The Epitome of an Insult: A Constitutional Approach to Designated Fighting Words

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A man in a bar tells a police officer who asks for identification, “You’re not the fucking gestapo, you don’t have any right to do this.”

A union member in New York City tells a replacement worker crossing a picket line, “[W]hen the cops leave, the blood is going to run off of your bald fucking head.”

A white teenager burns a cross in the front yard of a family of mixed race. A man drives past another car that he feels is moving too slowly and uses his middle finger in an obscene gesture directed at the slower driver. During his high school graduation, a teenager expresses a similar message by waving his middle finger just inches from his high school principal’s face.

Which of these instances of speech should not be protected by the First Amendment? In one of the five examples described, a court held that the speech was protected by the First Amendment and could not be criminalized or restricted; in the rest, courts held that the speakers could be prosecuted for using “fighting words.” The Supreme Court has defined fighting words as “those [words] which by their very utterance . . . tend to incite an immediate breach of the peace.”

Thus, ordinary fighting words are personalized insults that by defini-

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1 State v Huffman, 228 Kan 186, 612 P2d 630, 633 (1980) (holding that the defendant could, consistent with the First Amendment, be prosecuted under a Kansas disorderly conduct statute).

2 People v Prisinzano, 170 Misc 2d 525, 648 NYS2d 267, 271 (NY City Crim Ct 1996) (holding that the defendant could constitutionally be prosecuted for his speech, which also included the statement, “Once the police leave, I’m going to get you”).

3 People v Steven S., 25 Cal App 4th 598, 31 Cal Rptr 2d 644 (1994) (holding that a teenager could constitutionally be prosecuted for burning a cross in his neighbor’s yard).

4 Coggin v State, 123 SW3d 82 (Tex App 2003) (holding that the gesture was speech protected under the First Amendment and that the driver could not be prosecuted).

5 Estes v State, 660 SW2d 873 (Tex App 1990) (holding that the gesture was unprotected speech and the teenager could be prosecuted).

6 For the purposes of this Comment, speech includes not only spoken words but also conduct or the use of symbols that transmit a message to another person. Thus, speech encompasses the message written on a T-shirt, an obscene gesture, and the burning of a cross. Speaking therefore includes communicating not only verbally but also through gestures and other forms of messages. Listening encompasses, in addition to hearing the spoken word, observing gestures or other visually oriented speech.

tion make the listener to whom the speech is directed fight back almost instinctively. The category of fighting words is in essence an exception to the speech protections enshrined in the First Amendment; it is one of "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."

As court-designated "low value" speech, fighting words merit little First Amendment protection in the face of the competing state interest of preventing breaches of the peace.

While the Supreme Court declared that fighting words is a "well-defined" class of speech, whether any individual's speech constitutes unprotected fighting words rather than expression protected by the First Amendment is anything but clear. In most cases, state and local judges and law enforcement decide whether a particular expression of speech directed to a particular listener in a particular situation is sufficiently likely to provoke a breach of the peace by an ordinary listener in that situation. The questions of when speech constitutes fighting words and whether anyone should be punished for speaking fighting words have been much dissected, with proposals ranging from abolishing the fighting words exception to radically expanding it.

The fighting words doctrine is generally characterized as an "exception" to the speech protections codified in the First Amendment. While the language of the First Amendment—"Congress shall make no law . . . abridging the freedom of speech"—is absolute, the Supreme Court has, from the beginning of its jurisprudence in the First Amendment arena, recognized that the rule has many exceptions. Chaplinsky lists some of those exceptions, including defamation, threats, and fighting words, which do not receive full constitutional protection under the First Amendment.

Chaplinsky, 315 US at 571–72.

Id at 572 (noting that fighting words "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"). "Low value" is often used to describe categories of speech that the Supreme Court has held merit less First Amendment protection. Cass Sunstein has suggested that four factors are relevant:

First, the speech must be far afield from the central concern of the first amendment, which, broadly speaking, is effective popular control of public affairs. . . . Second, a distinction is drawn between cognitive and noncognitive aspects of speech. . . . Third, the purpose of the speaker is relevant: if the speaker is seeking to communicate a message, he will be treated more favorably than if he is not. Fourth, the various classes of low-value speech reflect judgments that in certain areas, government is unlikely to be acting for constitutionally impermissible reasons or producing constitutionally troublesome harms.


This Comment identifies and questions a new approach to the fighting words doctrine building from recent Supreme Court cases. This approach reasons that state and local government can—consistent with First Amendment jurisprudence—designate words or symbols as criminal, but only when used in certain situations where an ordinary listener in that situation might respond in such a way as to lead to a breach of the peace. This approach is consistent with First Amendment jurisprudence and has the potential to increase clarity and decrease law enforcement discretion (and its potential abuse) in fighting words cases. However, this approach also raises troubling questions about the future of First Amendment doctrine regarding categories of low-value speech, in particular whether the permitted criminalization of particular words or expressions of speech within those categories could lead to viewpoint discrimination and the chilling of protected speech.

Part I lays out a brief history of the fighting words jurisprudence. Part II demonstrates the evolution of First Amendment exception jurisprudence in two recent Supreme Court cases. Part III proposes that the next step in that evolution would be to hold constitutional laws banning particular words or symbols when used in situations where they are likely to provoke listeners into breaching the peace. Part IV examines some potential benefits and harms resulting from the described evolution in First Amendment jurisprudence as applied to the fighting words exception.

I. A BRIEF HISTORY OF FIGHTING WORDS

The fighting words exception traces back to Cantwell v Connecticut,12 a 1940 case in which the Supreme Court overturned the breach of the peace conviction of a Jehovah’s Witness convicted for prosely-
tizing on the streets of New Haven." In dicta, the Court wrote: "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution." Just two years later, in *Chaplinsky v New Hampshire*, the Supreme Court sustained, for the only time in its history, a fighting words conviction in the case of another Jehovah's Witness. Chaplinsky drew a crowd by denouncing all religion as a "racket" and then called a city marshal a "God damned racketeer" and a "damned Fascist." The Court set out a test for analyzing whether expressions of speech constitute fighting words: "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Such expressions, the Court held, "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." The *Chaplinsky* Court designed an objective test that examined how "men of common intelligence" would respond in that situation.

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14 Id at 307-11. Cantwell requested that two pedestrians listen to a recording, and when they agreed, he played a record that embodied "a general attack on all organized religious systems as instruments of Satan" and then "single[d] out the Roman Catholic Church for strictures couched in terms which naturally would offend not only persons of that persuasion, but all others who respect the honestly held religious faith of their fellows." Id at 309.
15 Id at 309-10.
16 315 US 568 (1942).
17 Id at 569-70.
18 Id at 572.
19 Id. While the rhetoric suggests fighting words might be entirely outside the First Amendment, fighting words are more properly categorized as a type of low-value speech that can be restricted when the government has a sufficient competing rationale that justifies the speech restriction. See note 10. With fighting words, the competing rationale is built into the test—preventing breaches of the peace.
20 Id at 573-74 (concluding that "the appellations 'damned racketeer' and 'damned Fascist' are epithets likely to provoke the average person to retaliation, and thereby to cause a breach of the peace"). Although the test started out as purely objective, it developed a subjective component as well. While the fighting words test evaluates the speech in light of the ordinary person, it looks at the ordinary person in the listener's position as opposed to a generalized ordinary person for all situations. For an explanation of how the standard can change depending on certain qualities of the person being verbally attacked, see *City of Houston v Hill*, 482 US 451, 462 (1987) (arguing that a police officer "may reasonably be expected to 'exercise a higher degree of restraint' than the average citizen"); *Lewis v City of New Orleans*, 408 US 913 (1972) (Powell concurring); Dawn Christine Egan, Note, "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). While the standard has a subjective element, it is not purely subjective because it does not consider the actual person who was the target of the speech and whether that person in fact responded, or even was likely to respond, by breaching the peace. How to define "ordinary person" has been the topic of much debate. See Michael J. Mannheimer, Note, *The Fighting Words Doctrine*, 93 Colum L Rev 1527, 1543-45 (1993) (arguing that the Court has adopted a standard that contains both an objective and a subjective component); Note, 106 Harv L Rev at 1134-37 (cited in note 11). This could be
While the Supreme Court has never affirmed another fighting words conviction, other cases have defined the exception’s narrow boundaries. In particular, in *Cohen v California,* the Court noted that for speech to be constitutionally criminalized under the fighting words doctrine, the speech must clearly address a *particular listener* as opposed to the general public. *Cohen* is the seminal case on profanity, an ill-defined category of speech that overlaps with fighting words. *Cohen* concerned a prosecution under a California law that made it illegal to use “any vulgar, profane, or indecent language within the presence or hearing of women or children, in a loud and boisterous manner.” The Court held that the law was unconstitutionally overbroad: the ordinance criminalized speech when speakers exposed unwilling listeners to disturbing language while in a public facility.

