF FIGHTING WORDS AND THE ANTI-REALISM OF THE DOCTRINE TODAY

It is hardly surprising, or objectionable, that the fighting words doctrine results in some close, readily contestable, and even dubious case outcomes.[192] What is surprising, unnecessary, and objectionable is instead what we might call the peculiar anti-realism of much of the fighting words doctrine, as developed and often applied in the cases. This anti-realism is manifested in the sheer disconnect between the acknowledged purposes and costs of free speech on the one hand and what the relevant case law actually deems to be constitutionally significant.

Consider, to begin with, the fighting words case of *State v. Baccala*.[193] In this case, the disorderly conduct defendant-speaker was "a forty year old woman who used a cane due to a medical condition that caused severe swelling in her lower extremities."[194] The target of the defendant's verbal wrath was an assistant manager on duty at a Connecticut supermarket.[195] The defendant initially spoke over the telephone, rather than in person, to the

189. *See supra* Part IV.

190. *See, e.g.*, *Free Speech Justifications*, *supra* note 45, at 130–47.

191. *See* sources cited *supra* note 47.

192. For an example of one fighting words case opinion seeking to distinguish another on questionable grounds, see *State v. Matthews*, 111 A.3d 390, 404–05 (R.I. 2015) (distinguishing State v. McKenna, 415 A.2d 729 (R.I. 1980)). The court's reasoning appears strained. *Compare* State v. Matthews, 111 A.3d 390, 404 (R.I. 2015) (holding that defendant's insulting and threatening speech towards police officers constituted fighting words because the speech was directed at the officers rather than a group of individuals and the defendant was in close proximity), *with* State v. McKenna, 415 A.2d 729, 731 (R.I. 1980) (holding defendant's abusive language did not constitute fighting words because the defendant addressed her remarks to a group of five men, spoke to them as a group, and was standing some fifteen feet away when she delivered her insults").

193. 163 A.3d 1 (Conn. 2017). For commentary, see *State v. Liebenguth*, 250 A.3d 1, 21–22 (Conn. 2020).

194. *Baccala*, 163 A.3d at 4.

195. *Id.*

assistant store manager.[196]

The defendant wanted, in essence, to process a Western Union money transfer at the store's customer service desk.[197] On being informed by the assistant manager, via phone, that the office computer could not be accessed at the hour in question, the defendant "became belligerent."[198] This belligerence involved calling the assistant manager "[p]retty much every swear word you can think of."[199] Shortly thereafter, the defendant arrived in person at the closed customer service desk and began filling out a money transfer form.[200] She then denied to the assistant manager that she had called earlier and directed a series of profane and personally and categorically abusive insults and epithets at the assistant manager, "while gesticulating with her cane."[201] The assistant manager "remained professional,"[202] wishing the defendant-speaker a "good night," at which point the defendant left the store.[203]

On this basis, the Court in *Baccala* declared that "a contextual examination of the circumstances surrounding the defendant's remarks inexorably leads to the conclusion that they were not likely to provoke a violent response and, therefore, were not criminal in nature or form."[204]

Whether a court chooses to take into consideration "the addressee's age, gender, and race,"[205] or instead focuses on some "average store manager"[206] in the addressee's position, the answer to the court's supposedly central inquiry seems reasonably clear. The likelihood of an on-duty assistant store manager physically striking the verbal abuser in question was doubtlessly

196. *Id.* The traditional sentiment has been that fighting words cannot possibly take the form of words spoken remotely over the telephone, or presumably, via social media, where the physical distance between the parties essentially imposes a "cooling-off" period before any physical altercation can take place. *See, e.g.*, State v. Dugan, 303 P.3d 755, 766 (Mont. 2013). Whatever the merits of this approach with respect to the reactive violence prong of the fighting words doctrine, it seems especially doubtful in the context of social media and the "inflict injury" prong in particular. *See* Ashley Barton, Note, *Oh Snap!: Whether Snapchat Images Qualify as Fighting Words Under* Chaplinsky v. New Hampshire *and How To Address Americans' Evolving Means of Communication*, 52 WAKE FOREST L. REV. 1287, 1302–06 (2017).

197. *Baccala*, 163 A.3d at 4.

198. *Id.*

199. *Id.*

200. *See id.*

201. *Id.*

202. *Id.* at 4–5.

203. *Id.* at 5.

204. *Id.* at 7.

205. *Id.* at 8.

