Arrested for Swearing: Why Minnesota Needs to Redefine Disorderly Conduct

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An Honors Thesis
Submitted for partial fulfillment of the requirements
for graduation with honors in Legal Studies
from Hamline University

04/17/09

On Saturday afternoon five boys went to their local public library to read and request books. The boys were well-behaved and quiet, but within minutes of arriving the boys were arrested for "breaching the peace."[1] The boys, unable to pay the small fines, were sentenced to jail time.[2] This would not have occurred had the boys been white; their punishment grew out of law enforcement's desire to maintain racial segregation.[3] The boys desired to check out The Story of the Negro, but were told they would need to pick up the book at the "Negro only" bookmobile- they were not welcome at the library.[4] This injustice occurred as President Lyndon Johnson signed the Civil Rights Act into law.[5] Now, over forty years later, some state disorderly conduct statutes have still not been amended to reflect evolving societal values and constitutional rights.[6]

While the U.S. Supreme Court recognized the flaws in the Louisiana disorderly conduct statute, and ultimately reversed the boys' sentence,[7] the Supreme Court cannot protect citizens' constitutional rights in every instance. It must also be acknowledged that the nature of vague statutes dealing with First Amendment issues are often overbroad too,

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[1] Brown v. Louisiana, 383 U.S. 131, 137(1966).
[2] La Rev. Stat. § 14:103:1 (Cum. Supp. 1962) *repealed by* 1976, La. Acts 489, § 1. Mr. Brown was sentenced to pay $150, but in default sentenced to spend 90 days in jail. The other four boys were sentenced to $35 "and costs" or 15 days in jail. Brown, 383 U.S. at 137-138.
[3] Four state convictions of Louisiana's breach of the peace statute were reversed by the U.S. Supreme Court from 1961-1966. *See* Garner v. Louisiana, 368 U.S. 157 (1961) (sit-ins at lunch counters), Taylor v. Louisiana, 370 U.S. 154 (1962) (sit-in in a waiting room at a bus depot); Cox v. Louisiana, 379 U.S. 536 (1965) (involving a civil rights leader who demonstrated in the vicinity of a courthouse and jail to protest the arrest of fellow demonstrators); Brown, 383 U.S. at 133.
[4] *Id*. The sit-in by the boys was organized in advance, and the arresting officer was aware of the plan, and arrived at the library shortly after the boys to ask them to leave. The boys were not making any disturbance and no one else in the library was bothered enough by their presence to alert law enforcement. This example illustrates the absurdity of the disorderly conduct justification and the broad scope available to law enforcement to practice discriminatory enforcement.
[5] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C. and 42 U.S.C.).
[6] Compare, for example, Mass. Gen Laws ch 272, § 53 with *infra* note 26.
[7] Brown, 383 U.S. at 143.

causing people to abstain from otherwise constitutionally protected activity.[8] Of those charged under these statutes, not all speak loudly enough for the courts to hear. Although most disorderly conduct offenses are misdemeanors, such a charge can have detrimental effects on a person's life.[9]

The definition and scope of disorderly conduct statutes are shaped by Supreme Court and respective state court decisions evaluating statutory constitutionality in areas of speech proscription. Due to their broad scope and generalized language, disorderly conduct statutes can effectively silence free speech and permit discriminatory enforcement.[10] Used as a "catch-all" offense, disorderly conduct statutes afford broad discretion to law enforcement, creating opportunities for unequal application of the law.[11]

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[8] In re S.L.J., 263 N.W.2d 412, 417 (Minn. 1978) ("Although the overbreadth and vagueness doctrines are conceptually distinct, in the First Amendment context they tend to overlap, since statutes are often overly broad because their language is vague as to what behavior is proscribed") (citing Lewis v. City of New Orleans, 415 U.S. 130 (1974) and Karlan v. City of Cincinnati, 416 U.S. 924, 928 (1974)).

[9] The recent case of Senator Larry Craig serves as a modern example of disorderly conduct's application as a catch-all statute. Senator Larry Craig entered a guilty plea under Minnesota's disorderly conduct statute for "(1) put[ting] a duffel bag at the front of his stall; (2) peer[ing] through a crack into an adjoining stall; (3) tapp[ing] his foot; (4) mov[ing] his shoe over until it touched an officer's." State v. Craig, No. 27CR07-043231, 2007 WL 2892651 (Minn. Dist. Ct. 2007) (Trial Order). Craig was charged under Minn. Stat. § 609.72 which provides "Whoever does any of the following in a public or private place, including on a school bus, knowing, or having reasonable grounds to know that it will, or will tend to, alarm, anger or disturb others or provoke an assault or breach of the peace, is guilty of disorderly conduct, which is a misdemeanor…Engages in offensive, obscene, abusive, boisterous, or noisy conduct or in offensive, obscene, or abusive language tending reasonably to arouse alarm, anger, or resentment in others." The court stated that Craig's actions would tend to disturb a person of "normal sensibilities." Craig's petition to withdraw his guilty plea was denied in Craig v. State, No. A07-1949, 2008 WL 5136170 (Minn. Ct. App. 2008). It could be argued that in Senator Craig's case, since there was no clear evidence to convict him of sexually related crimes, disorderly conduct charges were brought as a last resort for his socially unacceptable behavior. The argument could also be made that Senator Craig should be punished for his behavior, and any attempt to tighten the reigns on a statute used as a "catch all" for law enforcement could result in the degradation of a safe society. See generally Com. v. Swan, 897 N.E.2d 1015 (Mass. Ct. App. 2008) (discussing whether a bathroom is considered a public place as an element of disorderly conduct).

[10] Smith v. Goguen, 415 U.S. 566, 573 (1974) (The void-for-vagueness doctrine "requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement.'") (quoting Grayned v. City of Rockford, 408 U.S. 104, 108 (1972)).

[11] United States v. Reese, 92 U.S. 214, 221 (1865) ("It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large").

This paper examines the development of disorderly conduct statutes and case law in the face of free speech and due process challenges.

A majority of state supreme courts have declared that, as written, their state disorderly conduct statutes are unconstitutional. There is some existing scholarship on the Supreme Court "fighting words" doctrine,[12] addressing specific state statutory issues regarding disorderly conduct. Existing scholarship is usually only applicable to that specific state covered; there are no articles that consider states' statutes and the trends among them.[13] Based on the current wording of each states' disorderly conduct statutes, this articles groups states into three different categories: 1) states like Minnesota that have not legislatively amended their statutes, 2) states that have legislatively amended their statutes to include a "fighting words" definition, and 3) states that have repealed the portions of the statute proscribing speech.

Parts I and II provide necessary background information about the First Amendment and the development of the fighting words doctrine. Part III begins by discussing states like Minnesota that have judicially construed, but not legislatively amended, their statute to fit the Supreme Court's category of unprotected speech known as "fighting words." The judicial construction practiced by states like Minnesota has been

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[12] *See, e.g.,* Aviva O. Wertheimer, The First Amendment Distinction between Conduct and Content: A Conceptual Framework for Understanding Fighting Words Jurisprudence, 63 Fordham L. Rev. 793 (1994); Linda Friedlieb, The Epitome of an Insult: A Constitutional Approach to Designated Fighting Words, 72 U. Chi. L. Rev. 385 (2005) and Burton Caine, The Trouble with "Fighting Words": *Chaplinsky v. New Hampshire* is a Threat to First Amendment Values and should be Overruled, 88 Marq. L. Rev. 441 (2004).

[13] *See, e.g.,* Thomas M. Place, Offensive Speech and the Pennsylvania Disorderly Conduct Statute, 12 Temp. Pol. & Civ. Rts. L. Rev. 47(2002) (discussing recent disorderly conduct challenges in Pennsylvania courts); Dawn C. Egan, 'Fighting Words' Doctrine: Are Police Officers Held to a Higher Standard, or per *Bailey v. State*, Do We Expect No More From our Law Enforcement Than we do from the Average Arkansan? 52 Ark. L. Rev. 591 (1999).

condoned by the Supreme Court as an adequate means to fix any unconstitutionality.[14] Unfortunately, such restrictions can have limited impact when not properly conveyed to citizens, judges, and law enforcement. The effects of judicial construction without changes to the actual statute often don't make it past the courthouse, leaving the public unaware that the statute has been altered.[15]

The second option is to adopt fighting words language in the statute: an improvement upon no amendment, but as further discussed in Part III, this is not the best possible amendment due to the evolving nature of "fighting words." Part III then discusses the states that legislatively amend statutory language to match the definition of "fighting words." This approach removes issues of facial unconstitutionality due to free speech concerns and provides a clear definition to the public and peace officers.[16] Part IV argues that the best approach to narrowing the application of overbroad disorderly conduct statutes is to repeal any sections proscribing speech. Specifically, in the context of Minnesota's disorderly conduct law, this article advocates for the removal prohibition of Minn.Stat. § 609.72, subd. 1(3).[17]

I. Constitutional Analysis of Disorderly Conduct

While disorderly conduct may not seem a relevant statute, the effects of First Amendment infringement and broad police discretion are unacceptable. This paper

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[14] S.L.J., 263 N.W.2d at 419 (citing Rosenfeld v. New Jersey, 408 U.S. 901 (1972); Brown v. Oklahoma, 408 U.S. 914 (1972); Lewis v. City of New Orleans, 408 U.S. 913 (1972) "and on the basis of its later decision in Lewis, it remanded" Lucas v. Arkansas, 416 U.S. 919 (1974); Kelly v. Ohio, 416 U.S. 923 (1974); Rosen v. California, 416 U.S. 924 (1974); Karlan v. City of Cincinnati, 416 U.S. 924 (1974)).
[15] *See infra*, note 160 and accompanying text.
[16] *See* State v. Indrisano, 640 A.2d 986 (Conn. 1994) (citing Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-99, *reh. denied*, 456 U.S. 950 (1982)) (stating disorderly conduct statutes only prohibiting physical violence and physically threatening behavior avoid First Amendment difficulties).
[17] Prohibiting "offensive, obscene, abusive, boisterous, or noisy conduct or in offensive, obscene, or abusive language tending reasonably to arouse alarm, anger, or resentment in others"

begins by providing an overview of the statutory history and relevant U.S. Supreme Court doctrines used to judge disorderly conduct statutes, including the void-for-vagueness doctrine, "overbreadth," and the development of the "fighting words" exception to free speech.[18] In attempting to curb discriminatory practices and to protect vibrant public discourse, the U.S. Supreme Court has ordered that disorderly conduct statutes can only prohibit certain classes of language deemed outside the scope of First Amendment protection.[19] Stifled public discourse can harm a healthy democracy, and overly vague statutes both fail to provide citizens notice as what conduct is prohibited and allow for discriminatory enforcement.[20]

Violation of these constitutional principles gives law enforcement broad discretion and responsibility for discriminatory enforcement. The Supreme Court has constructed the "fighting words" doctrine to attempt to draw a line between what is considered protected and unprotected speech.[21] Ideally, statutes with clear guidelines of what constitutes the offense provide less discretion to police officers and greater protection of citizens' constitutional rights.[22]

A. Disorderly Conduct's Historical Development

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[18] The distinctions between overbreadth and vagueness are irrelevant for the purposes of this paper. For greater discussion of the distinctions of these doctrines and their due process and First Amendment implications *see* Richard H. Fallon, Making Sense of Overbreadth, 100 Yale L.J. 853, 904-05 (1991).
[19] Gertz v. Robert Welch, Inc, 418 U.S. 323 (1974) (libel); Roth v. United States, 354 U.S. 476 (1957) (obscenity); Chaplinsky v. New Hampshire 315 U.S. 568 (1942) (fighting words).
[20] *See, e.g.*, Stromberg v. People of State of Cal., 283 U.S. 359, 369 (1931) ("The maintenance of the opportunity for free political discussion essential to the security of the Republic is a fundamental principle of our constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment").
[21] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). The U.S. Supreme Court adopted the New Hampshire Supreme Court's definition of "fighting words" used to judicially narrow an overbroad disorderly conduct statute in State v. Chaplinsky, 18 A.2d 754 (N.H. 1941).
[22] *See generally* Anthony B. Amsterdam, The Void-for-Vagueness Doctrine, 109 U of Pa L. Rev. 67(1960).