In particular, the Court overturned the disturbing the peace conviction of a protester wearing a jacket that read “Fuck the Draft,” noting: “No individual actually or likely to be present could reasonably have regarded the words on appellant’s jacket as a *direct personal insult*.” Discussing the fighting words exception as a potential basis for upholding the conviction, the Court observed that to constitute fight-

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21 *Coggin v State,* 123 SW3d 82 (Tex App 2003) and *Estes v State,* 660 SW2d 873 (Tex App 1990), two Texas cases in which the same hand gesture was considered, respectively, constitutionally protected and unprotected speech.

22 *Id* at 20 (noting that fighting words are “personally abusive epithets . . . likely to provoke violent reaction” and also rejecting vulgarity, incitement, and offense to bystanders as rationales for upholding the conviction). For an example of a state court following this rule, see *Cunningham v State,* 260 Ga 827, 400 SE2d 916, 919–20 (1991) (holding unconstitutional a state statute regulating profane words on bumper stickers because the speech in a bumper sticker is not directed at a particular audience).

23 See Geoffrey R. Stone, et al, *Constitutional Law* 1188 (Aspen 4th ed 2001) (“The Court thus recognized in *Cohen* that the fighting words and profanity problems are analytically distinct—although fighting words typically involve the use of profanity, this is not essential; although fighting words usually involve insults directed personally to the addressee, the problem of profanity is not so limited.”).

24 403 US at 16 n 1.

25 *Id* at 21 (internal citation omitted):

While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue, we have at the same time consistently stressed that “we are often ‘captives’ outside the sanctuary of the home and subject to objectionable speech.”

26 *Id* at 20 (emphasis added) (“While the four-letter word displayed by Cohen . . . is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not ‘directed to the person of the hearer.’”). For other cases requiring a personal attack to criminalize speech, see *Texas v Johnson,* 491 US 397, 409 (1989) (“No reasonable onlooker would have regarded Johnson’s generalized expression of dissatisfaction with the policies of the Federal Government [his burning of an American flag] as a direct personal insult or an invitation to exchange fisticuffs.”); *Hess v Indiana,* 414 US 105 (1973).
ing words the speech must be specifically addressed to a particular listener and that although “fuck” could be and often is used as a personal insult, in this case the speaker used his jacket merely to express an opinion about the draft.27 Had Cohen instead walked up to a soldier in uniform and yelled “Fuck the draft,” that would perhaps have constituted the type of personalized insult that could constitutionally be punished for its likelihood of generating a breach of the peace.28 Thus, Cohen provides one boundary of the fighting words doctrine: the provocative language must be directed to a specific individual in a manner likely to lead to a breach of the peace.

A second key development in the post-Chaplinsky cases has been a focus on the second half of the test—“incite an immediate breach of the peace”—to the exclusion of the first half—“inflict injury.” For example, in Gooding v Wilson,29 the Court struck down a Georgia law banning “opprobrious words or abusive language” because it was applied in a case where no likelihood existed of an immediate violent response.30 Thus, the Court held that the law was unconstitutional because it merely banned speech that “inflicted injury” without the accompanying threat of a breach of the peace.

27 Cohen, 403 US at 20. In fact, other than the content and expression of his message, Cohen was quite respectful. When he entered the courtroom, Cohen stood in the back with his jacket removed and folded over his arm. A judge, alerted by law enforcement to the jacket, declined to hold Cohen in contempt. Cohen was not arrested until after leaving the courtroom. Id at 19 n 3. Without a personalized insult, the Court held Cohen was merely expressing an opinion that is clearly protected, noting, “[W]e cannot indulge the facile assumption that one can forbid particular words without also running substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.” Id at 26. This particular fear of the Court’s will be discussed further in Part IV.B.2.

28 The doctrinal characterization of fighting words, “those that by their very utterance . . . tend to incite an immediate breach of the peace,” does not require a traditional mens rea such as knowingly or recklessly in order to criminalize speech. A speaker speaks; if a strong enough likelihood exists that the listener will breach the peace in response, the speech can be criminalized consistent with First Amendment jurisprudence. Nevertheless, it may be presumed that most speakers will have knowledge, even if only constructive, of whether the ordinary listener in that situation is likely to respond with a breach of the peace. See note 20. Furthermore, since criminalization of the speech depends on state and local law, some statutes or ordinances criminalizing breaches of the peace or disorderly conduct may contain mens rea requirements, though they are not mandated by the Supreme Court’s First Amendment jurisprudence. For an example, see note 32 and accompanying text.

29 405 US 518 (1972).

30 Id at 519, 528. See also Street v New York, 394 US 576, 580, 592 (1969) (striking down a New York law making it a crime to “cast contempt upon [an American flag] by words” because the law was not narrowly drawn to punish only fighting words); Mannheimer, Note, 93 Colum L Rev at 1528–29 (cited in note 20) (recognizing that a series of cases in the 1970s resulted in a doctrine strikingly close to the “clear and present danger” test from the incitement context, but without the requirement of intent).
As in Gooding, Cohen, and even Chaplinsky, the use of fighting words traditionally is prosecuted under general breach of the peace or disorderly conduct laws enacted by states or cities. For example, a Texas disorderly conduct law provides in part that a person “commits an offense if he intentionally or knowingly . . . makes an offensive gesture or display in a public place, and the gesture or display tends to incite an immediate breach of the peace.” Such laws are evaluated under the narrowed version of the Chaplinsky definition: “those that by their very utterance . . . tend to incite an immediate breach of the peace.” If a law is written to encompass more language than the Chaplinsky test allows, courts must construe the law to encompass only that narrow class of words. This traditional approach of prosecuting fighting words under general breach of the peace or disorderly conduct laws has not led courts or legislatures to specify particular expressions of speech that are per se criminal because their use tends to cause breaches of the peace. Instead, in each prosecution, law enforcement must evaluate the speech to determine if its utterance to an objective listener in that situation was likely to cause a breach of the peace.

While the traditional approach to the criminalization of fighting words has been to prosecute fighting words under general statutes, two recent First Amendment cases have implied that another way may be constitutional. The next Part examines those two Supreme Court cases and shows how they provide a roadmap to a different understanding, one that would allow particular words or expressions to be specifically criminalized when used in fighting words situations—that is, those with the potential for breaches of the peace.

31 For examples of prosecutions under general statutes governing fighting words, see State v Robinson, 319 Mont 82, 82 P3d 27 (2003) (holding that “fucking pig” and “fuck off asshole” directed at a police officer were fighting words not protected by the right of free speech); People v Prisinzano, 170 Misc 2d 525, 648 NYS2d 267 (NY City Crim Ct 1996) (holding that face-to-face speech during a union strike could be prosecuted as both threats and fighting words); State v Huffman, 228 Kan 186, 612 P2d 630 (1980) (holding that the defendant could be prosecuted under a disorderly conduct statute narrowly construed to prohibit only “fighting words”). The real influence of the fighting words statutes is at the lower levels of the court system. Since the charges are often misdemeanors, it is unclear how often people are arrested for their speech but choose to pay a fine or take a quick plea bargain rather than going to the difficulty and expense of challenging their arrests as unconstitutional.

32 Tex Pen Code Ann § 42.01(a)(2) (West 2003). For examples of fighting words prosecutions under the Texas statute, see Coggin, 123 SW3d 82 (unsuccessful); Estes, 660 SW2d 873 (successful).

33 315 US at 572.

34 For examples of courts narrowly interpreting such statutes, see State v Poe, 139 Idaho 885, 88 P3d 704, 721 (2004); Huffman, 612 P2d at 636; State v Authelet, 120 R1 42, 385 A2d 642, 647 (1978); State v Boss, 195 Neb 467, 238 NW2d 639, 643 (1976).
II. THE SUPREME COURT'S RECENT PRONOUNCEMENTS ON VIEWPOINT DISCRIMINATION IN THE CONTEXT OF LESS PROTECTED SPEECH

In two recent cases, the Supreme Court has determined that the state can pass laws that restrict part, but not all, of a less protected class of speech such as fighting words. This Part considers how the Court has analyzed that issue first in dicta related to fighting words in *R.A.V. v City of St. Paul*35 and then in upholding a particularized threat statute in *Virginia v Black*.36 This Part’s analysis of the framework that the Court is building in *R.A.V* and *Black* for the criminalizing of part, but not all, of a category of speech traditionally less protected by the First Amendment provides a foundation for the analysis in Part III, which examines the new types of fighting words laws that would be constitutional under such a framework.