206. *Id.* at 13.

low.[207] What is less clear is the decisiveness, or even the relevance, of any such inquiry.[208]

The Court in *Baccala* acknowledged that the defendant's language was "extremely offensive and meant to personally demean"[209] their target and was reprehensible, cruel, and "calculated to cause psychic harm."[210] But the target's position as the responsible store manager, including her duty to model deescalating and hostility-diffusive behavior; her authorized control over the premises; and her advance knowledge of the defendant-speaker's state of mind all suggested a reduced likelihood of imminent violent retaliation.[211]

One might well wonder whether these sorts of considerations and judgments really carry no controversial normative element.[212] But any such quibble would be beside the point. Even without these above considerations, we can reasonably assume that no reactive violence was likely to be visited upon the cane-waving defendant in this case, even if the cane-waving and the accompanying language could be construed as a technical assault.[213]

It seems fair to say that even if some technical misdemeanor could have been charged in this case, the gravity of the offense would have been so minimal that as a matter of any reasonable set of discretionary priorities, the case should have been dismissed.[214] The defendant-speaker's conduct was indeed "an obvious expression of frustration at not being able to obtain services to which she thought she was entitled."[215] And we certainly do not know anything of any possible backstory.[216] In light of some possible inclusive backstory, perhaps the defendant's frustration, in and of itself, was entirely understandable.

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207. *Id.* at 14 ("Given the totality of the circumstances in the present case, . . . it would be unlikely for an on duty store manager in Freeman's position . . . to respond with a physical act of violence.").

208. *See id.* (making this inquiry the crux of the Court's fighting words analysis).

209. *Id.* at 13.

210. *Id.*

211. *See id.* at 14.

212. *See id.* at 20–21 (Eveleigh, J., concurring in part and dissenting in part) (footnotes omitted) (asserting that a "post hoc analysis of the circumstances of the addressee will not accurately reflect whether an ordinary person would reflexively respond with some degree of violence to a defendant's abusive language").

213. For a bare-bones definition, see *Assault*, BLACK'S LAW DICTIONARY (2d ed. 1910).

214. *Baccala*, A.3d at 16 (showing that the level of the harm from the incident did not even rise to the level of fighting words, let alone actual assault).

215. *Id.* at 14.

216. *See id.* at 4 (beginning the discussion of the incident at the time the defendant's verbal attack on the telephone occurred).

In any event, the obvious and extreme unlikelihood of any reactive violence in this case would be known largely from understanding the relevant background conditions. Broad background probabilities and the importance thereof are explored technically in Bayes' Theorem.[217] But such considerations hardly address the further question of freedom of speech, and of the values, costs, and limits thereof.[218] In this case, the underlying message was roughly that this particular speaker should have been able to have her Western Union money transaction processed at this particular supermarket, on the particular day in question, as long as the speaker arrived before the supermarket's 10:00 PM closing time.[219] There was, apparently, no claim of any sort of invidious discrimination, or any other broad or systemically based objection, to the denial or unavailability of this particular service.[220]

The case, thus, involves an essentially private or personal-level, if fervently held, grievance.[221] The courts are not entirely clear on whether such speech is entitled, in one context or another, to either no constitutional protection[222] or else to only some minimal constitutional protection under the category of speech.[223] For our purposes, we need not choose between these two approaches. We can instead begin with Judge Richard Posner's declaration that "[t]he purpose of the free-speech clause . . . is to protect the market in ideas, . . . broadly understood as the public expression of ideas, narratives, concepts, imagery, opinions—scientific, political, or aesthetic—to an audience whom the speaker seeks to inform, edify, or entertain."[224]

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217. *See* James Joyce, *Bayes' Theorem*, STAN. ENCYCOPEDIA OF PSYCH., https://plato.stanford.edu/entries/bayes-theorem/ (Sept. 30, 2003). That is, an approach to probability that relies heavily on the broad antecedent background likelihood or unlikelihood of a particular event. *Id.* If an outcome is extremely rare in general across many relevant trials, that fact may dominate judgments as to the likelihood of that outcome occurring in some particular single case. *Id.*

218. *See Baccala*, A.3d at 26 (Eveleigh, J., concurring).

219. *See id.* at 4.

220. *See id.*

221. *See id.*

222. In the public employee discipline cases, see, e.g., *Harris v. Quinn*, 573 U.S. 616, 653 (2014) (stating that "employee speech is unprotected if it is not a matter of public concern (or pursuant to an employee's job duties), but speech on matters of public concern may be restricted only if 'the interest of the state' . . . outweighs 'the interests of the [employee]'"); *Engquist v. Oregon Department of Agriculture*, 553 U.S. 591, 600 (2008); and *Garcetti v. Ceballos*, 547 U.S. 410, 417–18 (2006).

223. *See, e.g.*, Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 774 (1986) (libel case); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985) (plurality opinion) ("In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages [in defamation cases]—even absent a showing of 'actual malice.'"); Connick v. Myers, 461 U.S. 138, 147 (1983).