In order to understand the issues surrounding disorderly conduct and Supreme Court doctrines it is necessary to examine the history of the offense and relevant Supreme Court doctrines interpreting sometimes archaic state statutes. Disorderly conduct has roots in English common law offense of "breach of the peace." In the English Common law offense of breaching the peace included fighting in public "to the terror of his majesty's subjects."[23] Many "breach of the peace" statutes are similar to vagrancy statutes, which took effect following the breakdown of the feudal system.[24] Early American colonial laws reflected prevailing British laws,[25] some language of which remains today.[26] The offense of disorderly conduct encompasses "breach of the peace," sometimes including additional conduct prohibitions against disobeying an officer,[27] wearing a mask,[28] and creating "noxious odors." Disorderly conduct statutes also proscribe speech including "abusive," "insulting," "offensive," "obscene," "opprobrious, "profane," "threatening," and "vulgar" speech.[29] Early versions of disorderly conduct prohibited, for example:

> Rogues and vagabonds, persons who use any juggling or unlawful games or plays, common pipers, and fiddlers, stubborn children, runaways, common drunkards, common nightwalkers, both male and female, persons who with offensive or disorderly act or language accost or annoy in public places persons of the opposite sex, pilferers, lewd, wanton and lascivious persons in speech or behavior, common railers and brawlers, persons who

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[23] People v. Perry, 193 N.E. 175 (N.Y. Ct. App. 1934) (citing 1 Bishop Crim. Law (8th Ed.), 329).
[24] *See* Atwater v. City of Lago Vista, 532 U.S. 318 (2001).
[25] *Id.* (citing Colonial Laws of Massachusetts 139 (1889) (1646 Act) ("such as are overtaken with drink, swearing, Sabbath breaking, Lying, vagrant persons, [and] night-walkers")).
[26] *Supra* note 5.
[27] *See, e.g.,* Ark. Code Ann. § 5-71-207(a)(1-3).
[28] *See, e.g.,* Del. Code Ann. tit. 11, § 1301(g).
[29] See *infra* pp. 13-25 discussing the adoption of the Model Penal Code in 1962 by many states, bringing some degree of uniformity to these statutes. As First Amendment boundaries were further defined by the U.S. Supreme Court, states were forced to take judicial or legislative action to alter the scope of the model code's disorderly conduct definition.

> neglect their calling or employment or who misspend what they earn and do not provide for themselves, and all other idle and disorderly persons including therein those persons who neglect all lawful business and habitually misspend their time by frequenting houses of ill fame, gaming houses or tippling shops [30]

Over time, the U.S. Supreme court has made landmark decisions affirming rights of marginalized groups and defining the scope of constitutional speech. Persons charged under these laws often did not seek redress due to the financial burden of legal representation.[31] However, following the 1963 *Gideon v. Wainwright* decision, and the new rights of indigents to public defense, more people had access to lawyers and were able to challenge the validity of disorderly conduct statutes.[32] The pressure of challenges and the evolving nature of First Amendment jurisprudence led to the amendment of many statutes. Most of these statutes were argued unconstitutional under the Supreme Court doctrines of judicial review, "overbreadth" and "vagueness."

B. Void-for-vagueness and Overbreadth

The Supreme Court does not allow a statute to stand if it is too broad or vague, having the effect of limiting even protected speech because citizens wish to avoid possible penalties. One of the checks on legislative power is the doctrine of judicial review.[33] While the courts cannot legislate, they have the power to declare a statute unenforceable if it violates the Constitution. Most constitutional challenges to disorderly conduct laws allege violation of First Amendment rights. The nature of speech as a

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[30] Mass. Gen Laws ch. 272, § 53 (while the effective date of the statute is unclear, it was first substantially amended in 1943).
[31] 372 U.S. 335, 339-40 (1963).
[32] *See* Gideon v. Wainwright, 372 U.S. 335 (1963) and Argersinger v. Hamlin, 407 U.S 25 (1972). See also Vanessa Wheeler, Discrimination Lurking on the Books: Examining the Constitutionality of the Minneapolis Lurking Ordinance, 26 Law & Ineq. 467 (2008) (challenges to vagrancy laws began to gain momentum following the availability of legal assistance to indigents) (citing Joel D. Berg, The Troubled Constitutionality of Antigang Loitering Laws, 69 Chi.-Kent L. Rev. 461, 464 (1993)).
[33] *See, e.g.*, Marbury v. Madison, 5 U.S. 137 (1803).

protected category affords prohibitions on speech a higher level of scrutiny than conduct, although disorderly conduct statutes often contain both conduct and speech prohibitions.[34] For example, many state statutes include conduct prohibitions of physical fights in public or obstructing traffic, as well as speech prohibitions against language that is considered "annoying or derisive."[35] Persons charged with disorderly conduct can challenge the constitutionality of it even if their speech or conduct is clearly unprotected,[36] ensuring that overbroad statutes are properly scrutinized, as "persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression."[37]

The U.S. Supreme Court has used doctrines derived from the bill of rights to strike down overbroad disorderly conduct laws. The First Amendment provides "Congress shall make no law…abridging the freedom of speech."[38] The Supreme Court claims the duty to ensure that legislation does not inhibit constitutionally protected rights, acknowledging that first amendment rights are so fundamental to a free society they

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[34] Fallon, *supra* note 8, at 853 ("strict equal protection scrutiny, triggered when a governmental classification impinges on an interest judged to be 'fundamental,' appears quite similar to review for first amendment overbreadth…The 'compelling state interest' test that is applied to content-based regulation of fully protected speech is a balancing test of a kind, but is generally not so labeled, due to the heavy presumption that regulation is impermissible. A different, more lenient test, commonly described as 'balancing' applies when government regulates on a content-neutral basis to promote interests that are unrelated to the message of regulated speech.") (citations omitted).
[35] *See, e.g.*, Minn. Stat § 609.72.
[36] Gooding v. Wilson, 405 U.S. 518, 521(1972) ("although a statute may be neither vague, overbroad, nor otherwise invalid as applied to the conduct charged against a particular defendant, he is permitted to raise its vagueness or unconstitutional overbreadth as applied to others") (citing Coates v. City of Cincinnati, 402 U.S. 611, 619-20 (1971). *See also* Walker v. City of Birmingham, 388 U.S. 307, 344-345 (1967) (" the court has modified traditional roles of standing and prematurity" in order to "insulate all individuals from the 'chilling effect' upon exercise of First Amendment freedoms generated by…overbreadth").
[37] Gooding, 405 U.S. at 521.
[38] U.S. Const. Amend. I (applied to state legislation by U.S. Const. Amend. XIV).

deserve an especially high degree of judicial protection.[39] When considering legislation prohibiting the content of speech, the court applies strict scrutiny standards, requiring a "compelling government interest" to proscribe speech.[40] Such legislation must be "narrowly tailored" to meet the government interest, as stated here: "'First amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity'"[41] These ideas have developed over the past century, and the court has used the doctrines of overbreadth and the void-for-vagueness to invalidate statutes contrary to these core beliefs.

Overbreadth and vagueness create constitutional problems because they infringe on protected speech, and also because they violate due process, not giving citizens notice of what is and is not prohibited. While the void-for-vagueness and overbreadth doctrines are distinct, in the context of first amendment challenges, they are indistinguishable.[42] Overbreadth refers to the scope of a statute,[43] while vagueness refers to the statutory definition of the offense.

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[39] United States v. Carolene Products, 304 U.S. 144, note 4(1938) (Preferred Freedoms Doctrine)
[40] *See supra* note 36.
[41] Gooding, 405 U.S. at 522. *See also* Shelton v. Tucker, 364 U.S. 479, 488 (1960) ("purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose").
[42] *See* R.A. Collings, Jr., Unconstitutional Uncertainty—An Appraisal, 40 Cornell L.Q. 195, 215-219 (1955) (a number of commentators have argued that vague statutes in the area of the First Amendment "suffer the vices of overbreadth" and "an actor wishing to engage in privileged activity is inhibited by the doubt as to his immunity from statutory burdens"). *See also* Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, note 5 ("the objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application.") (citing Amsterdam, *supra* note 16).
[43] Thornhill v. Alabama, 310 U.S. 88, 97 (1940) (Murphy, J.) ("there is a 'pervasive threat inherent in [the] very existence' of a statute 'which does not aim specifically at evils within the allowable area of state control but…sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech") (citations omitted).