A. *R.A.V. v City of St. Paul*: Allowing Content-Based Restrictions Within an Entirely Proscribable Class of Speech

A half century after *Chaplinsky*, *R.A.V. v City of St. Paul* affirmed—despite striking down the fighting words law at issue—that fighting words remain unprotected by the First Amendment: “[T]he 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.”37

In *R.A.V.*, the Court struck down St. Paul’s Bias-Motivated Crime Ordinance, which provided:

> Whoever places on public or private property a symbol . . . including but not limited to, a burning cross or Nazi swastika, which one knows or has reason 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.38

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37 505 US at 393. This is important because the Supreme Court has not affirmed a fighting words conviction since *Chaplinsky*.
38 St. Paul, Minn Legis Code § 292.02 (West 2004). In the Minnesota Supreme Court decision, the reach of this ordinance was limited to fighting words. *In the Matter of the Welfare of R.A.V.*, 464 NW2d 507, 510–11 (Minn 1991), revd by *R.A.V.*, 505 US 377.
Although the Court acknowledged fighting words as a mode of expression that could be condemned categorically, as breach of the peace and disorderly conduct laws have done for the past century, it nevertheless struck down the ordinance because the criminalization of speech on the "basis of race, color, creed, religion or gender" constituted viewpoint discrimination. The First Amendment, the Court observed, "generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed." The ordinance banned speech on certain disfavored topics. For example, those who promoted religion were allowed a freedom of language not given to those arguing against religion. Thus, the Court condemned content-based discrimination even for speech unprotected (or, perhaps more accurately, less protected) by the First Amendment, because it served as a proxy for viewpoint discrimination.

However, the Court then identified three exceptions to its rule prohibiting content discrimination within otherwise proscribable categories of speech. These three exceptions, the Court said, would allow differential treatment of specific subcategories of proscribable speech. Of these three, only one is important to the analysis in this Comment: when the "basis for the content discrimination consists entirely of the

40 Id at 381 ("[T]he ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses.").
41 Id at 382 (internal citations omitted). In the immediate aftermath of R.A.V., one commentator argued that the Court implicitly overruled the "inflicts injury" prong of the original Chaplinsky definition by rejecting the rationale advanced by Justice Stevens in his concurrence that "harms caused by racial, religious, and gender-based invective are qualitatively different from that caused by other fighting words." Note, 106 Harv L Rev at 1139–40 (cited in note 11), quoting R.A.V., 505 US at 424 (Stevens concurring).
42 R.A.V., 505 US at 391–92 (majority) ("One could hold up a sign, 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.'").
43 Id at 383–84:

[T]hese areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content.

The rationale here—that the greater does not include the lesser—is akin to the Court's rationale in 44 Liquormart, Inc v Rhode Island, 517 US 484 (1996) (holding that a government could ban certain vices or conduct, but that once the government had determined the conduct was legal it could not ban advertising about otherwise legal conduct).
44 R.A.V., 505 US at 388–89.
45 Of the three exceptions to the Court's rule prohibiting content discrimination within otherwise proscribable categories of speech, the two that are beyond the scope of this Comment are regulation based on the particular "secondary effects" of the subcategory of speech being regulated such that the regulation is justified without reference to the speech's content, and regulation when the government targets conduct and incidentally reaches speech. Id at 389.
very reason the entire class of speech at issue is proscribable. The Court wrote: "Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class."

Thus, a state may constitutionally ban the most obscene obscenity, the type most appealing to prurient interests, but it may not ban only obscenity that contains political messages. Likewise, the federal government may constitutionally ban threats against the president—the importance of the president in society magnifies the reasons why threats are low-value speech—but it cannot constitutionally ban only threats against the president related to the war in Iraq. Thus, the ability to ban part, but not all, of an otherwise entirely proscribable class of speech when the "basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable"—a rule identified but not used in R.A.V.—provides the foundation for a shift in First Amendment jurisprudence and, specifically, in the fighting words doctrine.

B. Virginia v Black: Content-Based Restrictions in the Threats Arena

A decade later in Virginia v Black, the Court realized the potential of the R.A.V. exception for content-based distinctions rooted in the very reason a category of speech fails to deserve First Amendment protection. In Black, the Supreme Court analyzed the constitutionality of a Virginia law specifically banning cross burning as a threat, which read in part: "It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place." The Court upheld the ban on cross burning with the intent to intimidate, but struck down in a plurality portion of the
decision a provision of the statute that provided that the public burning of a cross was itself prima facie evidence of intent to intimidate. The ban on one specific type of threat was justified, the Court found, because the particular type of threat singled out in the statute was an especially intimidating one.

In Black, the Court held that Virginia could choose to ban threats by means of cross burning because “burning a cross is a particularly virulent form of intimidation” historically connected with violence. In its analysis, the Court noted that the burning of crosses historically was used to threaten other individuals in addition to African-Americans (such as civil rights workers, Jews, and union members). Furthermore, after reciting a lengthy history of the use of cross burning as a threatening message in American history, the Court also recognized that burning a cross is symbolic speech that “carries a message in an effective and dramatic manner,” and that often that message is constitutionally protected. Nevertheless, the Court observed that its holding in R.A.V. had not banned all content-based distinctions within low-value speech categories such as fighting words and threats. The Court held that the ban on cross burning was a threat law with a content distinction—and the content distinction was justified by “the very reason the entire class of speech at issue is proscribable.” This put the cross burning ban squarely within a category of content-based distinctions that the Court declared constitutional a decade earlier in R.A.V.

However, a plurality of the Court also rejected a portion of the law that made the cross burning itself prima facie evidence of intent to

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52 Id at 364-67 (plurality) (holding that the prima facie evidence provision of the statute does not allow factfinders to distinguish between constitutionally protected speech and constitutionally proscribable threats).
53 Id at 363 (majority) (“Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning’s long and pernicious history as a signal of impending violence.”).
54 Id. The Court in Black traced the history of cross burning from fourteenth century Scotland through its use by the Ku Klux Klan to demonstrate that “the history of violence associated with the Klan shows that the possibility of injury or death is not just hypothetical” and that the cross burner “often is making a serious threat, meant to coerce.” Id at 352-57.
55 Id.
56 Id at 360.
57 Id at 361-62. For R.A.V.’s analysis, see notes 44–49 and accompanying text.
58 Black, 538 US at 361, citing R.A.V., 505 US at 388. At least one commentator has suggested that the Court’s analysis was just plain wrong and that the cross burning statute should have been struck down. See Maribeth G. Berlin, Comment, The Shortcomings of the Supreme Court's Viewpoint Discrimination Analysis in Virginia v. Black, 81 Denver U L Rev 143 (2003) (arguing that cross burning can be criminalized consistent with the Constitution under general threat statutes, but not under statutes that single out cross burning).
intimidate. Cross burning is not per se illegal. Because a burning cross can be banned as a threat when used to intimidate but is otherwise constitutionally protected (symbolic) speech, the First Amendment demands a contextual, individualized analysis before a particular cross burning is punished. Thus, while the Court specifically rejected the idea that banning a particular symbol when used to intimidate was necessarily viewpoint discrimination, the Court simultaneously rejected the notion that the symbol could in effect be banned entirely by presuming intent to threaten from every burning of a cross and thereby chilling the symbol’s use. In Black, the Supreme Court first fulfilled the potential of its R.A.V. exception in upholding a statute that banned one particular element of symbolic speech because it epitomized the reason the particular category of speech is proscribable.

III. THE POTENTIAL FOR LAWS BANNING PARTICULAR FIGHTING WORDS

Having examined the Supreme Court’s recent analysis of when a law may permissibly proscribe some but not all of a particular category of low-value speech without violating the constitutional ban on viewpoint discrimination, this Part examines one possible consequence of that analysis for the fighting words exception. Part III.A examines the Seventh Circuit’s dicta in a recent non-fighting words First Amendment case in which the court suggested that legislative bodies ought to, under the fighting words rubric, be able to outlaw particular elements of symbolic speech. Building on that analysis, Part III.B discusses a potential new type of fighting words law that, unlike the general breach of the peace laws now used, would outlaw particular words or symbols perceived as most likely to lead to breaches of the peace.

