Brigham Powelson

POLSC335

Chad Newswander

10 December 2022

"Fighting Words" – Working Toward a Better Solution

Freedom of speech is designed to promote diverse ideas and vibrant discussion. Diverse ideas are vital to the development of effective and advanced society and as such, should be protected. While diversity is encouraged, ideas and actions that would inhibit or destroy society should not be tolerated. "Fighting words" are a vaguely defined class of speech that, when this speech is used, harm public security by inciting violence or other lawless action. The goal of policy, to enable and protect the welfare of citizens, is fulfilled only when citizens feel secure. Certain speech harms citizens' feelings of security and can provoke lawless action. Lawless action defeats security, so it should be mitigated and reduced as much as is possible. Our goal is to preserve security without adversely affecting liberty. The gap, here, is that "fighting words" are not clearly defined until entirely after-the-fact, as they cannot be described as such until imminent lawless action is produced resultant from speech. One such definition states that, "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has 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 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." (*Chaplinsky v. State of New Hampshire,* 1942)

Without censoring harmful speech, citizens may be injured by certain hurtful speech and suffer damage in psychological, moral, or even physical ways. Censoring speech cannot be allowed to go too far, though. *Beauharnais*'s ruling, for example, sets up a system that allows state censorship of ideas arbitrarily deemed harmful; the First Amendment's text is "couched in absolute terms" that provide it with a "preferred position as contrasted to some other civil rights"; Viewpoint discrimination is unconstitutional as it violates the principle of equality, but total neutrality is too broad for upholding the ideal of security. Therefore, our best alternative is that "Fighting words" should be filtered through the Clear and Present Danger test: If speech creates danger, or incites imminent lawless action, the speech can be proscribed. If speech fails this test, then the state cannot intervene.

Problem Definition

It is important to note that, despite the first usage of the term "fighting words" in reference to a class of speech being *Chaplinsky v. State of New Hampshire (1942)*, cases existed in which speech was disputed as protected or not on the basis of promoting or prompting disorderly conduct. Consider *Cantwell v. Connecticut (1940)*, in which Newton Cantwell and his

sons, Jesse and Russell, were members of the Jehovah's Witness (JW) faith and were engaged in distribution of religious material within a predominantly Roman Catholic neighborhood. Their process partially involved the playing of audio by way of portable phonograph, with permission from the prospective audience, the records for which described the contents of books that they were selling. One book, titled "Enemies", included an attack on the Catholic church; when the record describing this book was played to two Catholic men, they asked the Cantwell playing the record to leave, feeling tempted to strike him if he stayed and continued playing the record. Cantwell left as requested but was charged for inciting the men with desire to breach the peace. This charge is overturned by the Supreme Court on reasoning that Cantwell's conduct in the situation created no clear and present danger, and that his speech did not cross into the realm of what we now call "fighting words" because of his sincere belief in the religion he sought to promote—treating his speech and belief similarly to political speech and belief.

The joint conduct-speech analysis undertaken in *Cantwell* is important for helping us understand the problem. In David L. Hudson's "Essay: The Fighting Words Doctrine: Alive and Well in the Lower Courts", the problem is explained this way: "The reality is that in a fighting words case, the government often will focus on the aggressive conduct, while the individual will assert that he or she engaged in pure speech. Take the example of spitting—if a defendant curses at an officer and spits at the officer, a reviewing court is far more likely to find that the defendant engaged in disorderly conduct." At the Supreme Court level, speech is nearly always granted protection and conduct is what determines the nature of the speech—such is the case with *Snyder v. Phelps (2011)*, in which the Westboro Baptist Church was not held liable for emotional injury caused by their picketing near the funeral of Snyder's son. The opinion penned this, and it may be taken as a foundational reason why "fighting words" have not found many convictions at this level:

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

Such an opinion, unfortunately, undermines the security of the people. The Opinion of The Court sided with "pure speech", determining that Westboro's picketing was not "aggressive conduct". Returning to the *Snyder* case, Justice Alito dissents, stating that "Our profound commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case. … The Court now holds that the First Amendment protected respondents' right to brutalize Mr. Snyder. I cannot agree." As quoted in one case referenced by Hudson, the average person should not have to "tolerate the same level of abuse" that is expected of "a well-trained police officer" or another public figure. Mr. Snyder, as pointed out by Justice Alito, "is not a public figure. He is simply a parent whose son, … was killed in Iraq." Fortunately, not every case jeopardizes security for those victimized by "fighting words". Hudson's essay examines fourteen "fighting words" cases in which a conviction was held on the grounds that the speech was unprotected. Hudson also lists five possible considerations that could lead to such a conviction, which may also be used as guidelines for determining a policy solution that will enable us to preserve security without harming the intended nature of free speech: 1. Aggressive conduct in addition to speech; 2. Volume of the speech; 3. Repeated profanities; 4. Recipient of the communication; 5. Racial slurs—especially the "N-word".

Alternative #1 – Chaplinski's "Fighting Words" Doctrine

The first official precedent regarding the class of speech, "fighting words", comes from *Chaplinsky v. State of New Hampshire (1942)*. Appellant Chaplinsky was a member of the Jehovah's Witnesses, and while distributing literature of his sect, "Members of the local citizenry complained to the City Marshal, Bowering, that Chaplinsky was denouncing all religion as a 'racket'." Chaplinsky was warned by Bowering that, while acting within his rights, Chaplinsky was agitating the crowd. A disturbance later occurred and Marshal Bowering went back to the scene to quell a potential riot-in-progress. Crossing paths with Chaplinsky, Bowering exchanged words with Appellant who then said "You are a God damned racketeer" and "a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists". These words were found to be the first termed as "fighting words", following this new doctrine:

> Allowing the broadest 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, the prevention and punishment of which has 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 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. 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. … The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight.

Such a test places us in the direction that we want to go, but the test from *Chaplinsky* alone is not specific enough for the goal of finding the balance between security and liberty. Further refining of the test is needed, and such is demonstrated in the other Alternatives. *Beauharnais v. Illinois* (1952) is a sufficient demonstration of how the *Chaplinsky* ruling is vague enough to be damaging to public discourse. To quote Justice Black, who dissented from the majority opinion, "This Act sets up a system of state censorship which is at war with the kind of free government envisioned by those who forced adoption of our Bill of Rights. … The Court does not act on this view of the Founders. It calculates what it deems to be the danger of public discussion, holds the scales are tipped on the side of state suppression, and upholds state censorship."

Alternative #2 – The Clear and Present Danger Test

When *Terminiello v. Chicago* (1949) occurred, a new solution was determined for resolving the problem with "fighting words". This new test, following the direction of the *Chaplinsky* test, was specified in exactly the right way, thank to addition of one, brief phrase: "freedom of speech, though not absolute, Chaplinsky v. New Hampshire, is nevertheless 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*." (*Terminiello v. Chicago* (1949), emphasis mine.) Regarding the context of *Terminiello*,

the Court was determining the constitutionality of an ordinance in Chicago, under which the case's petitioner was convicted of disturbing the peace by unsettling a crowd with his speech. On those grounds, specifically, the opinion of the court had this to say: "The ordinance as construed by the trial court seriously invaded this province. It permitted conviction of petitioner if his speech stirred people to anger, invited public dispute, or brought about a condition of unrest. A conviction resting on any of these grounds may not stand". Clearly, the opinion of the court is one of protecting speech from state censorship, while leaving intact a way to define when speech has lost its protection and become "fighting words". However, this was not necessarily the view of all of the justice on that case. From Justice Jackson's dissent in *Terminiello*: "these wholesome principles are abandoned today and in their place is substituted a dogma of absolute freedom for irresponsible and provocative utterance which almost completely sterilizes the power of local authorities to keep the peace as against this kind of tactics." Jackson felt that the Clear and Present Danger test was too lenient and allowed the citizenry to deal too much damage before the state was allowed to intervene.