224. Swank v. Smart, 898 F.2d 1247, 1250–51 (7th Cir. 1990); *see also* Trejo v. Shoben, 319 F.3d

And then, with respect to the specific underlying free speech value of autonomous self-realization, consider the assessment of Professor Thomas Emerson: "[F]reedom of expression is essential as a means of assuring individual self-fulfillment. The proper end of man is the realization of his character and potentialities as a human being. For the achievement of this self-realization the mind must be free."[225]

The law, certainly, has no objection to the idea that a Western Union transfer transaction should, under specified circumstances or in general, be processed.[226] The constitutional status of this idea, in itself, is again unclear.[227] And it is particularly difficult to see what marginal value—in terms of a search for truth, the promotion of democracy, or the pursuit of self-realization—is added, distinctively, by the deeply offensive language alleged in the *Baccala* case.[228]

It is technically possible to describe the gratuitously personally demeaning[229] language alleged in *Baccala* as a contribution to some Posnerian collective pursuit of truth, or to democratic self-government, or to autonomous self-fulfillment.[230] But the more sensible approach to such expressions is to avoid both idealized and overly restrictive understandings of these values on the one hand[231] and an unduly minimalist understanding of these values that trivializes freedom of speech on the other.[232] Even if we choose to find that deeply abusive alleged fighting words distinctively promote, valuably, the flourishing of the speaker, we must ask as well whether the speech-related flourishing and fulfillment of the target of the speech is thereby not at least equally impaired.[233]

Focusing on the purposes of freedom of speech and on the genuine, if partly psychological, harms of exceptionally abusive speech of course cannot

878, 887 (7th Cir. 2003) (involving arguably harassing speech).

225. *See* EMERSON, *supra* note 42, at 6.

226. *See* State v. Baccala, 163 A.3d 1, 4 (Conn. 2017); *supra* notes 220–24 and accompanying text.

227. *See supra* notes 222–23 and accompanying text.

228. *See supra* note 201 and accompanying text.

229. *See supra* note 209 and accompanying text.

230. *See Baccala*, 163 A.3d at 4–5.

231. *See*, at least arguably, MILL, *supra* note 42, at 121 (seeking, ultimately, "the highest and most harmonious development of [personal] powers to a complete and consistent whole").

232. *See generally* Eugene Volokh, *How the Justices Voted in Free Speech Cases, 1994–2000*, 48 UCLA L. REV. 1191, 1196–97 (2001) (noting that the views of Supreme Court Justices over the years have ranged drastically, from "free speech maximalists" to free speech minimalists).

233. *See generally* Jim Hanson et al., *The Fighting Words Doctrine: A History of Balancing Order and Liberty*, 44 WHITMAN COLL. 119 (2009).

guarantee satisfactory outcomes in the fighting words cases.[234] But attention to the reasons for protecting speech, and to the nature and gravity of any speech harms involved, can provide useful guidance.[235] Consider, for example, the curious fighting words case of *Anderson v. State*.[236]

In this case, the defendant had hoped to have her son released on bond after his DUI arrest, based on her personal check, rather than by providing a cash bond.[237] This arrangement proved unsatisfactory to the jail deputies, and the defendant then remarked on the unlikelihood of the jail deputies retaining their employment after the next election.[238] The defendant was later informed that her son would not be released on a cash bond until the defendant had spoken with the local sheriff.[239]

The defendant located the sheriff at a local car dealership.[240] The verbal interaction between the two parties occurred while the defendant-speaker was seated in her car, leaning across and speaking to the sheriff through her car's open window.[241] The sheriff "asked her why she had been at the jail causing trouble."[242] The sheriff testified that the defendant told him that, "[T]hey was no good and that I was a no good son of a bitch and that she should get out of the car and kick my ass."[243] The sheriff's response was that "if she had to talk that way, she could leave," stating, "[I]f you don't leave, I'm going to call and have you removed."[244] The defendant replied, "Well, go ahead."[245] The sheriff testified that he "just went back to washing [his] car because [he] felt it wasn't even worth the trouble."[246] The defendant sat in her car for several minutes and then said, "Well, I'll see you on down the road,"[247] and then drove

234. *See, e.g.*, Greenawalt, *supra* note 47, at 292–93 (noting a variety of different, imperfect means to determine whether certain epithets are "fighting words").

235. *See Free Speech Justifications*, *supra* note 45, 130–47.

236. 499 S.E.2d 717 (Ga. Ct. App. 1998), *abrogated on other grounds by* Golden Peanut Co. v. Bass, 547 S.E.2d 637 (Ga. Ct. App. 2001).

237. *See id.* at 718–19.

238. *See id.* at 718.