59 Black, 538 US at 366 (plurality).
60 Id at 367.
61 Id at 365:

"The prima facie provision strips away the very reason why a State may ban cross burning with the intent to intimidate. The prima facie evidence provision permits a jury to convict in every cross-burning case in which defendants exercise their constitutional right not to put on a defense. And even where a defendant presents a defense, the prima facie evidence provision makes it more likely that the jury will find an intent to intimidate regardless of the particular facts of the case. The provision permits the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself. It is apparent that the provision as so interpreted "would create an unacceptable risk of the suppression of ideas."
A. The Seventh Circuit’s Proposal: Ban Offensive Symbols

In *Church of the American Knights of the Ku Klux Klan v City of Gary*, the Seventh Circuit suggested that particular offensive expressions of speech ought to be banned because of their potential to incite violence. In a decision holding that an offshoot of the Ku Klux Klan could hold a parade in Gary, Indiana, the court suggested in dicta that the fighting words exception should extend to “the sinister and offensive symbols used by organizations” such as the Ku Klux Klan. While the Seventh Circuit recognized that the First Amendment protects the advocacy of white supremacy, the court noted that it was less clear that the Ku Klux Klan’s symbols should be protected. Instead, borrowing language from intellectual property law, the court suggested that certain symbols should come within the fighting words exception—“the trademark and the trade dress of the Ku Klux Klan regarded as fighting words and signs by virtue of their history and connotations”—and therefore be banned. This approach would allow

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62 334 F3d 676 (7th Cir 2003) (Posner).
63 Id at 684:
   For while the First Amendment surely prevents the government from interfering with the dissemination of offensive ideas, it is less clear why it should be thought to privilege their dissemination by means that show an intent not to persuade, but instead to incite a violent reaction either from ordinarily peaceable people or from extremists at the other end of the political spectrum from the Klan.
64 Fighting words require a face-to-face confrontation, where the provocative speech is directed at a particular individual and not the public at large. See notes 21–27 and accompanying text. *Church of the American Knights* dealt with a parade situation, in essence a more recent version of the Nazis’ attempted march through Skokie, Illinois. See *Collin v Smith*, 578 F2d 1197 (7th Cir 1978). In such situations, the speech involved, whether symbolic or spoken, is outside the fighting words exception, given that the views expressed are as protected as they are abhorrent. In such a group situation, particularly in public, the speech’s constitutional protection is governed by *Cohen*, 403 US at 21, 25 (noting that people are “captive” outside their homes and subject to objectionable speech and that “one man’s vulgarity is another’s lyric”). Compare *Church of the American Knights of the Ku Klux Klan v Kerik*, 356 F3d 197, 208 (2d Cir 2004) (upholding a statute banning the use of masks in public places and noting that the Klan’s masks are redundant of the rest of its uniform and thus lack independent symbolism), cert denied, 125 S Ct 655 (2004).
65 *Church of the American Knights*, 334 F3d at 683–84.
66 Id at 684 (“It is not as if the bad vibrations given off by the Klan were redeemed by ideas, eloquence, or a coherent articulation of sane propositions.”). During the oral arguments in *Black*, Justice Ginsburg specifically asked counsel for Virginia whether the state could also ban the white robes and masks of the Ku Klux Klan. Transcript of Oral Argument, *Virginia v Black*, No 01-1107, *14 (Dec 11, 2002) (available on Westlaw at 2002 WL 31838589). Counsel for Virginia responded that such symbols were not so historically connected with ensuing violence. Id at *15.
67 *Church of the American Knights*, 334 F3d at 684. In trademark law, a symbol may acquire distinctiveness or a secondary meaning that relates to a particular product through longstanding use. The Seventh Circuit’s discussion of trademarks may have come from the Supreme Court oral arguments in *Black*, in which a justice asked about cross burning, “Isn’t it merely a trade-
for the designation of certain elements of speech as having acquired through longstanding use such a likelihood of provocation that the state could designate them as fighting words precisely because of their likelihood of causing breaches of the peace."

Criminalizing designated fighting words or symbols based on their history and thus their likelihood of provoking violent responses, as suggested by the Seventh Circuit, fits within the framework laid out by the Supreme Court in *R.A.V* and *Black*. As discussed in Part II.A, *R.A.V* in effect provided the rule, laying out a doctrinal framework for criminalizing part but not all of a category of low-value speech without violating the constitutional ban on viewpoint discrimination. Then *Black*, as discussed in Part II.B, demonstrated from within the realm of threats how such a law could work, singling out a historically offensive element of speech and banning it when it is used in the manner that justifies proscribing the category of speech as a whole. *Black* thus demonstrated how a particular expression of speech could epitomize a class of less protected speech and could be banned in one context yet protected in another. By allowing a state to single out a particular symbol that is offensive to most people but most offensive to a particular group, the Court in *Black* provided precedent for designating particular fighting words that offend most, but are most offensive to some. No such law has been passed, because prior to *R.A.V* and *Black* it was almost unthinkable that a law banning a particular expression of speech would be constitutional."

mark that has acquired a meaning? Isn't it also a kind of Pavlovian signal so that when that signal is given, the natural human response is not recognition of a message, but fear?" Transcript of Oral Argument, *Virginia v Black* at *29 (cited in note 66). Acquired distinctiveness is codified as a rationale for registering a trademark at 15 USC § 1052(f) (2000), and a general discussion of such claims can be found at Jerome Gilson and Jeffrey M. Samuels, *Trademark Manual of Examining Procedure* § 1212 (Matthew Bender 2d ed 1997).

The Seventh Circuit suggested that it was not entitled to take the step of actually declaring certain symbols of the Ku Klux Klan to be fighting words because in the plurality portion of its opinion in *Black*, the Supreme Court noted that the law "does not distinguish between a cross burning done with the purpose of creating anger or resentment and a cross burning done with the purpose of threatening or intimidating a victim." *Church of the American Knights*, 334 F3d at 684, citing *Black*, 538 US at 366. However, this quotation comes from the plurality portion of the Court's opinion, and concerned only the provision of the law that allowed a factfinder to infer intent to intimidate from the cross burning itself. In effect, the Court held that a symbol could be singled out as a particular type of threat, but the intent to threaten has to be proven, not presumed, so as not to encompass other situations in which the burning cross is a protected expression. Still, even if the Seventh Circuit had extended the ban on fighting words to the particular expressive symbols or the "trade dress" of the Klan, it would have faced the problem discussed in note 64 that a parade is not generally a fighting words situation.

*Black* itself was in many ways a surprising decision. While the Court in *R.A.V* did provide the doctrinal roadmap for the *Black* decision, courts in the time period between *R.A.V* and *Black* frequently struck down cross burning laws because they found that the laws constituted viewpoint discrimination. The Virginia Supreme Court was not atypical in its holding:
B. The Possibility of Designated Fighting Words Laws

If a legislative body were to pursue a designated fighting words law, it would need to justify its designation of particular fighting words or symbols by choosing those with a documented history of use in a manner likely to incite breaches of the peace. Such words or symbols could include those like the burning cross addressed in *Black* that are offensive to most but most offensive to a subsection of the general population due to their past use. Given the simultaneously objective and subjective nature of the fighting words test, a legislature might have to document ways in which the symbol has been used to show that it is offensive to multiple groups within society, in the same manner that the Court in *Black* documented that the burning cross was offensive cross-culturally. Such a history would justify the declaration that the speech was within the class of words at the heart of the Court’s refusal to extend First Amendment protection to fighting

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*R.A.V.* makes it abundantly clear that, while certain areas of speech and expressive conduct may be subject to proscription, regulation within these areas must not discriminate based upon the content of the message. In this case, the Commonwealth seeks to proscribe expressive conduct that is intimidating in nature, but selectively chooses only cross burning because of its distinctive message. As the Court in *R.A.V.* succinctly stated: “the government may not regulate use based upon hostility—or favoritism—towards the underlying message expressed.”

*Black v Commonwealth,* 262 Va 764, 553 SE2d 738, 743–44 (2001). Two such decisions were made by states’ highest courts in the year following *R.A.V.* See *State v Ramsey,* 311 SC 555, 430 SE2d 511 (1993); *State v Sheldon,* 332 Md 45, 629 A2d 753 (1993). While the Supreme Court laid down the rule in dicta in *R.A.V.*, it did so while striking down a hate crimes ordinance, and that rule thus seemed unlikely to support the banning of a symbol clearly associated with a particular viewpoint.

The phrase “designated fighting words” fits the proposed legislation better than the Seventh Circuit’s “fighting trademarks” for several reasons, though either would include all elements of speech, including words and symbols, as possibilities for designation and thus criminalization. First, trademarks are generally owned or asserted by one company, while fighting words develop out of the culture and history of society at large. Second, “designated fighting words” falls within the constitutional fighting words jurisprudence more clearly, whereas the term “fighting trademark” is misleading because it suggests the combination of two bodies of law. Although trademark law may provide some useful analogies, it has little to do with the breaches of the peace that are the heart of the fighting words exception.

The legislature must be able to point to specific examples of how the particular speech designated has led to breaches of the peace in the past. A court is unlikely to uphold a designation based on mere speculation that the speech might lead to breaches of the peace, due to the chilling effect such a designation is likely to have. While the history perhaps need not be long, it must be extreme, as the speech can only be designated as fighting words if it is at the root of why fighting words as a class of speech are deemed low value. See text accompanying notes 45–47.