Vague laws have been deemed unconstitutional by the Supreme Court for two main reasons. The first is that statutes should "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited."[44] If a law is written so vaguely that persons do not know what they can and cannot lawfully do or say, the statute violates the due process clause. Law enforcement must also have explicit guidelines to enforce the statute, as broad discretion[45] can lead to discriminatory enforcement. [46]

Vague and overbroad laws have a "chilling effect" on speech, or potentially silence otherwise protected speech due to the impression that it is prohibited.[47] Broad, sweeping laws related to speech can be construed by the court to only apply in narrow circumstances. Laws dealing with speech may prohibit the lawful exercise of first amendment rights if the boundaries of the law are not clearly defined.[48] If a statute, as written, appears to encompass a wide variety of speech, citizens may censor their rhetoric to steer clear of disorderly conduct, even though the speech may be sacred under the First Amendment. In First Amendment cases, the doctrines of overbreadth and vagueness overlap, with an overbroad statute deterring the rights of free speech by unnecessarily punishing constitutionally protected activities along with unprotected activity.[49]

Statutes must provide clear guidelines to law enforcement to avoid discriminatory tendencies in statutory application. A vague law, with no clear guidelines, leaves the

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[44] *See, e.g.*, Connally v. General Const. Co., 269 U.S. 385, 391 (1926) (vague laws may "trap the innocent by not providing fair warning").
[45] *Contra* Debra Livingston, Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing, 97 Colum. L. Rev. 551 (April, 1997) (arguing that law enforcement needs more discretion in order to engage communities).
[46] Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries on an ad hoc and subjective basis, with the attendant dangers of discriminatory application").
[47] *See, e.g.*, Zwickler v. Koota, 389 U.S. 241, 249 (1967).
[48] Grayned, 408 U.S. at 108.
[49] *Id.*

public at the mercy of the "personal predilections" of "policemen, prosecutors and juries."[50] The Supreme Court has ruled that criminal statutes must establish guidelines to govern law enforcement so that it is not discriminatory and arbitrary.[51] The Court stated that the Constitution does not permit states to use criminal laws that "set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large."[52] Unfettered police discretion takes lawmaking out of the hands of the legislature, becoming dependent on the "moment to moment judgment of the policeman on his beat."[53] Rather, states are required to establish minimum guidelines to "govern law enforcement" to prevent "arbitrary and discriminatory enforcement" of the law. [54]

The U.S. Supreme Court has been reluctant to declare many statutes unconstitutional, instead encouraging state courts to develop narrower guidelines. Because invalidating state statutes under the overbreadth doctrine is considered "strong medicine" for ill-written statutes,[55] courts reluctantly do so and often opt to define speech in terms of expressive conduct, which under other circumstances may be considered symbolic speech, is considered a purely physical act, not protected by the

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[50] *See* Gregory v. City of Chicago, 394 U.S. 111, 120 (1969) (Black, J., concurring) ("lawmaking should not be entrusted to the moment-to-moment judgment of the policeman on his beat.") and Cantwell v. Connecticut, 310 U.S. 296, 308 (1940) ("we have a situation analogous to a conviction under a statute sweeping in great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application") (Robert, J).

[51] *See* City of Chicago v. Morales, 527 U.S. 41, 51 (1999) (citing Kolender v. Lawson, 461 U.S. 357 (1983)).

[52] United States v. Reese, 92 U.S. 214, 221 (1876).

[53] Lewis v. City of New Orleans, 415 U.S. 130, 135 (1974) (Powell, J., concurring) ("confers on police a virtually unrestrained power to arrest and charge persons with a violation").

[54] Kolender v. Lawson, 461 U.S. at 358 (law requiring "credible and reliable identification" struck down due to the reliance on full police discretion).

[55] Broderick v. Oklahoma, 413 U.S. 601, 612 (1973).

First Amendment, and therefore open to state prohibition.[56] While the doctrines of vagueness and overbreadth give the courts rationale to declare many state statutes such as vagrancy, loitering, lurking and disorderly conduct unconstitutional, the court has generally attempted to sustain the constitutionality of disorderly conduct statutes by narrowly construing them to punish only "fighting words."

C. The Evolving Fighting Words Doctrine

. While free speech is a fundamental right necessary to the "free flow of ideas" not all speech is protected as the communicative effect is far outweighed by the states' interest in keeping the peace. The court has determined that certain categories of speech such as libel, obscenity, and fighting words fall outside the protection of the First Amendment. The rationale behind these categories is that the government has a legitimate interest in prohibiting such speech, which far outweighs any expressive value the speaker may assert. However, the category of fighting words has confused state courts and legislatures since its inception. As applied to disorderly conduct, this doctrine was borne in 1942, and through evaluation of Supreme Court treatment of disorderly conduct statutes it is evident that fighting words lacks clear definition.

a. <u>Chaplinsky</u>

Fighting words were originally defined as words likely to cause a breach of the peace. The U.S. Supreme Court first addressed the constitutionality of a disorderly conduct statute in the 1942 case, *Chaplinsky v. New Hampshire.* Chaplinsky was a Jehovah's witness, preaching on the street, shouting "'You are a God damned racketeer"

[56] *See e.g.* In re T.L.S. 713 N.W.2d 877 (Minn. Ct. App. 2006).

and 'a damned Fascist and the whole government of Rochester are Fascists…'"[57]

Chaplinsky was charged in violation of New Hampshire's disorderly conduct statute which stated:

> No person shall address any offensive, derisive or annoying words to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing him intend to deride, offend or annoy him, or to prevent him from pursuing his lawful business or application [58]

Chaplinsky appealed his conviction from the New Hampshire Supreme Court, alleging the "vague and indefinite"[59]statute was invalid.

In affirming Chaplinsky's conviction, the U.S. Supreme Court noted that the New Hampshire Supreme Court had narrowed the statutory language to limit the word "offensive" by imposing an objective standard: "The word 'offensive' is not to be defined in terms of what a particular addressee thinks…the test is what men of common intelligence would understand would be words likely to cause an average addressee to fight…"[60] Instead of declaring the statute unconstitutional, thereby ordering the legislature to revise the statute, the New Hampshire Supreme Court limited the application of the statute[61] to only cases involving "fighting words."[62] Vulgar, offensive, and insulting words condemned by the general public are not necessarily punishable by

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[57] Chaplinsky, 315 U.S. 569.
[58] *Id.*
[59] *Id.*
[60] Chaplinsky, 315 U.S. at 573 ("[T]he English language has a number of words and expressions which by general consent are 'fighting words' when said without a disarming smile…Derisive of annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace…")
[61] Judicial narrowing or construction is one of the powers of the judiciary. It is acknowledged that a statute cannot be written to anticipate every situation before it, and the court may be called upon to interpret the meaning of the statute as intended by legislatures. The amount of narrowing rests on the discretion of the court. Some state courts refuse to construe statutes as narrowly as New Hampshire did, arguing that such action would amount the legislating, or writing a new statute without the intentions of the legislature considered.
[62] *Id.*

the state, rather, such objectionable speech can only be prohibited by the state if the words fall into the categories of unprotected speech such as libel, obscenity, and fighting words.[63]

The Supreme Court was satisfied with the New Hampshire court's interpretation of disorderly conduct, which was deemed to be narrowly tailored and not unconstitutionally vague.[64] The *Chaplinsky* Court did not evaluate the actual likelihood of violence, but assumed that face-to-face offensive language such as Chaplinsky's would incite violence in an average person.[65] The Court held that "fighting words" are not protected under the First Amendment because they are not seen as an "essential part of any exposition of ideas," and the value of "fighting words" as a benefit to society "is clearly outweighed by the social interest in order and morality."[66] In accepting New Hampshire's construction, a new category of unprotected speech, along side libel and obscenity, known as "fighting words" was born.

When *Chaplinsky* was decided, most state disorderly conduct laws punished speech greater in scope than the *Chaplinsky* construction allowed, but the Supreme Court is reliant upon state construction to narrow the statutes. If the Supreme Court had ruled against the New Hampshire court's interpretation, declaring the statute unconstitutional, most other state statutes would have also been unenforceable. [67] Instead of effectively

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[63] Gertz v. Robert Welch, Inc, 418 U.S. 323 (1974) (libel is unprotected speech) and Roth v. United States, 354 U.S. 476 (1957) (obscenity is unprotected speech).
[64] Chaplinsky, 315 U.S. at 574. ("A statute punishing verbal acts, carefully drawn so as not unduly to impair liberty of expression, is not too vague for a criminal law").
[65] Chaplinsky, 315 U.S. at 572.
[66] *Id.*
[67] *But see* Fallon *supra* at 875 (" a federal court may hold a state statute "overbroad," but it cannot "invalidate" a state statute in the sense of rendering it irredeemably null and void… a federal court can only rule that a state statute, until properly limited by state courts, should be deemed unenforceable as a means of promoting federal constitutional values").

declaring most state laws unconstitutional, the Supreme Court encouraged state court judicial construction, [68] narrowing sections regarding speech to only prohibit "fighting words."[69].

The line drawn between unprotected and protected speech was blurred in subsequent cases before the Supreme Court. It has been noted by many that the Supreme Court has not upheld a disorderly conduct conviction since *Chaplinsky*, although it has never expressly overruled the holdings in *Chaplinsky*.[70] The court instead proceeded to muddy the waters for state legislatures in each subsequent case, maintaining minimal consistency in the "fighting words" doctrine.[71]

For example, seven years after *Chaplinsky*, the Court revisited "fighting words" in *Terminiello v. Chicago,*[72] adopting a different standard for fighting words. The "tends to incite" standard was omitted, instead stating that speech is considered "fighting words" if it is "likely to produce a clear and present danger of a substantive evil that rises far above public inconvenience, annoyance, or unrest."[73] The standards set out in *Terminello* made it clear that states cannot justify broad disorderly conduct statutes in the interest of civility if the speech merely "offends the listener's sensibilities."[74] Since *Terminello*, only a handful of states have adopted the "clear and present danger" test, and it has not

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[68] Gooding, 405 U.S. at 520 (*citing* United States v. Thirty-Seven Photographs, 402 U.S. 363, 369 (1971) (Only state courts can "supply the requisite construction" for disorderly conduct statutes, as the U.S. Supreme Court does not have jurisdiction to construe state legislation).
[69] *See supra*, note 21.
[70] *See e.g., supra* note 12
[71] *See supra* pp. 26, 38 and accompanying notes.
[72] 337 U.S. 1 (1941).
[73] Schenck v. United States, 249 U.S. 47, 52 (1919) (Holmes, J.) ("whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.")
[74] Instructions to the jury stated that a breach of the peace could be found if the speech "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance" were found to be too broad. Terminiello 337 U.S. at 4 ("Speech is often provocative and challenging...that is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment.").

been mentioned by the Supreme Court in the context of disorderly conduct in any recent decisions.[75]

b. The Model Penal Code Definition & Cohen

While the Supreme Court was developing the fighting words doctrine criminal laws nationwide drastically changed in the 1960s with the development of the Model Penal Code. This system of laws was created and adopted by many states in an effort to provide greater uniformity in state criminal code.[76] Seemingly ignoring the Chaplinsky fighting words definition, the Model Penal Code defined prohibited speech under disorderly conduct more broadly as "an offensively coarse utterance…or address[ing] abusive language to any person present."[77] Rather than adopting a more narrow approach to prohibited speech, the Model Penal Code used generalized language, common in then existing statutes. Many states adopted some version of the Model Penal Code language, and it is these statutes that provide basis for the most recent evaluation of the fighting words doctrine.

California's disorderly conduct statute, with Model Penal Code language, was

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[75] *See e.g* . State v. Saunders, 339 So.2d 641, 644 (Fla.1976) (Limited statute application to only include words fitting the *Chaplinsky* "fighting words" definition and words that create a clear and present danger of bodily harm to others.)

[76] Model Penal Code § 250.2 (ref and annos). Pennsylvania and New Jersey adopted the code in full. Most states adopted the code with revisions specific to the intent of the state legislature. Georgia, Kansas, Minnesota, New Mexico and Virginia, made less substantial changes than Delaware, Hawaii, Kentucky, New Jersey, New York, Pennsylvania, Oregon and Utah. In each case, however, "the legislative process made a major effort to appraise the content of the penal law by a contemporary reasoned judgment--the prohibitions it lays down, the excuses it admits, the sanctions it employs, and the range of the authority that it distributes and confers." A few states adopted the code in full, but most states made revisions to the code before adopting it, explaining the differences in the present language of these statutes between states.