239. *See id.* at 719.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

off.[248]

At trial, the sheriff testified that, "I really didn't pay her that much attention,"[249] but that "he was offended and disappointed"[250] by the defendant's language and that he took seriously her verbal threat.[251] On this basis, the defendant was convicted of disorderly conduct in the form of fighting words, and the conviction was, remarkably, upheld on appeal.[252] The appellate court did "not find that the words used by [the defendant] constituted protected speech."[253] That the sheriff might be used to hearing similar language was not decisive.[254] The appellate court in *Anderson* held specifically that "the words [the defendant] used were likely to provoke violence in the mind of the sheriff. This was sufficient."[255]

Anderson is, clearly, extreme in upholding a fighting words conviction under exceptionally dubious facts.[256] The likelihood of any immediate reactive violence by a sheriff against the person of the defendant seems doubtful in the extreme, and in any case entirely within the discretion and control of the sheriff himself. And the nature and gravity of any "inflict injury" prong would seem to be more a matter of the sheriff's subjective sense of proper deference and decorum than of any genuine identity-based harm.[257]

The more defensible aspect of the *Anderson* case, though, focuses on the reason for protecting, or not protecting, instances of speech in the first place. In *Anderson*, the most relevant language by the defendant was to the effect that the sheriff-addressee was "a no good son of a bitch,"[258] and that the defendant herself should exit her car and "kick [the sheriff's] ass."[259] We can, if we wish, classify this speech in particular as a citizen critique of the job

248. *See id.*
249. *Id.*
250. *Id.*
251. *See id.* The defendant testified that the sheriff had himself resorted to several profanities in addressing the defendant during their encounter. *See id.*
252. *See id*. at 720.
253. *Id.*
254. *Id.* (citing Bolden v. State, 251 S.E.2d 165, 166 (Ga. Ct. App. 1978)) (stating that the sheriff's being used to hearing this type of language would not be a defense). *But cf.* Knowles v. State, 797 S.E.2d 197, 201–02 (Ga. Ct. App. 2017) (recognizing the cases holding trained police officers to a higher standard in critical fighting words contexts); Trammel v. State, 851 S.E.2d 834, 837 (Ga. Ct. App. 2020) (same).
255. *Anderson*, 499 S.E.2d at 720 (citing Georgia authority).
256. *See id.* at 719.
257. *See id.*
258. *Id.*
259. *Id.*

performance of a public official.[260] On this approach, the defendant's speech falls neatly within even the narrow core of protected speech.[261]

But it is also possible to ask whether the defendant's admittedly quite mild invective adds to, or detracts from, the free speech values of her underlying message as to police mishandling of the particular bond requirements in connection with her son's arrest, including any degree of emotional fervor in expressing that underlying substantive message.[262] The mild verbal abuse itself expressed by the defendant's actual message did not detectably promote the search for truth, democratic self-government, or self-realization[263] above and beyond a non-profane, non-threatening form of her message.[264] And this would be true not only in the *Anderson* case specifically, but in most even loosely similar cases. In the *Anderson* case, what should have barred the conviction was not the value of the speech at issue but the *de minimis* character of any threat of the defendant's speech to the public order.[265]

260. *See Free Speech Justifications*, *supra* note 45, 141–42.

261. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) ("[D]ebate on public issues should be uninhibited, robust, and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.").

262. *See Anderson*, 499 S.E.2d at 718–19.

263. *See* sources cited *supra* note 158; *see also* Whitney v. California, 274 U.S. 357, 375 (1927) ("Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary."), *overruled in part by* Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (per curiam).

264. *See* Wright, *Freedom of Speech as a Cultural Holdover*, *supra* note 85, at 270; *supra* note 92 and accompanying text.

265. *See supra* note 252 and accompanying text.

VI. CONCLUSION

It thus turns out that the fighting words doctrine, in general, is neither obsolete nor in need of radical limitation. The traditionally neglected "inflict injury" prong of the fighting words doctrine can and should be vitalized, with only a minimal loss, if not an actual net gain, in promoting the basic purposes of freedom of speech in the first place.[266] And the "reactive violence" prong can and should be relieved of its historic biases and dubious assumptions.[267] On that basis, the reactive violence prong cases can be more thoughtfully and realistically adjudicated.[268]

In all fighting words cases, judicial attention should be paid to the distinction between the abusive or provocative words actually used by the defendant-speaker and any underlying message, including the underlying message's naturally associated emotional fervency.[269] Protecting the latter, in undistorted fashion, need not mean protecting the former.[270] In most fighting words cases, any tradeoff between the value of minimal discursive civility and the values underlying freedom of undistorted speech need not be substantial.

266. *See supra* notes 112–21 and accompanying text.
267. *See supra* notes 105–12 and accompanying text.
268. *See supra* Part III.
269. *See supra* note 233 and accompanying text.
270. *See supra* note 233 and accompanying text.

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