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72 See note 20.

73 See notes 54–55 and accompanying text.
words; in light of their history, the words could be presumed likely to provoke breaches of the peace in certain face-to-face encounters.  

The list of expressions of speech that legislatures could designate as fighting words due to their likelihood of causing breaches of the peace is varied. The list might include words, such as racial epithets, as well as symbols, such as a burning cross or swastika (though, again, the speech designated would be criminalized only when used to directly insult a particular listener in a situation where an ordinary listener in that situation would likely breach the peace in response). Some words and symbols might be most insulting to, and thus most likely to evoke a violent response from, a particular group of people, such as blacks in the case of “nigger” or Jews in the case of the swastika. Yet these words and symbols may nevertheless be sufficiently insulting and provocative across societal boundaries so as to justify legislation condemning their use as directed insults in confrontational situations regardless of the sex, race, or other specific characteristics of the listener—precisely because of the inherent likelihood that the speech will provoke a breach of the peace. For such a ban to be deemed constitutional under the R.A.V-Black framework, the particular word or symbol must have a history that places the word or symbol at the root of why fighting words are proscribable under First Amendment jurisprudence; thus, the speech at issue must be proven to frequently provoke breaches of the peace by targeted listeners.

In a particular prosecution under such a law, the state would first be required to show that the statute applies. With cross burning or threats, the speech must be used with intent to intimidate. Likewise, with designated fighting words, the speech must be directed at a particular individual and must be used in a situation where an ordinary person is likely to respond with violence.

Furthermore, a defendant could challenge the law’s constitutionality by demonstrating that a particular expression never was or no longer is at the heart of the fighting words exception; that is, it either never was or no longer is likely to provoke breaches of the peace. If it is no longer likely to provoke a fight, it cannot be criminalized under the narrowed Chaplinsky definition. The ability to challenge whether

74 As with secondary meanings in trademark law, this meaning or designation comes from continuous use of a word or mark in a particular manner. See Gilson and Samuels, Trademark Manual of Examining Procedure § 1212.04 to .06 (cited in note 67). This would be akin to the long history of violence and intimidation associated with cross burning outlined by the Court in Black.

75 The Supreme Court of Nebraska suggested almost two decades ago that “fuckhead” and “motherfucker” would be such words. State v Groves, 219 Neb 382, 363 NW2d 507, 510 (1985).

76 315 US at 572. See notes 33–34 and accompanying text.
a designated fighting word is truly at the heart of the fighting words exception should prevent the ossification of the list of designated fighting words and the specter of criminal liability for words that once provoked fights but now inflame the passions of no one but lexicographers. When the fighting words designation is no longer justified, the law would simultaneously become obsolete and therefore unconstitutional, and the law should thus be repealed or struck down. The evolution of language provides, in theory at least, a built-in sunset provision.77

As Justice White wrote in his concurrence in R.A.V., "Fighting words are not a means of exchanging views, rallying supporters, or registering a protest; they are directed against individuals to provoke violence or to inflict injury."78 While states cannot discriminate based on viewpoint or subject matter in banning fighting words, they may—as suggested by R.A.V. and Black—select certain words or expressions to ban because they exemplify why fighting words are considered low value and thus less protected by the First Amendment.

IV. EVALUATING THE DESIGNATED FIGHTING WORDS APPROACH

The designated fighting words approach could perhaps reduce the use of inflammatory language and symbols, but it also raises serious concerns for the future of freedom of speech. Part IV.A addresses some potential benefits of this approach, including protection against societal violence and improving notice and clarity. Part IV.B addresses the concerns raised by an approach that allows individual words or symbols to be codified as, in effect, criminal, including the potential for viewpoint discrimination and the risk of a chilling effect.

77 The evolution of language is rarely so crystal clear that one day a word could be a fighting word and the next it could be harmless. Words and their definitions evolve over time. Nonetheless each designated fighting word will be analyzed at various moments in time—when designated by the legislature and when challenged by defendants—and thus must be evaluated at those moments.

78 As discussed in Part IV.A.2, the designation of fighting words in statutes or ordinances in effect places the burden of challenging the law on defendants, most of whom are not going to spend the time, effort, or money necessary to challenge a law's constitutionality. This, in effect, creates a collective action problem, since few defendants will value avoiding a misdemeanor conviction enough to expend the resources necessary to challenge the law. Nevertheless, civil liberties organizations such as the ACLU would no doubt keep such challenges alive in the courts.

79 505 US at 401 (White concurring) (arguing that since fighting words as a whole may be banned, cities ought to be able to ban a certain subset of fighting words without "creating the danger of driving viewpoints from the marketplace").
A. Advantages of the Designated Fighting Words Approach

The designated fighting words approach builds on existing constitutional doctrine and recognizes the political and jurisprudential reality that the fighting words exception is unlikely to be abolished. Additionally, designated fighting words laws, coupled with general breach of the peace laws, have the potential to strengthen society's protection against breaches of the peace. Such laws also have the potential to address equality-based criticisms of the fighting words doctrine, stemming from its focus on breaches of the peace to the exclusion of emotional harms caused by the use of such insults and epithets. Finally, such an approach could potentially increase notice and clarity in an area of the law plagued by uncertainty and unending, sometimes arbitrarily exercised, discretion, while simultaneously retaining the case-by-case analysis necessary to prevent the fighting words exception from encroaching on speech protected by the First Amendment.

1. The fighting words exception is here to stay.

Critics of the fighting words doctrine call for its abolition, either due to the exception's vague scope or due to its perceived bias toward a particular societal construct. But the abolition of the fighting words exception, even were it desirable, is an unrealistic approach to constitutional doctrine. The Supreme Court has not indicated the slightest interest in eliminating the doctrine. Commentators seeking its abolition have seized on the fact that the Supreme Court has not affirmed a single fighting words conviction since Chaplinsky, but the Court has repeatedly affirmed the doctrine's continued vitality—most recently in R.A.V. and in Black. In addition, though no Supreme Court cases have affirmed convictions, fighting words cases are generally prosecuted by the states, and state appellate and supreme courts have repeatedly affirmed fighting words convictions.

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80 For an introduction to equality-based criticisms leading to proposals to either abolish or expand society's conception of fighting words, see notes 11–12.
81 See Part IV.A.2.
82 See Part IV.A.4.
83 R.A.V., 505 US at 393; Black, 538 US at 358–59. See also text accompanying note 37.
84 See, for example, State v Read, 165 Vt 141, 680 A2d 944 (1996); People v Steven S., 25 Cal App 4th 598, 31 Cal Rptr 2d 644 (1994); Estes v State, 660 SW2d 873 (Tex App 1990); State v Groves, 219 Neb 382, 363 NW2d 507 (1985); State v Huffman, 228 Kan 186, 612 P2d 630 (1980). It is also important to remember that because such crimes are usually misdemeanors carrying light penalties, many defendants likely opt not to spend the time or money challenging convictions for fighting words offenses. Thus, the number of cases at the appellate level likely drastically under-reflects the number of cases at the trial court level and even more so the number of arrests on fighting words–related charges.
The conclusion that designated fighting words laws are likely constitutional is a logical evolution of the current jurisprudential framework. By allowing certain words and symbols to be criminalized because of their track record for, and thus implied likelihood of, producing breaches of the peace when used as personalized insults, designated fighting words laws fit within the *R.A.V.* exception for content distinctions justified by "the very reason the entire class of speech at issue is proscribable." 85

Statutes designating particular fighting words need not replace traditional general breach of the peace statutes. Instead the approaches complement each other. For example, the Virginia cross burning law at issue in *Black* complements other state laws criminalizing threats more generally. Certain symbols or words likely to lead to breaches of the peace can be singled out as the epitome of fighting words when used in face-to-face confrontations, while others can be covered by more general statutes. So long as the rationale for singling out particular words or expressions as fighting words is not based on viewpoint discrimination, the singling out is constitutional. 86

2. Improving notice and clarity.

The designated fighting words approach parallels the cross burning law in *Black*; the designation makes clear that specific speech is banned when used as a personalized insult, while leaving whether the situation is in fact a fighting words situation up to a contextual analysis of the circumstances in which the speech is used. Thus, a designated fighting words law would substitute a rule (this particular word leads to breaches of the peace) combined with a standard (whether the speech is being used as a personalized insult in a confrontation) for what was previously a standard combined with a standard. 87

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85 *R.A.V.*, 505 US at 388.
86 See id at 390:

Indeed, to validate such selectivity (where totally proscribable speech is at issue) it may not even be necessary to identify any particular "neutral" basis, so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot. (We cannot think of any First Amendment interest that would stand in the way of a State's prohibiting only those obscene motion pictures with blue-eyed actresses.) Save for that limitation, the regulation of "fighting words," like the regulation of noisy speech, may address some offensive instances and leave other, equally offensive, instances alone.

general breach of the peace laws, law enforcement must determine both (1) if the language constituted fighting words, or an insult likely to provoke the average person to respond violently, and (2) if it was used as a personalized insult in a face-to-face confrontation allowing for immediate response. Law enforcement in effect has to evaluate each situation under two standards to determine if the speech was likely to provoke when used as a personal insult and if the situation was the type likely to foster breaches of the peace. Under a designated fighting words statute, the police need only evaluate the second prong, whether the circumstances constitute a fighting words situation, because the expression of speech is already declared by law to be fighting words when used in such situations. A designated fighting words law thus amounts to a presumption that the ordinary listener is likely to respond violently to that expression when the speech is used as a personalized insult in a confrontation.

