IN DEFENSE OF CHAPLINSKY v. NEW HAMPSHIRE

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In Chaplinsky v. New Hampshire,[1] the Supreme Court upheld the conviction of Chaplinsky, a Jehovah's Witness, for calling a city marshall on a public sidewalk a "God damned racketeer" and a "damned fascist" under a New Hampshire statute providing that "[no] person shall address any offensive, derisive or annoying word to any other person who was lawfully in any street or other public place. . . ". This statute had been narrowly construed by the New Hampshire Supreme Court to outlaw only "fighting words" defined as follows:

> [N]o [words were] `forbidden except such as have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed'. . .
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> `The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. . . Derisive and annoying words can be taken as coming within the purview of the statute only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace. . . . The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee. . .'.[2]

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[1] 315 U.S. 568, 86 L.Ed. 1031 (1942).

[2] Id. at 573, 86 L.Ed at 1036.

Given that narrow construction of the New Hampshire statute by the New Hampshire Supreme Court, the United States Supreme Court in Chaplinsky held that "it is a statute narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace."[3]

Subsequent Supreme Court decisions have made clear that a "fighting words" statute is unconstitutional on its face if it is not limited to words which have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed.[4] In Gooding v. Wilson,[5] the Supreme Court overturned the defendant's conviction for violating a Georgia statute which made it unlawful to use "opprobrious words or abusive language". The words spoken to the police officers were: "white son of a bitch, I'll kill you," you "son of a bitch, I'll choke you to death," and "you son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces." Without considering the constitutionality of punishing Gooding's words under a narrowly drawn statute, the Court found the Georgia law as construed by the state court was void on its face because it was not limited to that narrow category of words that "have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed."[6]

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[3] Id.

[4] Gooding v. Wilson, 405 U.S. 518, 523, 31 L.Ed.2d 408 (1972); Cohen v. California, 403 U.S. 15, 29 L.Ed.2d 284 (1971); Texas v. Johnson, 491 U.S. 397, 105 L.Ed.2d 342 (1989).

[5] supra, note 4.

[6] Id. at 524-525, 31 L.Ed.2d at 415.

In Cohen v. California,[7] the Supreme Court rejected the contention that the expression "Fuck the Draft," was "fighting words" when it appeared on the back of a jacket worn in the public corridors of the Los Angeles County Courthouse. The Court reversed the defendant's conviction for disturbing the peace for wearing a jacket with that message as violative of the First Amendment. While the Court acknowledged that the four letter word displayed by Cohen on his jacket is often employed in a personally-provocative fashion, the word in this instance was not directed at some particular person and could not reasonably be regarded as a direct personal insult.[8] Hence it did not constitute "fighting words" in this context.

The Supreme Court, in Texas v. Johnson,[9] held that Johnson's expressive conduct in burning the American flag did not "fall within that small class of `fighting words' that are `likely to provoke the average person to retaliation, and thereby caused a breach of the peace.'"[10] The Johnson Court described the "fighting words" doctrine as including only those words which, when directed to someone individually, would constitute "a direct personal insult" or "an invitation to exchange fisticuffs".[11]

In R.A.V. v. City of St. Paul,[12] the Court held that the government may not regulate fighting words "based on hostility - or favoritism - towards the underlying message expressed."[13] In R.A.V.,

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[7] supra, note 4.

[8] Id. at 20, 29 L.Ed.2d at 291.

[9] supra, note 4.

[10] Id. at 409, 105 L.Ed.2d at 357.

[11] Id.

[12] 505 U.S. 377, 120 L.Ed.2d 305 (1992).

the Court applied the well-established principle that content-based restrictions on speech are presumptively unconstitutional.[14] In R.A.V., the Supreme Court struck down the following ordinance of the City of St. Paul:

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

R.A.V. had been convicted under the aforesaid ordinance for burning a cross inside the privately-owned, fenced yard of a black family, who lived across the street from where R.A.V. was staying. R.A.V. intended to terrorize the black family. The Court noted that the only question was the constitutionality of the ordinance. The defendant was also charged with violation of a state law that prohibited racially motivated assault, but there was no constitutional challenge to that count.

The Minnesota Supreme Court had construed the St. Paul ordinance so it would only prohibit conduct that amounts to "fighting words" within the meaning of Chaplinsky, and that it was a "narrowly tailored means toward accomplishing the compelling governmental interest in protecting the community against biased motivated threats to public safety and order."[15] In R.A.V., Justice Scalia, writing for the Court majority, accepted this interpretation of the ordinance by the state Court but explained that even as so construed the ordinance was unconstitutional on its face

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[13] 120 L.Ed.2d at 320.