[77] Kan. Stat. Ann. § 21-4101 ("offensive, obscene, or abusive language or engaging in noisy conduct tending reasonably to arouse alarm anger or resentment in others"); Minn. Stat. § 609.72 ("offensive, obscene, or abusive language tending reasonably to arouse alarm, anger or resentment in others.") Wis. Stat. § 947.01 ("abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance.")

tested in the Supreme Court in 1971.[78] In *Cohen v. California*, the defendant was charged with disturbing the peace by wearing a jacket into a courthouse bearing the phrase "Fuck the Draft." Although Cohen's words were written on his jacket, rather than spoken, the phrase was still considered speech in terms of First Amendment rights. [79] In affirming Cohen's conviction, the California Court of Appeals judicially limited the scope of the statute to apply only to "behavior which has a tendency to provoke others to acts of violence or to in turn, disturb the peace."[80] Although the California court followed the *Chaplinsky* example and judicially ordered a narrow application of the statute, the U.S. Supreme Court reversed Cohen's conviction.[81] The U.S. Supreme Court reasoned that Cohen's conviction was based on the offensive nature of his symbolic speech.[82]

While the California court claimed that Cohen's speech constituted the *Chaplinsky* definition of "fighting words" the U.S. Supreme Court disagreed, concluding that because Cohen's speech was not a personal insult directed at any one individual it fell outside the "fighting words" category and was therefore protected speech.[83] The court rejected the claim that the state has the power to maintain "a suitable level of discourse" by prohibiting certain words. The court reasoned that it is not possible to make objective standards among words that could conceivably incite a violent reaction, as the

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[78] Cal. Penal Code § 647 (amended 1976). Prohibition against "loud or unusual noise, or by tumultuous or offensive conduct, or threatening, traducing, quarreling, challenging to fight, or fighting, …or use any vulgar, profane, or indecent language within the presence or hearing of women or children, in a loud and boisterous manner," held unconstitutional in Cohen v. California, 403 U.S. 15 (1971).
[79] *See, e.g.*, Texas v Johnson,, 491 U.S. 397 (1989) (flag burning as symbolic speech).
[80] People v. Cohen, 81 Cal. Rptr. 503(Cal. Ct. App. 1969).
[81] People v. Cohen, 81 Cal. Rptr. at 508-10.
[82] *Id.* at 510 (state established that it was "reasonably foreseeable that [Cohen's] conduct might cause others to rise up to commit a violent act against the person of the defendant or attempt to forcibly remove his jacket").
[83] *Id* at 20.

effect of each word uttered is circumstantially dependent. [84] The *Cohen* decision is also noteworthy because it narrowed the *Chaplinsky* definition of "fighting words" to only include speech that incites physical violence rather than emotional injury.[85]

The *Cohen* decision also reviewed an aspect of exposure to public life and discourse as an inherent risk when stepping into the public sphere. *Cohen* forced the Court to discern the differences between direct personal insults and a public audience, holding that the speaker must be communicating an insult to a specific person, and that insult must tend, not only to psychologically harm the hearer, but actually tend to incite violence. The fact that women and children were present in the courthouse may have been objectionable to some, but the court ruled "we are often 'captives' outside the sanctuary of the home and subject to objectionable speech'"[86]

The *Cohen* decision also asserts that prohibitions against certain profanities cannot be established, as the words likely to start a fight with one person, would cause someone else to laugh and walk away. The debate regarding profanity in the public sphere was addressed by the *Cohen* court, which states "'so long as the means are peaceful, the communication need not meet standards of acceptability'"[87] This implies that the manner of delivery is more determinative than content when defining whether speech can be considered fighting words. The differences in thirty years of Supreme Court jurisprudence are clear when contrasting *Cohen* and *Chaplinsky*. The special place

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[84]Cohen, 403 U.S. at 25 ("Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.").
[85] *See* Mark C. Rutziak, Offensive Speech and the Evolution of First Amendment Protection, 9 Harv. Civ. Rights-Civ. Lib. L. Rev. 1, 22 (1974) (noting the Court's failure to mention "sensibilities" interest suggests Court no longer views emotional injury as a justifiable basis for punishment of offensive speech).
[86] Cohen, 403 U.S at 21 (citing Rowan v Unites States Post Office Dept., 397 U.S. 728 (1970).
[87] Cohen, 403 U.S at 25 (citing Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971)).

of speech in the degree of constitutional protection offered is made apparent in *Cohen*, where the court asserted "the constitutional right of free expression is powerful medicine in a society as diverse and populous as ours."[88] The *Chaplinsky* court stated that profane speech is included under the "fighting words" definition, stating: " epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the constitution…"[89] The *Cohen* court ruled differently, stating that to shut off speech considered offensive from public discourse, would "effectively empower a majority to silence dissidents simply as a manner of personal predilections."[90]

Even statutes drafted using the language directly from the *Chaplinsky* definition of "fighting words" fail constitutional challenge because of their broad application. For example, the Supreme Court revisited the *Chaplinsky* definition of "fighting words" in the 1972 case of *Gooding v. Wilson.*[91] Wilson was charged under the Georgia disorderly conduct statute prohibiting "opprobrious words or abusive language, tending to cause a breach of the peace."[92] Wilson was arrested for uttering the phrases: "'you son of a bitch, I'll kill you.' 'You son of a bitch, I'll choke you to death'" which were deemed to fit the definition of "fighting words" by the Georgia Supreme Court.[93] The language of the Georgia statute is nearly an exact copy of the *Chaplinsky* definition of "fighting words," containing the requirement that the language tends to cause a "breach of the peace."[94]

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[88] Cohen, 403 U.S at 24 ("To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance…that the air may at times be filled with verbal cacophony is…not a sign of weakness but of strength").
[89] Chaplinsky, 315 U.S. at 572-73.
[90] Cohen, 403 U.S at 21.
[91] Ga. Code Ann. § 26-6303 (repealed).
[92] *Id.*
[93] Gooding v. Wilson, 405 U.S. 518, 520-23 (1972). He also stated "You son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces."
[94] Chaplinsky 315 U.S. at 572.

The U.S. Supreme Court struck down Wilson's conviction, however, on the grounds that the application by law enforcement and the Georgia courts was too broad. The U.S. Supreme Court ruled that the statute was unconstitutional because Georgia courts had interpreted the statute to include words that merely annoy the public rather than "fighting words."[95] Instead of prohibiting language that tended to incite violence the Georgia statute applied to language that incited a breach of the peace by annoying or offending others, "rendering the statute susceptible of application to speech that was merely offensive."[96] The U.S. Supreme Court held that harm to public morality cannot be used to justify a statute that proscribes merely offensive speech and even a narrowly written statute must be applied to "punish only unprotected speech and not be susceptible of application to protected expression."[97] *Gooding v. Wilson* added the condition that a disorderly conduct statute should be written *and* applied narrowly.

Not all justices agreed in *Gooding*; some felt that a narrowly drawn statute was all that could be expected of the states and the court had not given Georgia enough time to change old disorderly conduct standards: "if the First Amendment overbreadth doctrine serves any legitimate purpose, it is to allow the Court to invalidate statutes because their language demonstrated their potential for sweeping improper applications posing a significant likelihood of deterring important first amendment speech-not because of some insubstantial or imagined potential for occasional and isolated applications that go beyond constitutional bounds." [98]

The most recent decision to spark the most controversy as to the status of

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[95] Gooding 405 U.S. at 525.
[96] Gooding 405 U.S. at 527.
[97] Gooding 405 U.S. at 520-23.
[98] Gooding, 405 U.S. at 530-31 (Burger, J., dissenting).

"fighting words" was *RAV v. City of St. Paul*, which involved a St. Paul ordinance prohibiting bias-motivated crimes. While the ordinance was not titled "disorderly conduct," the language of the ordinance justifies its place here: "whoever…knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race…commits disorderly conduct…" [99] The Minnesota Supreme court evoked *In re SLJ*, the pivotal Minnesota case declaring Minnesota's disorderly conduct statute facially unconstitutional, construing it to only apply to "fighting words." RAV's symbolic speech was determined inclusive in the "fighting words" category, and he was charged for his involvement in a cross burning on a black family's front lawn.[100] Although the Minnesota Supreme Court held the symbolic speech was within the scope of the construed ordinance, only applicable to *Chaplinsky's* "fighting words," a unanimous U.S. Supreme Court overturned RAV's conviction.

While every justice held that RAV's conviction should be reversed, each had very different reasons. Justice Scalia's decision held that a state cannot prohibit only certain types of "fighting words" because such discrimination is "inherently content based."[101] Although "fighting words" are not considered protected speech, he stated that the government cannot prohibit them "based on hostility - or favoritism - towards the underlying message expressed."[102] The concurring justices branded this idea "underbreadth," stating that the *RAV* decision created a new doctrine based on the idea

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[99] St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn, Legis Code § 292.02(1990).
[100] St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn, Legis Code § 292.02(1990) ("on public or private property a symbol, object, appellation, characterization or graffiti (sic), including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct . . . .").
[101] R.A.V., 505 U.S. at 377
[102] R.A.V., 505 U.S. at 381.

that limited categories of speech must be applied generally, and can be struck down for underbreadth.[103] In his concurring opinion, Justice White pointed out that in ruling that "fighting words" can be used as some sort of "debate," the Court deviated from the previously decided definition of "fighting words," which placed the category of speech outside the protections of the First Amendment.[104] Justice Blackmun's concurring opinion concluded similarly, stating that by affording "fighting words" protection from legislation, the Court now placed the speech on the same level of First Amendment protection as political speech.[105]

The justifications and changing standards of "fighting words" have not gone unnoticed to observers of the Court.[106] Seeming erratic and arbitrary, the conflicting decisions by the Supreme Court are arguably justified as a departure from the "balance test" of state interests and the value of speech content, to a more nuanced definition outside the realm of speech, instead focusing on the conduct nature of "fighting words."[107] As an illustration of typical state construction, I will extend the discussion of

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[103] *Id.*

[104] R.A.V., 505 U.S. at 402-403, 423 ("Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position; commercial speech and nonobscene, sexually explicit speech are regarded as a sort of second-class expression; obscenity and fighting words receive the least protection of all. Assuming that the Court is correct that this last class of speech is not wholly "unprotected," it certainly does not follow that fighting words and obscenity receive the same sort of protection afforded core political speech. Yet in ruling that proscribable speech cannot be regulated based on subject matter, the Court does just that.")

[105] R.A.V., 505 U.S. at 423. ("By prohibiting the regulation of fighting words based on its subject matter, the Court provides the same protection to fighting words as is currently provided to core political speech").

[106] Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev at 869-70, note 43 ("the court has been willing in recent years to undertake an apparently thorough review of the record in disorderly conduct cases, but the results do not inspire confidence in the supposed precision with which the as applied methods determines first amendment claims…Ad hoc factual review is at best erratic and tends to degenerate into due process review of records to see if there is a shred of evidence to justify conviction.").