This approach thus would increase the clarity and reduce the discretion inherent in the fighting words exception. As applied, the use of designated fighting words in a situation where there is both an insult to a particular person and a likelihood of violent response could lead to a criminal conviction or to civil liability. Designating fighting words could add clarity without sacrificing the case-by-case analysis integral to preserving the core of First Amendment protected speech. The same words would remain protected in non-fighting words situations to allow their use in general and in criticism of government policies, thereby protecting the expression of opinion in the marketplace of ideas.

degree of law-making at the point of application}). The fighting words doctrine is a particularly salient example of the tradeoff between increased flexibility and the potential for abuse of discretion inherent in standards.

By leaving the overarching breach of the peace laws in place, law enforcement would still be able to exercise discretion in both arenas when the person uses expressions of speech that are not designated but still fit within the modified Chaplinsky definition of fighting words. However, by providing a model for the type of language that could constitute fighting words, the designated fighting words statutes also guide law enforcement in exercising their discretion under general breach of the peace and disorderly conduct laws in determining what other language constitutes fighting words.

Such case-by-case analysis is necessary precisely because the same speech condemned in fighting words situations is otherwise protected by the First Amendment. This is the same point the Supreme Court acknowledged with regard to threats in Black, 538 US at 363, and the Seventh Circuit lamented with regard to fighting words in Church of the American Knights, 334 F3d at 684.

The marketplace of ideas endorsement in U.S. jurisprudence traces to Justice Holmes's famous dissent in Abrams v United States, 250 US 616 (1919): [W]hen 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 of ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market.
Clarity is needed because of the potential for abuse by law enforcement with too much discretion to arrest individuals based on speech. Police officers, in arresting for fighting words, must assess not only what the speech is but also the likely reaction to the speech. The Supreme Court analyzed this concern in *City of Houston v Hill,* in which it struck down a city ordinance making it unlawful to "oppose, molest, abuse or interrupt any policeman in the execution of his duty." The Court noted, "The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." The potential for abuse under the ordinance, which granted police almost unlimited power to arrest for speech, was evident to the Court: "The present type of ordinance tends to be invoked only where there is no other valid basis for arresting an objectionable or suspicious person." Because the person arrested for fighting words may be arrested for speech alone and because the line is often unclear between protected protest or criticism and unprotected

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91 See, for example, *Lewis v City of New Orleans,* 415 US 130, 136 (1974) (Powell concurring). For a discussion of the hazard of discretion in fighting words arrests, see Note, 106 Harv L Rev at 1144–45 (cited in note 11) (arguing that discretion invites abuse by law enforcement who might target minority groups and/or those who disrespect law enforcement and that the "danger is compounded by the fact that a disorderly conduct arrest often serves as punishment in and of itself, rather than as the first step in the criminal process"); Egan, Note, 52 Ark L Rev at 602–03 (cited in note 20):

> Without meaningful judicial restraint, it is left to the sole discretion of the police to determine whether language constitutes “fighting words” and is, therefore, punishable under the disorderly conduct statute. This lack of concrete guidance from the United States Supreme Court, coupled with the unbridled discretion of the police to make arrests under this subsection, is liable to have a chilling effect on speech. The statute, therefore, is likely to reach a substantial amount of constitutionally protected speech such that the statute is facially overbroad.


93 Id at 455, citing Code of Ordinances, City of Houston, Texas § 34-11(a) (1984).


95 Id at 466, quoting *Lewis,* 415 US at 135–36. The Supreme Court also recognized this potential for abuse in *Norwell v City of Cincinnati,* 414 US 14 (1973), in which it struck down the conviction of a man who was arrested for being "loud and boisterous" and "annoying" a police officer. Id at 16 (noting that the conviction might have been affirmed if the defendant used fighting words but finding that "petitioner was arrested and convicted merely because he verbally and negatively protested [the officer's] treatment of him").
fighting words, the potential for abuse in this situation justifies a re-
thinking of the fighting words framework.

Designated fighting words laws may clarify an otherwise murky
area of First Amendment law by listing specific words, symbols, or
gestures that would justify an arrest because of their potential to lead
to a breach of the peace. Providing specific fighting words, which when
directed at particular listeners clearly present a risk of violent re-
sponse, guides police officers in deciding when to arrest the speakers.
Even though general fighting words statutes would continue to exist,
designated fighting words laws would provide direction to officers
about which insults merit arrest. By providing a rule as well as a stan-
dard, designated fighting words laws would reduce law enforcement
discretion, and the potential for its abuse, as well as provide clearer
notice to speakers about what expressions of speech are proscribed as
fighting words.

3. Protection against societal violence.

A fighting words exception that includes certain designated fight-
ing words would continue to address the harm—breaches of the peace
and associated violence—that motivated the Supreme Court to with-
draw First Amendment protection for fighting words in Chaplinsky.86
Effectively, in the fight that breaks out, the words are the symbolic
first punch; the physical reaction may be merely an instinctive re-
sponse to the provocative insult.97 To prevent a fight, the Court de-
cided long ago that the state must be able to punish the speaker.98 Es-

86 See notes 16–20 and accompanying text. Implicit in this argument is the idea that insults
lead to breaches of the peace, and that such breaches of the peace are harmful to society, due to
their strong likelihood of accompanying violence. These ideas underlie the Supreme Court’s
decision in Chaplinsky. But they also reflect reality. See, for example, Rex W. Huppke and David
Heinzmann, Shoot-First Culture Stalks Streets of Murder Capital: Poverty, Value System Erosion
Spark Persistent Gang Violence, Chi Trib C1 (Feb 1, 2004) (“It’s an environment, experts say,
where social responses have literally been altered, where the logical reaction to some affront—
from an insult at a party to a wayward glance at a girl—is to pull a pistol from a waistband and
shoot.”).

87 See Greenawalt, 42 Rutgers L Rev at 292 (cited in note 12) (“[W]hen insults and epi-
thets are employed face-to-face, the analysis of their use becomes more complicated. Indeed, in
such encounters, abusive remarks often approach closer to action and may even amount to situa-
tion-altering utterances. At the extreme, social convention might establish that certain insults
invite or even ‘demand’ set responses.”); Thomas F. Shea, “Don’t Bother to Smile When You Call
Me That”—Fighting Words and the First Amendment, 63 Ky L J 1, 9 (1974–75) (stating that fight-
ing words are “not a form of communicative speech but rather a medium of something ap-
proaching a physical assault”).

88 Note that often the state punishes both the speaker and the hitter. However, if the
speech is considered analogous to the first punch thrown, thereby allowing its criminalization,
the second person to punch could be seen as merely acting in self-defense. One could imagine it
sentially, the insult must generate a "clear and present danger" of a violent response."

The vast majority of fights do not end up in an appellate court but break up on their own, are disposed of by law enforcement without an arrest, or are resolved in a municipal court. Thus the small number of cases found at the U.S. Supreme Court or even the state supreme or appellate courts represents only a fraction of a fraction of the cases in which the fighting words doctrine might apply. The known cases adequately represent neither the fighting words prosecutions in the state and municipal court systems nor the unknowable amount of provocative speech deterred by the potential for arrest.

When designating fighting words, a legislative body must show how certain words have caused breaches of the peace, relying on past experiences to single out particular words or symbols most likely to provoke such breaches. Thus, such a law would fall precisely within the exception laid out by the Court in R.A.V. As a ban focused on particular words or expressions is likely to be high profile, it has the potential for deterring even more violence by providing increased notice about the consequences of using fighting words, thereby reducing their use.