[14] See e.g., Texas v. Johnson, 491 U.S. 397, 105 L.Ed.2d 342 (1989); United States v. Eichman, 496 U.S. 310, 110 L.Ed.2d 287 (1990).

[15] 464 N.W. 2d 507, 510-511 (Minn. 1991), reversed R.A.V. v. City of St. Paul, 505 U.S. 377, 120 L.Ed.2d 305 (1992).

because it "prohibits otherwise permitted speech solely on the basis of the subject [that] the speech addressed." In short, the ordinance regulates "fighting words" based on the government's hostility toward the underlying message expressed. In essence, the Court held that the government must regulate "fighting words" in a content-neutral manner. The state is free to ban all fighting words, but it is not free to ban fighting words based on the government's hostility or favoritism towards the viewpoint of the speaker. As stated by the R.A.V. Court:

> Although the phrase in the ordinance, `arouses anger, alarm or resentment in others,' has been limited by the Minnesota Supreme Court's construction to reach only those symbols or displays which amount to `fighting words,' the remaining unmodified terms make clear that the ordinance applies only to `fighting words that insult or provoke violence, on the basis of race, color, creed, religion or gender.' Displays containing abusive invective, no matter how vicious or severe, are permissible unless they addressed one of the specified disfavored topics. Those who which to use `fighting words' in connection with other ideas -to express hostility, for example, on the basis of political affiliation, union membership or homosexuality - are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects. [Citations omitted.]
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> In its practical operation, moreover, the ordinance goes beyond even mere content discrimination, to actual viewpoint discrimination. Displays containing some words - odious, racial epithets, for example - would be prohibited to proponents of all views. But `fighting words' that do not themselves invoke race, color, creed, religion or gender - aspersions upon a person's mother, for example - would seemingly be usable ad libitum in the placards of those arguing in favor of racial, color, etc. tolerance and equality, but could not be used by that speaker's opponent. One could hold up a sign saying, for example, that all `anti-catholic bigots' are misbegotten; but not that all `papists' are, for that would insult and provoke violence `on the basis of religion.' St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules. . . .

> The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content.[16]

All nine Justices of the United States Supreme Court in R.A.V. indicated their support for the Chaplinsky "fighting words" doctrine and their agreement that "fighting words" are and should be a category of proscribable speech undeserving of First Amendment protection. Chaplinsky has been cited approvingly and as controlling law by all eleven United States Circuit Courts of Appeals; Chaplinsky has been cited as relevant authority by federal and state courts in thousands of cases.[17]

Thus, any assertion that Chaplinsky has been abandoned by the Courts is wholly devoid of merit. A review of the case law shows that the "fighting words" doctrine is routinely accepted as governing law by the federal and state courts and applied in their adjudication of cases. Indeed, given the decisions of the United States Supreme Court, the federal and state courts are duty-bound to apply the Chaplinsky-created "fighting words" doctrine in their decision-making.

As the foregoing Supreme Court cases make clear, the rationale behind the "fighting words" doctrine is that some words constitute a particularly intolerable and socially unnecessary manner of expressing an idea or a thought. Prohibition is not on the thought or idea but on the way that it is expressed. The "fighting words" doctrine allows the state to prohibit an intolerable technique or

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[16] 120 L.Ed.2d at 323-324.

[17] Shepard's United States Citations, Case Edition (Volume 1.4), pp. 1401-1405 (1994), January 1, 1996 Semiannual Cumulative Supplement, pp. 149-150, September 1, 1996 Cumulative Supplement, p. 41. *Shepard's United States Citations* is a part of a unique system of citations that allows users to determine the precedential value of case law. The use of Shepard's Citations, known as Shepardizing®, is generally a process of locating cases or other authorities that have cited a prior case or authority. The Shepardizing of Chaplinsky shows it has been cited as precedent in over 2700 reported cases.

manner of expressing an idea, but does not authorize the state to ban the idea itself. As the Supreme Court explained in R.A.V., "the reason why `fighting words' are categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content embodies a particularly intolerable (and socially unnecessary) mode of expressing whatever idea the speaker wishes to convey."[18]

In short, when the Court holds that "fighting words" are a category of speech excluded from the protection of the First Amendment, it means that the state may ban an intolerable means of expressing an idea, no matter what idea the speaker wishes to express. The doctrine does not give the government power to ban speech on the basis of the subjects that the speech addresses. The state may forbid "fighting words" as long as it does so in a viewpoint and content neutral manner.