[107] Weirthheimer, supra note 19, at 793. ("In establishing the fighting words doctrine, the Court determined that when a speaker's words do not contribute to dialogue or the expression of ideas, but are instead intended to provoke harmful conduct, they have no value as instruments of "speech." Therefore, they may be regulated without contravening the first amendment. While "speech" is protected under the constitution, words that do not promote dialogue or the exchange of ideas are instruments of something other than

Minnesota case law and statute. The inconsistent opinions of the Supreme Court have made drafting legislation difficult[108] and the next section discusses typical state reactions to disorderly conduct statutes.[109]

II. The Minnesota Experience: Ineffective Judicial Construction of Statute

A. Minnesota's Disorderly Conduct Law

The confusion of state courts regarding "fighting words" and disorderly conduct can be seen in the history of Minnesota's disorderly conduct laws. As Minnesota was not one of the thirteen colonies, connected with the English common law system, it did not carry vestiges of archaic statutes. Until 1953, disorderly conduct was punishable mostly by city ordinances like the one in question in *RAV*. Minnesota's first disorderly conduct statute, Minn. Stat § 615.17, was challenged in *State v. Reynolds* where Reynolds argued that the statute was unconstitutionally vague and indefinite. The Minnesota Supreme Court upheld Reynold's convictions because he was charged under a conduct provision, which is afforded a lesser degree of scrutiny than speech legislation.[110]

Prior to the adoption of the Model Penal Code language, disorderly conduct was defined in Minnesota as "some act which tends to breach the peace or to disturb those people who may hear it or see it."[111] Many statutes at that time were broader, and

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speech") (citing Chaplinsky at 574 (The court understood fighting words to be a form of conduct, or "verbal acts," analogous to conduct that is likely to have violent consequences)).

[108] Since 1942, the Supreme Court has never upheld a conviction under a fighting words statute. *Id.* note 110 at 795 ("these decisions have produced a seemingly arbitrary distinction between speech and conduct in this area of First Amendment law and reflect what critics argue is the futility of the fighting words doctrine").

[109] *See also* Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. at 866 ("when the dust has cleared after these decisions, highly general laws apparently applicable to a great range of expressive activity have been only slightly eroded and remain essentially intact").

[110] State v. Reynolds, 66 N.W.2d 886 (Minn. 1954).

[111] See State v. Perry, 265 N.W. 302 (1936), State v. Zanker, 229 N.W. 311, 312 (1930), and State v. Cooper, 285 N.W. 903, 905 (1939).

judicial construction and interpretation led them to include encompassing acts and words "of a nature to corrupt the public morals or to outrage the sense of public decency."[112] Minnesota last amended the portion of its disorderly conduct statute that addressed speech in 1963.[113] In 1963 Minnesota recodified disorderly conduct under Minn. Stat § 609.72, punishing whoever "engages in offensive, obscene, or abusive language or in boisterous and noisy conduct tending reasonably to arouse alarm, anger, or resentment in others."

The writers of the current Minnesota disorderly conduct statute recognized that "disorderly conduct is commonly used by police against those unable to defend themselves," but instead of narrowing the language of the statute with new legislation, the parameters of what can be considered disorderly conduct were broadened with the 1963 amendment.[114] The statute now defines disorderly conduct speech as "offensive, obscene, or abusive language tending reasonably to arouse alarm, anger or resentment in others" if the person knows or has reasonable grounds to know that such language will "alarm, anger or disturb others or provoke an assault or breach of the peace."[115] This version of the statute, mirroring many others in similarity to the model penal code, was first seriously challenged before the Minnesota Supreme court in 1975 with *In re S.L.J.*[116]

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[112] Reynolds, 66 N.W.2d at 890 (citing Commonwealth v. Lombard, 73 N.E.2d 465, 466 (Mass. 1947)); Teske v. State, 41 N.W.2d 642, 644 (Wis. 1950) (disorderly conduct can consist of words or acts) and Hackney v. Commonwealth, 45 S.E.2d 241, 243 (1947).

[113] Minn. Stat. 609.72, as adopted in 1963 read " This language was changed slightly in 1991 to the current language. Minnesota's previous law enacted in 1953 and read "Every person who engages in brawling or fighting, shall be guilty of disorderly conduct, herein defined to be a misdemeanor, and upon conviction thereof, shall be punished by a fine of not to exceed $100 or by imprisonment in the county jail for not to exceed 90 days." Minn. Stat. 615.17 (repealed 1963).

[114] Minn. Stat. § 609.72 (Advisory Committee Comment, 40 A M.S.A. p. 63 (1963)); In re S.L.J, 263 N.W.2d 412, 416 (Minn. 1975).

[115] Minn. Stat. § 609.72.

[116] 263 N.W.2d. 412 (Minn. 1975).

B. Judicial Construction of Minn. Stat. § 609.72(1)(3)

1. *In re S.L.J.*

In 1978 a girl, known as S.L.J. was walking with a friend in St. Paul. Two police officers approached the girls and started asking about activities, threatened to take them to the station, and eventually dismissed them to go home. The two girls walked away from the police as they get on the squad car, and once they were far enough away to be comfortable, both girls shouted "Fuck you pigs! The officers got out of the squad car and arrested S.L.J. for disorderly conduct under subd. 1(3) which deals with speech, for causing ;"resentment" in the officer she shouted at.) *S.L.J.* challenged Minnesota's statute as unconstitutionally overbroad and vague.[117]. The Minnesota Supreme Court ruled that the statute is "both overly broad and vague" it punishes "offensive, obscene or abusive language" that merely "arouse, alarm, anger or resentment in others," a much broader definition than the" fighting words" exception allows.[118] In distinguishing the statutory challenges in *S.L.J.* from *Reynolds* by noting that the *Reynolds* statute dealt with conduct, whereas the section in question deals with speech, "because speech is accorded special constitutional protection by the First and Fourteenth Amendments."[119]

Factually the court determined that a 14 year old girl yelling "fuck you pigs" did not meet the definition of "fighting words," as the language only created resentment in the officer, without tending to incite him to violence. The *S.L.J.* decision gave deference to the *Cohen* decision in finding that the emotional injury to the officers by S.L.J.'s

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[117] S.L.J, 263 N.W.2d at 416.
[118] *Id.*
[119] *Id.* ("Although a predecessor statute…was upheld over the objection that it was vague and indefinite in State v. Reynolds, 66 N.W.2d. 886 (1954), the court there was construing what was to become § 609.72, subd. 1, clause (1), rather than clause (3), which punishes speech…").

insults did not constitute "fighting words"[120] The court also discussed whether officers of the law should be held to a higher standard of restraint than average citizens due to their training and role as a peace keeper.[121] Although the court determined that the statute is unconstitutional on its face, the court did not strike down the law, but instead judicially construed the statute to only punish "fighting words."[122] Despite this ruling Minnesota's disorderly conduct statute has not been legislatively amended to reflect the court's 1975 decision in *S.L.J*

2. Subsequent Rulings

Minnesota courts have continued applying the "fighting words" construction in more recent cases.[123] The court affirmed convictions for disorderly conduct in *In re M.A.H*, [124]where group of juveniles were arrested for swearing at police in front of an angry crowd. [125] Every speech-related disorderly conduct conviction upheld by Minnesota appellate courts since *S.L.J.* has involved either an explicit verbal threat of violence or a situation where the addressee was placed in fear of immediate physical harm.

In 2006 the Minnesota Court of Appeals heard the case of *In re T.L.S.*, where the court distinguished *T.L.S* from *S.L.J.* by broadening the scope of the court's

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[120] S.L.J. 263 N.W.2d at 415 ("'should my daughter say something like that to an officer or anybody I'd be upset and ashamed as a parent. It would bother me'")
[121] Dawn Egan, Fighting Words Doctrine: Are Police Officers Held to a Higher Standard, or Per *Bailey v. State*, Do We Expect No More From Our Law Enforcement Officers Than We Do From the Average Arkansan? 52 Ark. L. Rev. 591 (1999).
[122] S.L.J., 263 N.W.2d at 419.
[123] City of Little Falls v. Witucki, 295 N.W.2d 243 (Minn. 1980) (disorderly conduct ordinance which proscribes engaging in offensive, obscene, or abusive language or in boisterous and noisy conduct tending reasonably to arouse alarm, anger, or resentment was construed by the courts to only include" fighting words").
[124] 572 N.W.2d 752 (Minn. Ct. App. 1997).
[125] *See also* City of Minneapolis v. Lynch, 392 N.W.2d 700, 704-05 (Minn. Ct. App.1986) (concluding that jury could find calling police "motherf* * *ing pigs" amounted to fighting words where words appeared to be inciting surrounding crowd of 50 to 100 people, some of whom carried clubs).

construction.[126] Former student T.L.S. became upset when a school administrator told her she had been transferred to another school. She refused to leave the school and began shouting. When police arrived *T.L.S.* continued to refuse to leave and shouted more loudly until the officers escorted her out of the school. Once outside she continued to yell profanities in phrases such as "You dumb mother fucking bitch ass cop you figure it out since you know every fucking thing!" The court held that although a person's words may not rise to the level of "fighting words," the court must examine the conduct and the speech of the person as a package. [127] The question then becomes, within the context of a situation, are a person's conduct *and* speech likely to provoke an immediate breach of the peace?

This recent decision has stretched the narrow *S.L.J.* interpretation to include speech that may only be abusive, reverting back to the original statutory language, even if conduct is used as a rationale for an arrest. [128] Although this case may seem to have avoided First Amendment difficulties by talking about conduct and speech together, it could be argued that neither the conduct alone nor speech alone could have sustained a conviction. Ultimately, T.L.S. was acquitted of disorderly conduct, but was convicted of a weapons charge supported by evidence obtained post arrest for disorderly conduct. While probable cause is a lower standard than conviction,[129] the rationale of the court is

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[126] 572 N.W.2d. 752 (Minn. Ct. App. 1997).
[127] In re T.L.S., 713 N.W.2d. 877 (Minn. Ct. App. 2006).
[128] However, the Georgia Supreme Court has held the opposite, stating that "while the circumstances surrounding the words can be crucial, circumstances cannot change harmless words into 'fighting words' within meaning of disorderly conduct statute's proscription on fighting words. The Supreme Court has not made a definitive statement regarding the nature of speech in relation to conduct and "fighting words", so whether speech is considered alone or with conduct is still undecided.
[129] Probable cause to arrest exists when "the objective facts are such that under the circumstances, a person of ordinary care and prudence would entertain an honest and strong suspicion that a crime has been committed. In re T.L.S., 713 N.W.2d. at 880.

that although speech sections are narrowed to “fighting words” conduct provisions stay the same:

> Although the disorderly conduct statute prohibits only "fighting words" as applied to speech *content*, the disorderly shouting of otherwise protected speech or engaging in other "boisterous or noisy *conduct* " may still trigger punishment under the statute without offending the First Amendment. [130]

This instant switch from speech to conduct is dangerous, as words can be asserted as conduct, even when there is no logic to suggest this. The court admitted that they did not have enough to sustain a conviction for disorderly conduct, but tweaked the statutory language to allow inclusion of the knife as evidence.