The entire rationale for the Supreme Court's embrace of the fighting words exception is the deterrence of breaches of the peace, and therefore designated fighting words laws should also be evaluated for their potential to deter additional violence without sacrificing additional speech. The Supreme Court itself has already balanced the value of fighting words as a category of speech and found its expressive value outweighed by the potential deterrent effect of reducing First Amendment protection of such words. Allowing certain words

like a conflict between children in the back seat of the car: the first person to physically hit effectively says to the Court, "Ma, he hit me first." The doctrine—going back to its dueling roots—supposes confrontations between equals. See Jeffrey Rosen, "Fighting Words": Where They Came From, How They Got Pummeled by the First Amendment, and Why the Fight Has Gone out of Them, 1 Legal Aff 16 (May/June 2002) ("Legal bans on fighting words grew out of 19th-century efforts to discourage the practice of dueling, and they evolved from a Southern culture of honor and hierarchy that's very different from modern American democracy."). See also Note, 106 Harv L Rev at 1132 (cited in note 11) ("The Chaplinsky 'breach of the peace' prong has evolved into a doctrine justified as a mechanism to curtail responsive violence rather than to purge discourse of uncivil words... Words are denied First Amendment protection when they function as 'triggers of action.'"). For an elucidation of "clear and present danger" in the incitement context, see Brandenburg v Ohio, 395 US 444, 447-48 (1969). At least one commentator has called for application of the clear and present danger test to fighting words. See generally Mannheimer, Note, 93 Colum L Rev 1527 (cited in note 20).

Such cases would be only those cases in which a defendant actually appeals on the issue of whether the general breach of the peace statute under which he is charged is unconstitutional, either facially or as applied. See notes 18-20 and accompanying text. The amount of deterrence obtained by having a fighting words exception is unclear. If the fighting words exception were abolished, it would take
to be designated fighting words would likely eliminate an unspecified additional number of breaches of the peace by providing notice that specific, highly provocative words could be criminalized, thereby deterring their use as well as the use of other fighting words by making more well-known the doctrine as a whole. Furthermore, designated fighting words laws would not increase the amount of unprotected or criminalized speech, as the words designated must, in essence, already be fighting words regulated by the general breach of the peace laws.

4. Addressing equality-based criticisms.

The designated fighting words approach also has the potential to address, although likely not eliminate, the concern raised by some critics that the fighting words doctrine as currently implemented in breach of the peace statutes focuses on a white, male conception of what would cause an objective person in the listener's situation to fight back. As the doctrine now stands, it perhaps ignores potential breaches of the peace by employing traditional conceptions of which insults would provoke which listeners into breaching the peace. The Court's rejection of the psychic harm component of the Chaplinsky test facilitates this traditional concentration, in effect allowing words that would otherwise be fighting words to be used with impunity if an average person like the listener is perceived as unlikely to breach the peace in response. By taking particular fighting words, and in effect declaring that anyone hearing those words as directed insults in a confrontation would presumptively respond by breaching the peace, the

with it not only criminal prosecution for the use of fighting words but also civil liability for intentional torts rooted in such speech. Such torts are permissible only when they fall within the fighting words exception outlined in Chaplinsky. See Richard A. Epstein, Torts § 1.7 at 17 (Aspen 1999). In addition, the tort system often views the harm from insulting words as de minimis so that no penalty attaches. Therefore, the tort system is perhaps less likely to deter such insults. For more on torts and First Amendment limitations, see generally Richard D. Bernstein, Note, First Amendment Limits on Tort Liability for Words Intended to Inflict Emotional Distress, 85 Colum L Rev 1749 (1985).

102 See notes 11-12. The doctrine, as applied, is designed to deter insults where the victim of the insult would likely respond violently but not where the victim of the insult is likely to be psychically harmed without actually throwing a punch in retaliation. The exact same remark or gesture can be punished when directed at one person, but not at another. Women, for example, are perceived in many instances as less likely to fight, and thus no word said to a woman might be considered a fighting word. See, for example, Conkle v State, 677 S2d 1211, 1217 (Ala Crim App 1995) (holding that whether harassment and verbal threats are actionable depends on the likelihood of the victim responding with violence). See also Kathleen M. Sullivan, The First Amendment Wars, New Republic 35, 40 (Sept 28, 1992) (“[I]t seems absurd to give more license to insult Mother Teresa than Sean Penn just because she is not likely to throw a punch. If we have to live with such an exception, shouldn't it at least be extended to words that cause flight or fright as well as fights?”); Reilly, Note, 52 Rutgers L Rev at 961-63 (cited in note 11); Randall L. Kennedy, The David C. Baum Lecture: “Nigger!” as a Problem in the Law, 2001 U Ill L Rev 935, 942-43.
designated fighting words law reduces the need to focus on the actual target of the fighting words; the expression of speech would be presumed to cause a breach of the peace in a fighting words situation no matter the race, sex, or age of the listener.

Whatever the origins of the fighting words doctrine,\textsuperscript{103} breaches of the peace of the type intended to be deterred by the fighting words exception now occur across society. For example, in Baltimore last year, an anger management class erupted into a melee, which began when a student’s mother confronted several girls.\textsuperscript{104} This incident is not atypical; violence among girls and women is growing.\textsuperscript{105} Incidents such as the deadly shootings at Columbine High School also suggest that those traditionally perceived as meek and able to be bullied also strike back if provoked.\textsuperscript{106} Thus, by focusing on the objective person in that situation, the fighting words exception as traditionally construed was underinclusive; it overlooked some of those who might actually respond violently to fighting words. By designating particular fighting words, and presuming that most or all of the public will respond to those with breaches of the peace, the designated fighting words laws would eliminate this undercount and address those who use fighting words against those once assumed never to respond violently.

On the other hand, the increasing perception that everyone has the potential to be violent in some circumstances, reinforced by the daily news, makes it more likely that the average person, whatever that person’s sex, race, or other characteristics, will be seen as likely to breach the peace. As that occurs, the fighting words doctrine expands to protect more people from insults likely to provoke an immediate breach of the peace.\textsuperscript{107} The designated fighting words laws could fur-
ther that protection by designating particular expressions that are offensive to most but most offensive to some as automatically likely to lead to a breach of the peace. Thus, particular symbols that are most offensive to those perceived as less likely to breach the peace but offensive to most, many of whom would breach the peace, could be designated fighting words under the Court’s formulation as laid out in *R.A.V.* and *Black*.

Furthermore, the designation of particular fighting words with gendered or racial connotations might increase societal recognition that such words cause psychic harm in addition to breaches of the peace. That rationale underlies laws such as the Virginia cross burning law at issue in *Black* and other hate speech laws and would extend to, for example, the designation of “nigger” as a fighting word. Official disapproval of the speech, even if not a proxy for suppression of any idea since the expression would still be usable in other non-fighting words situations, could have incidental beneficial effects. In particular, the designation could express society’s condemnation of a particular word or expression, which may have the dual effect of making it more powerful when actually used but also more universally rejected so as to decrease its use. This would in effect address the psychic harm that the Supreme Court was concerned with in *Chaplinsky*, without having to delve into the actual harm caused to listeners.

B. Potential Concerns Stemming from the Designated Fighting Words Approach

Despite the potential advantages discussed in Part IV.A, the designated fighting words proposal also raises certain troubling concerns related to speech and institutional competence, which are outlined in this Part. In particular, any list of designated fighting words would be questionable at best, courts and legislatures would still exercise massive amounts of discretion in deciding when an expression of speech should fall at the heart of the fighting words exception, and any such list is likely to have a chilling effect on protected as well as unprotected speech.

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1. Parsing linguistic realities.

No clear list of fighting words exists, and while one could be formulated, it would remain constantly under debate as language evolves and as the composition of legislatures or city councils evolves. It is hard to imagine a panel of dictionary editors, let alone a state legislature or city council, creating a true list of the words at the heart of the fighting words exception. Any such list runs the risk of being drastically overinclusive. When the Supreme Court considered during the oral argument in Black whether cross burning with intent to intimidate could be singled out for criminalization, Justice Ginsburg questioned whether cross burning was unique or whether the state could also ban the white robes that symbolize the Ku Klux Klan. No clear limits appear to exist, leaving the designation of fighting words, like threats, up to the legislature and the findings of a judge or panel of judges as to whether a particular word or phrase is sufficiently likely to provoke breaches of the peace when used as a personalized insult.

Furthermore, the list approach does not take into account the highly situational aspect of fighting words: whether any particular word or symbol is likely to lead a reasonable person to fight back and breach the peace may in fact be completely subjective—despite the fighting words doctrine's partially objective, reasonable-person-in-that-situation standard. As a result, any such designation would still require case-by-case analysis to see if this use of the designated fighting word would fit within the exception because it took place in a situation meriting the lack of constitutional protection. As discussed in Part IV.A.2, the designated fighting words approach allows a rule (the speech is criminal) and a standard (in certain situations) to replace two standards; nevertheless, the clarity of the rule can be swallowed whole by the need to define what constitutes a fighting words situation, when the speech is used as a personalized insult in a confrontational situation.