The "fighting words" doctrine first established in Chaplinsky v. New Hampshire, and reaffirmed by the United States Supreme Court in the recent R.A.V. case, should not be discarded but rather should be maintained as a doctrine which gives the government a limited but needed tool to regulate particularly intolerable and socially unnecessary speech - speech which in essence constitutes a verbal assault by the speaker against a particular individual to whom it is directed in a face-to-face encounter. As stated by the Court in Chaplinsky:

> Allowing the broader scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous and the insulting or `fighting words' - those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well-observed that such utterances are no essential part of any exposition

[18] 120 L.Ed.2d at 324.

> 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 interests of order and morality. 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.[19]

It is important that the government retain this limited power to regulate and sanction verbal assault and verbal harassment. For example, student-to-student verbal harassment in grammar and high schools has become a major problem in this country.[20] Likewise, the presence of hostile and harassing speech on college and university campuses in the United States is well documented.[21] Indeed the societal problem of assaultive and harassing hate speech and concomitant hate-motivated conduct resulted in Congress enacting the Hate Crimes Statistics Act of 1990, 28 U.S.C. § 534.

The states have criminal statutes which proscribe harassment and assault; in the absence of the Chaplinsky-created "fighting words" doctrine, such laws could not survive First Amendment scrutiny thus rendering the government powerless to prevent and punish assaultive and/or harassing speech. For example, the government would be powerless to protect citizens from racial and ethnic insults, epithets, slurs and other forms of individual verbal harassment. The "fighting words"

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[19] 315 U.S. at 571-572, 86 L.Ed. at 1036.

[20] Adam Milani, Harassing Speech in the Public Schools; The Validity of Schools' Regulation of Fighting Words and the Consequences if they Do Not; 28 Akron Law Review 187 (1995); Amy Saltzman, Its Not Just Teasing, U.S. News and World Report, December 6, 1993, at 73; Karen Rubenstin, Fighting Sexual Harassment in Schools, New York Times, June 10, 1993, at C8.

[21] See, e.g., Richard Kinle Page and Kay Hartwell Hunnicott, Freedom for the Thought that We Hate: A Policy Analysis of Student Speech Regulation at America's Twenty Largest Universities, 21 Journal of College and University Law 1; Joseph M. Fernandez, Bringing Hate Crime Into Focus: The Hate Crime Statistics Act of 1990, 26 Harvard C.R. - C.LL. Rev. 261 (1991).

doctrine gives the state the power to prohibit and sanction verbal harassment. As the Supreme Court has stated: "Indeed, the fundamental values necessary to the maintenance of a democratic political system disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions."[22]

The government under the "fighting words" exception to the First Amendment can sanction racial, sexist and ethnic epithets and slurs and other name-calling addressed to an individual in a face-to-face encounter. For example, someone could be constitutionally sanctioned for calling a black person to his face a "nigger" or a Jew a "kyke". However, the use of the identical language in a speech, lecture or classroom discussion, or almost any written form (e.g., in signs, leaflets, letters, newspapers, academic papers) would not be subject to regulation under the "fighting words" doctrine. Thus the "fighting words" doctrine cannot be utilized by the government to suppress offensive ideas, but only to prohibit direct, interpersonal insults that have no value in the marketplace of ideas. Justice Holmes introduced the "marketplace of ideas" notion in his famous dissent in Abrams v. United States.[23] His premise, which has become a major justification for free speech, stated:

> When men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas, - that the best test of truth is the power of the thought to get itself accepted in the competition of the

[22] Bethel School District v. 403 U.S. Fraser, 478 U.S. 675, 681 (1986).

[23] 250 U.S. 616, 63 L.Ed. 1173 (1919).

> market; and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution.[24]

Fighting words are pure interpersonal insults directly addressed to another person. They convey no expressive message to the marketplace; the speaker does not attempt to persuade the listener to adopt any viewpoint, change the addressee's opinion or contribute to our organization as a society. In contrast, the speaker expresses himself solely to hurt the addressee, degrade the individual and intimidate him from exercising his legal rights. Such speech does not add any expression of opinions or values into the marketplace of ideas and deserves no First Amendment protection. As stated by Justice White in his concurring opinion in R.A.V. v. St. Paul:

> Fighting words are not a means of exchanging views, rallying supporters, or registering a protest; they are directed against an individual to provoke violence or to inflict injury. Chaplinsky, 315 U.S. at 572, 86 L.Ed. 1031, 62 S.Ct. 766. Therefore, a ban on all fighting words or on a subset of the fighting words category would restrict only the social evil of hate speech, without creating the danger of driving viewpoints from the marketplace.[25]