C. Judicial Construction’s Incomplete Fix.

Even if Minnesota courts had been consistent in following the “fighting words” construction, law enforcement is unaware of any judicial construction, and is trained to follow the statutory language.[131] Minnesota peace officers are trained according to standards set out by the Minnesota Board of Peace Officer Standards and Training (POST Board). Neil Melton is currently the executive director of Minnesota POST Board.[132] Mr. Melton explained that training peace officers involved an explanation of the law as

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[130] T.L.S., 713 N.W.2d at 880. “She misreads *S.L.J.* In *S.L.J.*, the supreme court held that the prohibition of "offensive, obscene, or abusive language" in the disorderly conduct statute violates the First Amendment, and it construed the provision to proscribe "only ... the use of 'fighting words.' " *Id.* at 418-19. The statute does not limit disorderly conduct to fighting words; it also includes "abusive, boisterous, or noisy conduct." Minn.Stat. § 609.72, subd. 1(3).

[131] Minnesota Board of Peace Officer Training (POST Board) is an administrative agency created by the Minnesota Legislature in 1977 to establish law enforcement licensing and training requirements. *See* Minn. Stat. § 626.843

[132]Interview with Neil Melton, Executive Director, Minnesota Post Board, in St. Paul, Minn. (11/06/08).

written, with dictionary definitions of the terms "abusive" and "opprobrious."[133] Peace officers are not trained to follow the judicially construed definition of "fighting words" but to instead follow the language as written of a facially unconstitutional statute.[134] According to Mr. Melton, disorderly conduct is used as a "catch-all" statute that officers use when no other crime has been committed.[135]

In addition to its role as a "catch all" statute, Neil Melton also acknowledged that the possibility of discriminatory enforcement is inevitable, as the decision to arrest is largely at the officer's discretion.[136] Unless every citizen reads the latest Minnesota Supreme Court case, the statute remains invalid because the average person would understand that any "annoying" language, whether constitutionally protected or not, may be punishable as disorderly conduct. Although Minnesota courts have modified the statutory language with judicial construction, the original language remains in full force in the real world.

D. Discriminatory Impact

Overbroad statutes contribute to discriminatory enforcement and Minnesota's experience illustrates that connection. Evidence of discriminatory enforcement in Minnesota can be seen by examining data from the Minnesota Bureau of Criminal

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[133] The *Gooding* court specifically pointed out that the dictionary definitions of these terms "give them greater reach than 'fighting words'"

[134] Neil stated that officers in training are given a copy of the statute and a list of synonyms for words like "abusive"and "opproprious." The officers are also given a copy of the bill of rights, but the "fighting words"definition is not mentioned, nor is any judicial construction known to the head of police training.

[135] *Id.*

[136] *Id.* Although this paper is focused on peace officer discretion, there are many levels of discretion and potentially discriminatory enforcement. Mr. Melton said one of the main problems with disorderly conduct is the inconsistent standards used by county judges. By creating a more uniform standard perhaps this problem could also be improved.

Apprehension.[137] Although this data does not differentiate between arrests made for conduct and those made for speech, the nature of the statute and information known about standards for enforcement suggest that at least some of the disparities are for arrests made in regards to speech.[138]

Comparing 2000 Census data with BCA arrest statistics from the same year reveals this disparity. While only 2.9% of the population was Hispanic, 11.44% of disorderly conduct arrests were of Hispanic people. Even more staggering, while 3.5% of the population is black, 21.43% of disorderly conduct arrests were of black people. These results are also seen in juveniles under 18, where black juveniles made up 20.38% of arrests.[139] Clearly, more minority groups are implicated in disorderly conduct charges by peace officers and judges.

Further research in this area unfortunately supports the claim that disorderly conduct is applied in a discriminatory fashion. Acknowledging that many factors could affect these numbers, another study done further examines the disparities between black and white persons arrested and charged with low-level offenses, including disorderly conduct. The nature of disorderly conduct as a misdemeanor makes investigation of enforcement difficult, as statistics are not collected by the Bureau of Criminal Apprehension on those arrested but never charged and those cited versus arrested. In order to discuss the nuances involved in disorderly conduct, a study done of Minneapolis

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[137] BCA Crime statistics from 2000.
[138] Data indicating the reason for arrest or citation is very difficult to find. One would need to go to the county court to examine arrests and charges, which are often subject to an officer's report. Wide scale collection of such data is nearly impossible. For the most in depth research into disorderly conduct enforcement *see infra* note 141.
[139] BCA data compared with U.S. Census data from the year 2000.

law enforcement and trial court judges applications of Minn. Stat § 609.72 will now be examined.[140]

The study, done by the Council on Crime and Justice,[141] focused on data collected in 2001, to examine racial disparities in enforcement of low-level offenses.[142] The study reviewed data from the Minneapolis Police Department, Hennepin County District Court, and the Hennepin County Adult Detention Center.[143] We can see that even states without a historically prominent discrimination practices can be susceptible to discrimination enforcement, most likely due to a lack of guidelines outlining crime for officers. Comparing the percentage of arrests for disorderly conduct, the study found that 67% of arrests were made of black persons, as opposed to 33% white. To put these numbers into perspective, Minneapolis population figures from 2000 estimate that black persons make up only 15.8% of the population of the city of Minneapolis while, 69.8% of Minneapolis' population is white.[144] With respect to whether a citation is given or an arrest made, the percentage of white people who were cited rather than arrested was 64%, while among blacks the percentage of arrests versus citations were generally equal.[145] This study affords more evidence of discriminatory enforcement of disorderly conduct. Such application undermines the authority of law enforcement, breeding disrespect and

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[140] Council on Crime and Justice, Low Level Offenses in Minneapolis: An Analysis of Arrests and Their Outcomes 3 (2004).
[141] *Id.* at 9. The Council on Crime and Justice (CJS) is a private, non profit organization whose mission is "to building community capacity to address the causes and consequences of crime and violence through research, advocacy, and demonstration."
[142] Id. The study focused on 7 low level offenses including driving after revocation, driving after cancellation, no valid driver's license, disorderly conduct, loitering with intent to commit prostitution, loitering with intent to sell narcotics, and lurking with the intent to commit a crime. The study tracked arrests made in Minneapolis from January to December 2001.
[143] *Id.* at 5 The only racial groups compared were Whites and Blacks.
[144] *Id* at 21 compared with 2000 census data
[145] *Id.*

mistrust by community members. Such discrimination cannot be tolerated, and every player in the process of criminal law enforcement needs to do whatever possible to lessen the opportunities for discriminatory enforcement.

Even more disturbing are the cases seen in Minnesota courts dealing with speech convictions for disorderly conduct that neglect to mention "fighting words" or *S.L.J.*, relying on facially overbroad statutory language. In an unreported decision, the Minnesota Court of Appeals affirmed a district court ruling using the standard for disorderly conduct set out in the statutory language without citing to S.L.J.:

> Whoever intentionally "[e]ngages in offensive, obscene, abusive, boisterous, or noisy conduct or in offensive, obscene, or abusive language tending reasonably to arouse alarm, anger, or resentment in others" is guilty of disorderly conduct.[146]

If the judicial system does not acknowledge or know about judicial construction, should citizens be held accountable for such information? Not only do these convictions rest on the discretion of law enforcement, they are also subject to a judge's knowledge of relevant case law and her willingness to apply a statute narrowly. Neil Melton acknowledged that, while the decision to arrest or cite is at the discretion of law enforcement, the outcomes of such arrests vary greatly depending on the personal predilections of the presiding judge.[147]

The possibility exists to make the scope of a law more clear to law enforcement and the public. To avoid further discriminatory enforcement Minnesota's legislature needs to clarify the bounds of disorderly conduct with respect to language, specifically

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[146] State v. Lalani, Minn. Ct. App WL 224111 (Minn. Jan. 31, 2006) *quoting* Minn.Stat. § 609.72, subd. 1(3). *See also* State v. Greenburg, 2000 W.L. 781092 (June 20, Minn. Ct. App), State v. Hubbard, 2001 WL 568973 (May 29 Minn. Ct. App.), State v. Soukup, 656 N.W.2d 424 (Minn. Ct. App. 2003), State v. McCarthy, 659 N.W. 2d 808 (Minn. Ct. App. 2003), State v. Yeazizw, 2003 WL 21789013 (Aug 5, Minn Ct. App).

[147] Interview with Neil Melton, Executive Director, Minnesota Post Board, in St. Paul, Minn. (11/06/08).

609.72(1)(3).[148] Such clarity could only do more to protect the constitutional freedoms and equality of our society. By making laws as clear as possible to law enforcement by establishing clear guidelines, the discrimination seen that summer day in a Georgia library will become merely a problem of the past.

Judicial construction is not reaching those who apply the statutes, and the statute must be legislatively amended in a way that is clear to citizens and law enforcement while not infringing on First Amendment rights. Minnesota's exclusively judicial solution to the First Amendment problems of disorderly conduct has not been effective in curbing the discriminatory effects of the statute. If the law can be made clear, it would do no harm to change it, and the possibility of improving the justice system and avoiding wasted time and money would be worth the effort it takes to amend the statute. The question then becomes how should the statute be changed? The following sections discuss various ways other states have amended or interpreted their statutes to conform with the "fighting words" doctrine.

III. National Perspective

Minnesota's approach to disorderly conduct law is replicated throughout the country. Currently, 17 states rely on judicial construction of their statutes to cure any First Amendment problems.[149] A majority of states have responded legislatively. But with two main approaches. Nineteen state legislatures have amended their statutes to

[148] Minn. Stat. § 609.72.
[149] Including Alabama, Connecticut, Delaware, Florida, Idaho, Kansas, Louisiana, Maryland, Massachusetts, Montana, New Jersey, North Dakota, Ohio, Pennsylvania, South Carolina, Texas, and Vermont.

prohibit a specific category of speech known as "fighting words."[150] Five states have repealed all explicit speech proscription from the scope of disorderly conduct.[151]

A. Judicial Construction in other states

Mirroring the Minnesota experience, 16 other states have judicially narrowed facially overbroad statutes, proscribing limited application standards. However, not all state courts have adopted the same definition of "fighting words." Judicial standards limiting statutory application differ among states. Ten state courts have limited speech proscription to the *Chaplinsky* "fighting words" definition.[152] Two states employ the "clear and present danger" test.[153] Others simply state that the statute should not be applied to conduct or speech protected by the first amendment, without giving any standard to law enforcement.[154]

As discussed in Part II, the Supreme Court has failed to uphold any state disorderly conduct conviction since *Chaplinsky*, providing states with multiple examples of unacceptable construction using no apparent objective test.[155] The majority of states employing judicial construction follow the original *Chaplinsky* definition. However, the constitutionality of the *Chaplinsky* construction, while not explicitly abandoned, has led the court to favor definitions where violence is a probable result of speech rather than an

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[150] Including Alaska, Arizona, Arkansas, California, Colorado, Georgia, Hawaii, Illinois, Iowa, Maine, Mississippi, Missouri, New Hampshire, New Mexico, North Carolina, Oklahoma, Rhode Island, and Washington and Vermont

[151] Including Kentucky, Oregon, South Dakota, Utah and Virginia.