Alternative #3 – The Content Neutrality Doctrine

The final alternative comes from *R.A.V. v. St. Paul* (1992), a case dealing with the burning of a cross within the fenced yard of a black family that lived across the street from petitioner. The primary contention with the charges laid upon petitioner rested in an ordinance he was convicted under, which regulated speech and expressive conduct on the basis of content. According to the opinion of the court, "Content-based regulations are presumptively invalid." Government cannot engage in viewpoint discrimination or content-based regulation. So, as an alternative, it was suggested by the court that if the government is to ban a kind of speech, such as hate speech, they must ban ALL kinds of that speech, rather than one type of the speech in question (such as cross-burning): "When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists." Elaborating further on this issue, Scalia writes the following:

> "As with the sound truck, however, so also with fighting words: the government may not regulate use based on hostility – or favoritism – towards the underlying message expressed." "The rationale of the general prohibition, after all, is that content discrimination 'raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace'." (*R.A.V. v. St. Paul* (1992))

This doctrine changes the approach traditionally taken in protecting and regulating speech. One either bans all speech, or no speech, effectively threatening or eliminating the traditional hierarchy of speech categories. Justice Stevens, concurring in the judgement, points out that "Core political speech occupies the highest, most protected position; commercial speech and nonobscene, sexually explicit speech are regarded as a sort of second-class expression; obscenity and fighting words receive the least protection of all." Speech of public concern "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." In reflecting on the opinion of the court, however, Stevens says, "The Court today turns First Amendment law on its head: Communication that was once entirely unprotected (and that can still be wholly proscribed) is now entitled to greater protection than commercial speech – and possibly greater protection than core political speech."

Recommendation

Taking into account all of the above, my recommendation is Alternative #2, the Clear and Present Danger test. Where *Chaplinsky* is too vague, and can lead to rulings like *Beauharnais*, the Clear and Present Danger test would resolve this with the added specificity it provides. In the face of *R.A.V.*'s Content Neutrality doctrine, the Clear and Present Danger test provides a solution that would alleviate the concerns of Justice Stevens, who felt (accurately) that the Content Neutrality doctrine afforded too much protection to "fighting words". As the goal of this recommendation is to find the policy solution that best establishes what "fighting words" actually are, without sacrificing too much of security for the cause of liberty or vice versa, I recommend the Clear and Present Danger test as the solution to the problem. Through the case *Wood v. Eubanks* (2022), it can be shown that conduct is the best indicator of what "fighting words" are. Wood, bearing a shirt with the words, "F*** the Police", was escorted out of the county fair by the defendant police. Wood hurled insults at the police and the fairground administrator, for which Wood was arrested for disorderly conduct. The court conducted an analysis of Wood's speech and found that, while the speech was profane, profane words alone do not constitute "fighting words". Because Wood's speech in this scenario did not incite any lawless action, the court upheld that Wood was wrongfully arrested under the charge of breaching the peace. This case is an example of the intention of the Clear and Present Danger test being carried out effectively and accurately. Hence, it is entirely plausible that the test recommended may continue to be accurately applied as a policy solution.

Works Cited

Chaplinsky v. State of New Hampshire, 1942

Terminiello v. City of Chicago, 1949

Beauharnais v. Illinois, 1952

R.A.V. v. St. Paul, 1992

Snyder v. Phelps, 2011

Cantwell v. Connecticut, 1940

Wood v. Eubanks, 2022

Hudson, David L., Essay: The Fighting Words Doctrine: Alive and Well in the Lower Courts (2020). University of New Hampshire Law Review, Vol. 19, No. 1, 2020, 19 U.N.H. L. Rev. 1 (2020), Belmont University College of Law Research Paper No. 2021-1, Available at SSRN: https://ssrn.com/abstract=3762605