109 See, for example, Rosen, “Fighting Words,” 1 Legal Aff at 18 (cited in note 99) (arguing that no such consensus existed even by the 1940s, and that “it was hardly obvious even in the middle of World War II that being called a ‘damned Fascist’ would have provoked an average man to a fistfight”).

110 With trademarks, a federal agency exists to determine whether a mark has acquired a secondary meaning such that it could be registered. In the realm of obscenity law, legislators make such lists. See Miller v California, 413 US 15, 23–24 (1973). However, such lists, while a necessary part of any ban on obscenity, are often criticized for either providing a roadmap for evasion or in the alternative remaining a vague means of criminalizing speech.

111 Transcript of Oral Argument, Virginia v Black at *14 (cited in note 66).

112 See note 20 and accompanying text.
The impact of such a designation is complicated by the fact that in non-fighting words situations, the words or expressions remain constitutionally protected.113 Therefore, the words are not excised from common parlance, allowing language to continue evolving rather than crystallizing it at one point in time. Using a designated fighting word in a speech in an auditorium, for example, would be akin to burning a cross in celebration of a Ku Klux Klan leader's birthday—neither could be criminalized and both even may become more powerful symbolically by their express condemnation in designated fighting words or threats statutes.114 The powerfulness of symbols or expressions of speech could be an undesirable result of their designation as a threat or fighting word, since society likely is not bettered if their designation as prohibited increases their potency.

On the other hand, legislatures could show restraint and only designate symbols that are already so powerful that not even official condemnation could make them more powerful. Courts are unlikely to find sufficient history to uphold other designations. In addition, historically, some of the United States' most powerful efforts for change depended on symbolic speech or conduct made more powerful by its illegality—burning draft cards during the Vietnam era, sitting in at lunch counters to protest segregation. To the extent that the meaning of any symbol can evolve, the symbol can be claimed and used by others. If the use of such symbolic speech falls into a tradition of civil disobedience, it could provide a check on government suppression of ideas and strengthen the underpinnings of the First Amendment by protecting even abhorrent ideas. The complexities and implications for language of designating fighting words thus present a challenge to legislators attempting to pass such laws.

2. The potential for viewpoint discrimination.

Furthermore, the declaration that certain words or symbols are per se fighting words could be—whether the courts recognize it or not—viewpoint discrimination. This is the Court's expressed fear in Cohen.115 As Justice Souter observed in his opinion in Black, the problem with selecting certain symbols for condemnation is that the selec-

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113 For an example of this reasoning, see the discussion of Cohen at notes 21–27 and accompanying text.

114 This is precisely why civil disobedience is powerful—the willingness to break a law peaceably to prove a point. In United States v O'Brien, 391 US 367 (1967), the very lawlessness of burning a draft card made it a powerful statement. Id at 369.

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tion could in effect discriminate by viewpoint.\(^\text{116}\) This is precisely the approach \textit{R.A.V.} rejected, where a more general law was specifically tagged to certain subject matters as opposed to certain symbols or words.\(^\text{117}\) A designated fighting words approach may allow the state to appear to be choosing a symbol for legitimate reasons, when in fact it is engaging in viewpoint discrimination.\(^\text{118}\)

In the past, the Court has analogized generalized bans on fighting words to content-neutral speech restrictions:

Fighting words are thus analogous to a noisy sound truck: Each is, as Justice Frankfurter recognized, a “mode of speech”; both can be used to convey an idea; but neither has, in and of itself, a claim upon the First Amendment. 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.\(^\text{119}\)

However, where a particular word or symbol is singled out, it is less clear that the analogy is apt.

3. The risk of a chilling effect.

Finally, to choose some words or symbols as designated fighting words would have a chilling effect on their use in other situations, where they are protected by the First Amendment.\(^\text{120}\) This is especially troubling because the words and symbols at issue would likely have emotive content not easily duplicable by other words: “We cannot sanction the view that the Constitution, while solicitous of the cogni-

\(^{116}\) 538 US at 381 (Souter concurring in part and dissenting in part) (“Although the Virginia statute at issue here contains no such express ‘basis of’ limitation on prohibited subject matter, the specific prohibition of cross burning with the intent to intimidate selects a symbol with particular content from the field of all proscribable expression meant to intimidate.”).

\(^{117}\) 505 US at 394 (“Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas.”). This was in fact the basis for the Virginia Supreme Court’s opinion striking down the cross burning law. See \textit{Black v Commonwealth}, 262 Va 764, 553 SE2d 738, 746 (2001).

\(^{118}\) \textit{Black}, 538 US at 383 (Souter concurring in part and dissenting in part): The cross may have been selected because of its special power to threaten, but it also may have been singled out because of the disapproval of its message of white supremacy, either because a legislature thought white supremacy was a pernicious doctrine or because it found that dramatic, public espousal of it was a civic embarrassment. See also \textit{Cohen}, 403 US at 26 (“[G]overnments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.”).


\(^{120}\) See, for example, \textit{Kennedy}, 2001 U Ill L Rev at 935–37 (cited in note 102) (noting that the word “nigger” can be both an insult and a sign of respect depending on how it is used and by whom).
tive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.\textsuperscript{121} This is more troubling when combined with the argument that the choice of symbols may result in de facto viewpoint discrimination, for it suggests that one side of a debate might be allowed to make more emotionally rich, powerful arguments than another.

In a fighting words situation, where the speaker is face-to-face with the target of the speech in a situation likely to lead to a breach of the peace, the viewpoint may be conveyed with another expression, just not another expression of speech likely to cause the objective person in that situation to fight back.\textsuperscript{122} For example, in a situation where a striking union member insults a person crossing the picket line, the insult—or perhaps even a threat to harm him later—could be considered a fighting word,\textsuperscript{123} but a striker's pro-union speech about the value of the strike remains protected. Nevertheless, a law banning certain speech in such circumstances may have a chilling effect on certain speakers.

\section*{CONCLUSION}

While the proper scope of the fighting words exception has been debated since \textit{Chaplinsky}, this Comment argues that Supreme Court jurisprudence has evolved such that a statute or ordinance designating particular fighting words or symbols is likely constitutional. Legislative bodies can designate as per se fighting words particular words and symbols that are most likely to lead to breaches of the peace, criminalizing their use as personal insults in confrontations where a breach of the peace is possible. Such an approach would be constitutional because it falls within the jurisprudence laid out by the Supreme Court in \textit{R.A.V.} and built upon in \textit{Black}.

\begin{itemize}
\item[\textsuperscript{121}] \textit{Cohen}, 403 US at 26. See also \textit{R.A.V.}, 505 US at 393 ("It is obvious that the symbols which will arouse 'anger, alarm or resentment in others on the basis of race, color, creed, religion or gender' are those symbols that communicate a message of hostility based on one of these characteristics.").
\item[\textsuperscript{122}] There may be some situations where any expression of a particular viewpoint would spark a violent response. For example, if the speaker used the word "motherfucker" and meant it literally or even figuratively, then likely it would be hard to rephrase the sentiment with language unemotional enough to avoid the fight. Nevertheless, the Supreme Court in balancing the value of First Amendment protection of such speech in fighting words situations versus the potential for breaches of the peace has in effect held that when there was an imminent likelihood of a violent response from a particular listener, such silencing is constitutionally permissible. This may be part of the reason why the line is drawn so clearly between individualized and group situations in \textit{Cohen}. See note 26 and accompanying text.
\item[\textsuperscript{123}] See \textit{People v Prisinzano}, 170 Misc 2d 525, 648 NYS2d 267, 271–75 (NY City Crim Ct 1996).
\end{itemize}
This Comment also identifies the potential advantages of a designated fighting words approach. By designating certain speech as fighting words, such laws would facilitate prosecutions for the worst of society's insults when used in fighting words situations, furthering the goal identified in *Chaplinsky* of avoiding breaches of the peace, perhaps without sacrificing the flexibility and case-by-case analysis necessary to safeguard speech protected by the First Amendment. In addition, by allowing the designation of particular expressions of speech that are most offensive to one group within society, while offensive to a larger swath of society, such laws might better address the reality of a diverse society and the other, non-breaches of the peace harms of such speech. Nevertheless, this Comment also points to the risks of such an approach, including the possibility of viewpoint discrimination in the choice of expressions of speech to be designated and the potential for a chilling effect on speech intended to be protected by the First Amendment.

However the harms and benefits of such an approach balance out, the mere likelihood that a law designating a particular offensive word or symbol as a type of per se fighting word is constitutional illustrates the direction in which the Supreme Court jurisprudence is moving. Given that the constitutionality of a law banning a particular expression of speech was unthinkable to the Supreme Court in *Cohen*, the fact that such a law is likely constitutional under the *R.A.V.-Black* framework demonstrates a significant shift in First Amendment jurisprudence.