[152] including Delaware, Florida, Idaho, Kansas, Louisiana, Maine, Massachusetts, Ohio Tennessee, and Texas

[153] Florida cases refere4nce both the Chaplinsky and clear and present danger test. Maryland,

[154] New jersey, Massachusetts, north Dakota,

[155] *Supra* pp. 15-23 and accompanying notes.

"immediate breach of the peace."[156] Alabama courts have defined "fighting words" as "words that by their very utterance *provoke a swift physical retaliation* and incite an immediate breach of the peace."[157] The inclusion of "immediate breach of the peace" in the Alabama statutory construction leaves the scope of the statute encompassing generally the same speech as *Chaplinsky* followers, which leaves the courts with the same problems of over inclusiveness as states only employing *Chaplinsky* "fighting words."

In abandoning the *Chaplinsky* definition, some courts have chosen more narrow limitations. The Arkansas Supreme Court has defined "fighting words" as "likely to provoke a *violent or disorderly response*" while the federal district court for Arkansas has

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[156] Maine: "When dealing with fighting words, government has legitimate interest in preventing speech which may incite immediate breach of peace, but use of language which is merely distasteful or offensive cannot be punished; application of criminal statute must be restricted to kind of speech that produces or is likely to produce clear and present danger of substantive evils that State may constitutionally seek to prevent." State v. Griatzky., 587 A.2d 234 (Me 1991).Maryland: Whether constitutional guarantee of freedom of speech is applicable depends upon whether words are used in such circumstances and are of such nature as to create clear and present danger. Bacheller v. State, 240 A.2d 623 (1968).DE: "offensively coarse utterance" and "abusive language" narrowed to fighting words - those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." (Chaplinsky definition) State v. White, 1989 WL 25818, at *1 (Del. Super. March 7, 1989); FL: Limited statute application to only include words fitting the Chaplinsky "fighting words" definition and words that create a clear and present danger of bodily harm to others. State v. Saunders, 339 So.2d 641, 644 (Fla.1976); White v. State, 330 So.2d 3, 7 (Fla.1976), and Spears v. State, 337 So.2d 977, 980 (Fla.1976)). ID: Apply statute only to "fighting words" State v. Poe, 88 P.3d 704, 722 (Idaho 2004). KS: Section (c) narrowed to only apply to "fighting words" using the Chaplinsky definition State v. Huffman, 612 P.2d 630 (Kan. 1980); State v. Beck, 682 P.2d 137 (Kan. Ct.. App. 1994).; LA: Statute is constitutional when narrowed to only "fighting words" State v. Woolverton, 474 So.2d 1003 (La.App. 5 Cir. 1985); ME: "When dealing with fighting words, government has legitimate interest in preventing speech which may incite immediate breach of peace, but use of language which is merely distasteful or offensive cannot be punished; application of criminal statute must be restricted to kind of speech that produces or is likely to produce clear and present danger of substantive evils that State may constitutionally seek to prevent." State v. Griatzky., 587 A.2d 234 (Me 1991); MA: Alegata v. Com., 231 N.E.2d 201, 211 (Mass. 1967). TN: State v. Roberts, 106 S.W.3d 658 (Tenn. 2002), appeal denied. TX: Derisive and annoying words can be taken as coming within purview of statute prohibiting disorderly conduct only when they have characteristic of plainly tending to excite addressee to breach of peace. Duran v. Furr's Supermarkets, Inc. 921 S.W.2d 778(App. 8 Dist. 1996), rehearing overruled, writ denied, rehearing of writ of error overruled.,

[157] Skelton v. City of Birmingham, 342 So.2d 933, 936-37 (Ala.Crim.App.) *remanded* 342 So.2d 937 (Ala.1976) (emphasis added); Swann v. City of Huntsville, 455 So.2d 944, 950 (Ala.Crim.App.1984). *See also* Mosley v. City of Auburn, 428 So.2d 165 (Ala.Crim.App.1982).

employed a standard of likely to incite an "immediate and violent response."[158] The word "disorderly" was defined as overbroad by the Supreme Court, and one would expect a case involving such interpretation before the Supreme Court would not pass constitutional muster. Some state courts have employed the "clear and present danger" test.[159]

Massachusetts serves as another example of the problems of evolving language and the limits of judicial construction. In 1967 the Massachusetts Supreme Court struck down the Massachusetts disorderly conduct statute as unconstitutional due to its archaic language and overly broad scope.[160] In an attempt to save the statute, the court construed it to reflect § 250.2 of the Model Penal Code without ordering the statutory language amended.[161] In 1975, the Massachusetts Supreme Court had to further construe the prior judicial construction due to the constitutional issues of section (a) and (c), ordering them only to be applied to conduct, not speech.[162] More recent decisions have further construed the existing judicial construction by allowing disorderly conduct convictions only under the "fighting words" standard.[163] Through a nearly fifty year span, the courts of Massachusetts have added several layers to their construed version of the statute.

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[158] Bailey v. State, 972 S.W.2d 239, 244 (Ark. 1998) ("Abusive or obscene" must be "likely to provoke a violent or disorderly response."); Johnson v. State, 37 S.W.3d 191 (2001). *See also* Hammond v. Adkisson, 536 F2d. 237(1976). ("immediate and violent response").

[159] *See e.g* State v. Saunders, 339 So.2d 641, 644 (Fla.1976); White v. State, 330 So.2d 3, 7 (Fla.1976), and Spears v. State, 337 So.2d 977, 980 (Fla.1976)) (Limited statute application to only include words fitting the Chaplinsky "fighting words" definition and words that create a clear and present danger of bodily harm to others).

[160] Alegata v. Commonwealth, 231 N.E.2d 201, 211 (1967).

[161] Alegata, 231 N.E.2d 201, 211 (1967).

[162] Am. Law Inst., Model Penal Code, s 250.2 (Proposed Official Draft, 1962), as adopted in *Alegata v. Commonwealth*, 231 N.E.2d 201 (1967), encompass more than fighting words. "Therefore, we are compelled to conclude that the disorderly person provision in so far as it relates to speech and expressive conduct is unconstitutionally overbroad as 'susceptible of application to protected expression.' Gooding v. Wilson, 405 U.S. 518, 523 (1972)." Com. v. A Juvenile, 334 N.E.2d 617 (Mass. 1975).

[163] Levine v. Clement 333 F.Supp.2d 1, 5 (D. Mass. 2004).

While Minnesota has not construed its statute as extremely as Massachusetts has, recent cases have simply added more specifications and exemptions to the *SLJ* construction.[164]

While this approach has the advantage of less energy spent and confrontation between states and the Supreme Court, it leaves much to be desired in clarity and communication. While judicial construction can solve problems of constitutionality with the high court, such constitutional principles exist to protect citizens, not simply to satisfy an intellectually ideal aspect of the justice system. If these rights are threatened, the state should seek to remedy the environment, without fear of noncompliance with the Supreme Court.

B. Amend Speech Prohibitions

Some state courts have recognized the problems of drastic judicial interpretation and have exercised discretion, declaring the legislature responsible for law making, not the judiciary.[165] A previous version of Colorado's disorderly conduct statute came before the Colorado Supreme Court in the 1970s. The court refused to construe "abusive and threatening," claiming that such action would overstep the judiciary's boundary by ascribing meaning not originally intended by the state legislature.[166] Five years after this decision, the Colorado legislature added the provision "and the utterance…tends to incite

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[164] In re Louise C., 3 P.3d 1004 (App. Div.1 1999).
[165] Musselman v. Com., 705 S.W.2d 476 (Ky. 1986).While not a disorderly conduct statute, the Kentucky supreme court refused to construe an overbroad harassment statute with similar language to many disorderly conduct statutes: KRS 525.070, "A person is guilty of harassment when with the intent to harass, annoy or alarm another person (b) In a public place, makes an offensively coarse utterance, gesture or display, or addresses abusive language to any person present."
[166] Hansen v. People, 548 P.2d 1278, 1282 (Colo. 1976) (Colorado Supreme Court refused to construe "abusive or threatening" language). People v. Smith, 826 P.2d 939, 946 (Colo. 1981); Ch. 227, sec. 1, § 18-9-106(1)(a), 1981 Colo. Sess. Laws 1010. (Subsection (a) was amended in response to *Hansen* in 1981 to add "and the utterance, gesture, or display tends to incite an immediate breach of the peace").

an immediate breach of the peace."[167] The Missouri courts made a similar distinction in refusing to interpret beyond the language of the statute, stating "there is no indication that such was the intent of the legislature."[168] However, legislators do not necessarily need to be forced to amend a statute by means of judicial prodding. Hawaii legislators amended their statute before it was ever deemed unconstitutional.[169] In total, 17 states have legislatively adopted some variation of "fighting words" since the *Chaplinsky* ruling. [170]

While the Georgia statutory amendment did not remove all scrutiny by the U.S. Supreme Court in *Gooding v. Wilson*, such an approach appears to be passing constitutional muster in Alabama, Arkansas, California, Hawaii and Iowa.[171] Since *Gooding* was decided Georgia has amended the previous version with slight additions making the definition of "fighting words" obvious in hopes of passing constitutional muster. The new version prohibits the use of

> opprobrious or abusive words which by their very utterance tend to incite an *immediate* breach of the peace, that is to say, words which as a matter of common knowledge and under ordinary circumstances will, when used to or of another person in such other person's presence, naturally tend to provoke violent resentment, that is, *words commonly called "fighting words.*[172]

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[167] *Aguilar v. People*, 886 P.2d 725(1994); section deleted in 2000 Colo. Legis. Serv. Ch. 171 (H.B. 00-1107) (Another provision of the revised disorderly conduct statute punishing a person who "Abuses or threatens a person in a public place in an obviously offensive manner" was ruled facially unconstitutional).
[168] State v. Carpenter, 736 S.W.2d 406, 408 (Mo., 1987).
[169] State v. Butler 455 P.2d 4 (Hawaii 1969). Act 136, Session Laws 1973 (case discussed recent decisions regarding "fighting words" but the court reached the decision that it did not need to decide the constitutionality of the statute but did eventually change the wording of the statute. The offense of disorderly conduct was amended to require intent to cause physical inconvenience or alarm by members of the public. Previously, the offense merely required intent to cause "public inconvenience, annoyance, or alarm." In addition, subsection (1)(b) (now subsection (1)(c)) was changed by adding the language "which is likely to provoke a violent response" after the word "present.")
[170] Alaska, Arizona, Arkansas, CA, CO, GA, HI, IL, IO, ME, MS. MO, NH, NM, NC, OK, RI, WA
[171] Ariz. Rev. Stat. Ann. § 13-2904 ("Uses abusive or offensive language or gestures to any person present in a manner likely to provoke immediate physical retaliation by such person") Ark. Code Ann. § 5-71-207 ("uses abusive or obscene language, or makes an obscene gesture, in a manner likely to provoke a violent or disorderly response").
[172] Ga. Code Ann., § 16-11-39.