Whether one views fighting words as Justice Scalia does for the Court in R.A.V. as an intolerable mode of communication, or as Justice White does in R.A.V. as words which make no contribution to the marketplace of ideas but which instead are directed against individuals solely to incite violence or inflict injury, it is clear that the Chaplinsky created "fighting words" exception to the First Amendment is a necessary one which allows the government to regulate a narrow category

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[24] Id. at 630 (Holmes, J., dissenting). The Supreme Court's reliance on the marketplace concept appears in many opinions. See e.g., Gertz v. Robert Walsh, Inc., 418 U.S. 323, 339, 41 L.Ed.2d 789 (1974); Keyishian v. Board of Regents, 285 U.S. 589, 603, 17 L.Ed.2d 629 (1967); New York Times v. Sullivan, 376 U.S. 254, 270, 11 L.Ed.2d 686 (1964).

[25] 120 L.Ed.2d at 330.

of speech to effectuate a proper governmental purpose - namely, prevention of a mode of speech which constitutes nothing more than verbal harassment or verbal assault on an individual by the speaker and which would cause the reasonable addressee of such speech to react in a violent manner thereby causing a breach of the peace. Speech that contributes nothing to the marketplace of ideas and which merely insults and/or harasses another is not speech deserving of First Amendment protection; rather it is speech which the government should legitimately be able to prohibit and sanction.[26]

> As stated by constitutional scholar Laurence Tribe:
> "The [Supreme] Court, however, has not foreclosed the possibility of imposing costs on those whose words inflict injury by their very utterance. Indeed, that notion need not be limited to words that trigger reflexive violence. The Constitution may well allow punishment for speaking words that cause hurt just by being uttered and heard. The Court of Appeals for the Seventh Circuit appropriately rejected an ordinance passed by the village of Skokie, Illinois, in order to prevent a planned march by a group of neo-Nazis. Yet a more narrowly drawn statute - one that, say, allowed for an after-the-fact award of damages for the intentional infliction of psychic trauma - might well have passed constitutional muster. So, too, might a court approve a law that sought to protect the victims of rapes or other violent attacks from being assaulted with photographic reminders of the crimes they had suffered. . . . The first amendment need not sanctify the deliberate infliction of pain simply because the vehicle used is verbal or symbolic rather than physical.[27]

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[26] Many commentators have reached the same conclusion. See, e.g., Richard Delgado, Words That Wound: A Tort Action For Racial Insults, Epithets and Name Calling, 17 Harvard C.R. - C.L.L. Rev. 133 (1982); Charles R. Lawrence, III, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 Duke Law Journal, 431; Melody L. Hurdle, Recent Development: R.A.V. v. City of St. Paul, 47 Vanderbilt Law Journal, 1143 (1994); Rhonda G. Hartman, Hateful Expression and First Amendment Values: Toward a Theory of Constitutional Constraint on Hate Speech at Colleges and Universities after R.A.V. v. St. Paul, 19 the Journal of College and University Law 343 (1993).

[27] Laurence H. Tribe, American Constitutional Law 2d Edition, p. 856 (1988).

To summarize, "fighting words" are personally-provocative words directed at a particular person that would be likely to cause a reasonable addressee to fight. In R.A.V. v. St. Paul, the Supreme Court reaffirmed the "fighting words" doctrine established in Chaplinsky and made clear that such speech may be banned by the government as an intolerable and socially unnecessary means of expressing an idea, no matter what idea the speaker wishes to express. All nine Justices of the Supreme Court in R.A.V. approvingly cited and relied upon Chaplinsky in the adjudication of that case and indicated their support for the fighting words doctrine. The First Amendment should not protect speech which falls within the "fighting words" definition because fighting words constitute interpersonal insults directly addressed to another person to hurt the addressee, degrade the individual or intimidate him from exercising his legal rights; they are face-to-face words which would be likely to cause a reasonable addressee to fight.

Fighting words contribute nothing to the marketplace of ideas. The Supreme Court considers fighting words unworthy of First Amendment protection because they are not an essential part of any exposition of ideas and are "of such slight social value as a step to truth that any benefit. . .derived from them is clearly outweighed by the social interest in order and morality."[28] "Fighting words" are valueless speech which the government has a legitimate interest in prohibiting and sanctioning in order to maintain public order and civility. The government has a legitimate interest in prohibiting one person from verbally assaulting or verbally harassing another. Thus Chaplinsky should not be overruled.

[28] R.A.V. v. City of St. Paul, 505 U.S. 377, 120 L.Ed.2d 305 (1992), quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 86 L.Ed. 1031 (1942).