This version attempts to clarify "fighting words" in an attempt to avoid the possibility of discriminatory enforcement and the Supreme Court chopping block. California's legislature also undertook similar action following the Supreme Court decision in *Cohen v. California*.[173] The California legislature amended the *Chaplinsky* definition, requiring an inherent tendency to "provoke an immediate violent reaction."[174]

Another approach worth noting is the tendency for state legislators to simply add a subdivision to existing overbroad statutes stating "this law does not punish constitutionally protected activity."[175] The court has not ruled on the validity of this statement in protecting free speech, but to the simple observer this appears reliant upon circular logic, not helpful in elucidating the standards of the statute. The legislature is as bound by the constitution as the legislature, and such amendment should be implicit rule in every piece of legislation, not an exception.

Gooding also exposed the problem of legislatively adopting fighting words, in that Gooding's conviction was overturned due to broad application of a narrowed statute. This implies that law enforcement was using the same tactics, considering them "fighting words." The statute is not clear enough with "fighting words" definition. These approaches seem to pass state court judicial interpretation using the Supreme Court *Chaplinsky* and *Gooding* decisions to define disorderly conduct in terms of "fighting words."[176] Although these definitions may appear satisfactory for some, there are other

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[173] Cohen
[174] Cal. Penal Code § 647 statute amended one year after *Cohen* decision.
[175] See e.g. N.D. Cent. Code § 12.1-31-01(2) ("This section does not apply to constitutionally protected activity. If an individual claims to have been engaged in a constitutionally protected activity, the court shall determine the validity of the claim as a matter of law and, if found valid, shall exclude evidence of the activity").
[176] *See e.g.* Constitutionality upheld in *Sterling v. State*, 701 So.2d 71 (Ala.Crim.App.1997)

options states have taken that result in a more clearly defined law, with little area for broad police discretion or judicial interpretation. It must also be considered that the Supreme Court has not upheld a disorderly conduct statute since *Chaplinsky*, and reliance on old decisions, not following a well-defined test or standard, may not be the best choice.[177]

Part IV. Clarity, Consistency and Constitutionality: Removal of Speech Provisions.

With the changing definition of "fighting words" and the tendencies of state courts, repealing all prohibitions on speech could serve as a lasting change for the better in terms of equality and constitutional freedoms. Considering the impact that an overbroad statute like disorderly conduct has on a community and relations with law enforcement, it is necessary to provide some sort of guideline that removes the burden of making split second decisions. Fighting words, while sounding clear, has been changed over and over again and remains an unstable doctrine, known to invalidate seemingly air-tight statutory language.

In recognizing the importance of constitutional rights of citizens to due process and free speech, some states have completely repealed any aspects of disorderly conduct that proscribe speech. Six states have chosen this path, including Kentucky, Oregon, South Dakota, Tennessee, Utah and Virginia. While the New York legislature decided to repeal their entire disorderly conduct statute, not all states have let go of this tool for law

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Affirmed *Sterling* holding in *Hutchins v. City of Alexander City*, 822 So.2d 459 (Ala.Crim.App.,2000). Illinois and Iowa have statutes that use the "fighting words" definition in the statutory language, but have been deemed unconstitutional at one time or another due to other issues dealing with the manner of passage and a prohibition on flag desecration.

[177] Fighting words article.

enforcement so easily.[178] This approach provides clarity to citizens and law enforcement with relation to speech and disorderly conduct.

Alaska serves as an example of a cautiously drafted disorderly conduct statute. A previous version of Alaska's statute prohibited "obscene or profane language…to the disturbance or annoyance of another" was deemed unconstitutional by the Alaska Supreme Court.[179] The state legislature took quick action and this statute was repealed and replaced by a new version that does not prohibit speech, except "unreasonable noise", which has been defined as conduct rather than speech.[180] However, the new version that requires that the conduct is done "with intent to disturb the peace…with reckless disregard that the conduct is having that effect..." limiting even conduct to a quasi "fighting words" definition. [181]

Following the familiar pattern, Utah courts struck down the former version of disorderly conduct which prohibited "abusive or obscene language" and amended the statute to only prohibit "unreasonable noise" in public or private places.[182] Kentucky legislators revised their disorderly conduct statute after a similar harassment statute was deemed unconstitutional by the state supreme court; with the new version also only prohibiting "unreasonable noise" South Dakota and Tennessee have similar provisions.

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[178] McKinney's Penal Law § 240.20(repealed)

[179]Alaska Stat. § 11.45.030(repealed) Poole v. State, 524 P.2d 286 (1974). ("AS 11.45.030 is void for vagueness because the conduct and speech sought to be prohibited are determined by the impermissibly vague standards of 'annoyance' and 'disturbance' to another...").

[180] Alaska Stat. § 11.61.110 prohibits making "unreasonable noise" but this only with respect to conduct.

[181] Former version: "A person who (1) uses obscene or profane language in a public place or private house or place to the disturbance or annoyance of another; or (2) makes a loud noise or is guilty of tumultuous conduct in a public place or private house to the disturbance or annoyance of another, or is otherwise guilty of disorderly conduct to the disturbance or annoyance of another…" held unconstitutional in Poole v. State, 524 P.2d 286 (1974). Re-written and substantially changed by the legislature in 1973 (am s 1 ch 63 SLA 1973).(post Poole's arrest) New Version: Alaska Stat. § 11.61.110. VA statute reads similarly, with restrictions on conduct prohibited.

[182]Utah Code Ann. § 76-9-102

While Connecticut courts have not repealed sections regarding speech, the judicial manipulation of language is interesting to note. The Connecticut Supreme Court ruled that "offensive conduct" [183]was construed to include "fighting words," as the statute is not "speech prohibitive" by proscribing content of speech, but rather the manner of delivery or conduct of the person.[184] According to the court, because "fighting words" imply imminent physical violence or are likely to prompt imminent physical retaliation, such words may have sufficient aspect of physicality to constitute violation of section of breach of peace statute which proscribes "fighting or violent, tumultuous or threatening behavior." [185]

Similarly, Oregon courts construed their statute to include aspects of speech as conduct, stating that the disorderly conduct statute prohibiting "fighting and violent, tumultuous or threatening behavior, is not overbroad, since term 'behavior' does not prohibit speech, but refers only to physical acts of violence."[186]Following this logic, the court states that any case dealing with speech will instead be thought of as conduct, which does not require judicial protections.[187] This idea is supported by existing scholarship examining the history of "fighting words." While viewing the category of "fighting words" as a class of unprotected speech, Supreme Court decisions seem

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[183] In § 53a-181a (Public Nuisance Statute, identical to Disorderly Conduct statute 53a-182 except that subdivision (2) proscribes only offensive conduct, and not disorderly conduct.
[184] 531 A.2d 184, 191 (Conn. Ct. App. 1987
[185] State v. Szymkiewicz, 678 A.2d 473 (1996).
[186] State v. Cantwell, 676 P.2d 353 (Or App 1984), review denied 681 P.2d 134.
[187] State v. Rich, 180 P.3d 744(Or App 2008) "unreasonable noise" doctrine is unconstitutional only when applied to the content of speech rather than the act(statute held in this case) Defendant was convicted of violating statute prohibiting disorderly conduct, which conduct included "unreasonable noise," on the basis of the volume, location, and duration of his speech, and not on the basis of the content of his speech, which speech involved defendant loudly arguing with a police officer at county courthouse and using expletives, and therefore, the statute was not applied against defendant in violation of his state constitutional right

inconsistent and erratic. However, when examined as conduct rather than speech prohibitive, these decisions make much more sense.[188]

Since *Chaplinsky*, disorderly conduct statutes have been under suspicion of encroachment of constitutionally sanctioned activity. Statutes must be drafted to avoid overbreadth and vagueness, while still meeting the needs of the state. In upholding these values, the Minnesota Supreme Court has narrowed the statute, but these changes are not big enough. Peace officers are trained to follow the statutory language, and some unreported decisions dealing with disorderly conduct do not even mention *SLJ* or "fighting words"[189] These abstract notions of discriminatory enforcement are met with the harsh reality of arrest and citation statistics that reflect racial disparity.

The Supreme Court has not created a neat category of unprotected speech as First suggested in *Chaplinsky*. The only plausible justification for the inconsistent opinions of the court is that "fighting words" were never about the content of speech, but the manner of delivery. "Fighting words" therefore, are not a category of speech, rather the consequence of speech, in the form of fighting conduct. Giving the Supreme Court the benefit of this interpretation, every "fighting words" violation would also violate a simple conduct provision prohibiting physical fighting. The courts have already used conduct as a justification when "fighting words" did not fit the speech, and although a broad interpretation is undesirable, law enforcement could maintain the tools to keep the peace with clear boundaries.

To clearly delineate the bounds of police discretion the statute must be amended. When defining disorderly conduct, the first place sought is the statutory language itself,

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[188] *See supra* note 12
[189] *Supra* note 146

and by further defining the limits of disorderly conduct in the statute itself, one more barrier to discriminatory enforcement will be erected. This means that disorderly conduct does not have differing definitions based on government branch or county courthouse.[190]The simplest way is to remove subdivision 1(3) from Minnesota's statute prohibiting annoying language. Law enforcement still has the tools to keep the peace, as "fighting words" have been shown to be content-neutral, entirely dependent on the manner of delivery. The manner in which "fighting words" are delivered is considered conduct, so any speech which prompts another to fight could be prosecuted under a general provision against fighting in public, which does not intrude upon First Amendment turf. [191]

Conclusion

As scholars have begun looking to long ignored statutes such as vagrancy, loitering, and disorderly conduct, the public has become aware of the implicit targets of these laws. Disorderly conduct represents a problem for every aspect of the criminal justice system. Law enforcement is not made aware of the nature of "fighting words" and a narrow application of the statute. The public is not aware of "fighting words" and therefore disorderly conduct is vulnerable to the "chilling effect" of silencing speech that may be seen as within the bounds of the statute, even if such speech is constitutionally sanctioned. Finally, even the judges are not always aware of judicial construction placed

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[190] *Supra* note 42, p. 883 (In opposition to interest balancing and the overbreadth doctrine, some commentators consider "a method of evolving per se first amendment standards by elucidating the analytical distinction between 'speech' and action).
[191] *See supra* note 42.

on statutes, and the narrow rules of application do not even remain in the court house for long. This is not an exercise in assessing blame to one party or another. One cannot expect that every player has the time or resources to thoroughly investigate the history of every criminal law. Such potential tools for discriminatory enforcement cannot be allowed to stand untouched. Simply repealing the speech provision from Minnesota's Disorderly Conduct statute would save the courts the hassle of applying a misunderstood doctrine, and removes some ambiguity from the statutory language. Silenced free speech cannot be justified by a vague statute, especially when such a fix would be relatively easy.