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David L. Hudson, Jr.

## Essay: The Fighting Words Doctrine: Alive and Well in the Lower Courts

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INTRODUCTION ..... 3

I. LOWER COURT CASES FINDING THAT SPEECH CONSTITUTES FIGHTING WORDS ..... 6

    A. *State v. Harvey* ..... 6

    B. *State v. Hale* ..... 7

    C. *State v. Krueger* ..... 8

    D. *State v. Nelson* ..... 9

    E. *In Re J.K.P.* ..... 10

    F. *Rebel v. Rebel* ..... 10

    G. *In Re H.K.* ..... 11

    H. *McCormick v. City of Lawrence* ..... 11

    I. *County of Milwaukee v. Kiernan* ..... 13

    J. *State v. Ovadal* ..... 13

    K. *State v. C.D.* ..... 14

    L. *State v. Deloreto* ..... 15

    M. *In Re S.J.N-K* ..... 16

    N. *In Re John M.* ..... 17

II. WHAT FACTORS CAN LEAD A COURT TO FIND THAT SPEECH IS FIGHTING WORDS? ..... 17

    A. *Aggressive Conduct In Addition to Speech* ..... 17

    B. *Volume of the Speech* ..... 18

    C. *Repeated Profanities* ..... 18

    D. *Recipient of the Communication* ..... 19

    E. *Racial slurs—especially the “N-word”* ..... 19

III. CONCLUSION ..... 20

## INTRODUCTION

The fighting words exception to the First Amendment has a long vintage.<sup>1</sup> The U.S. Supreme Court created the doctrine nearly eighty years ago in *Chaplinsky v. New Hampshire*.<sup>2</sup> The Court famously defined fighting words as words “which by their very utterance inflict injury or [cause] an immediate breach of the peace.”<sup>3</sup> The Court applied the concept to uphold the breach-of-the-peace conviction of a Rochester, New Hampshire-based Jehovah’s Witness, Walter Chaplinsky, who allegedly cursed a local marshal.<sup>4</sup> The New Hampshire breach-of-the-peace statute was quite broad, stating that “no person shall address any offensive, derisive, or annoying word to any other person . . . .”<sup>5</sup> However, the New Hampshire Supreme Court interpreted the statute to apply only to fighting words — the first time an appeals court had ever used the term “fighting words.”<sup>6</sup> The U.S. Supreme Court accepted this narrow construction and famously declared:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.<sup>7</sup>

Since *Chaplinsky*, the U.S. Supreme Court has consistently invalidated convictions in subsequent fighting words decisions. Most famously, the Court ruled that Paul Robert Cohen did not engage in fighting words when he wore a jacket to a Los Angeles County Courthouse bearing the words “Fuck the Draft.”<sup>8</sup> The Court explained that the jacket with the profane word was not a “direct personal insult.”<sup>9</sup> The Court also noted that there was “no showing that anyone who saw

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<sup>1</sup> David L. Hudson, Jr., *Fighting Words Case Still Making Waves in First Amendment Jurisprudence*, FREEDOM F. INST., Mar. 9, 2012, <https://www.freedomforuminstitute.org/2012/03/09/fighting-words-case-still-making-waves-in-first-amendment-jurisprudence/> [https://perma.cc/8BNS-343Z].

<sup>2</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

<sup>3</sup> *Id.* at 572.

<sup>4</sup> *Id.* at 569, 574.

<sup>5</sup> *Id.* at 569.

<sup>6</sup> David L. Hudson, Jr., *Fighting Words*, in LEGAL ALMANAC: THE FIRST AMENDMENT: FREEDOM OF SPEECH § 3:6 (2012).

<sup>7</sup> *Chaplinsky*, 315 U.S. at 571-72.

<sup>8</sup> *Cohen v. California*, 403 U.S. 15, 26 (1971).

<sup>9</sup> *Id.* at 20.

Cohen was in fact violently aroused or that [Cohen] intended such a result.”<sup>10</sup>

A few years later, the Court in *Lewis v. New Orleans*<sup>11</sup> reversed the conviction of a New Orleans woman who had cursed at police officers for arresting her son. She was charged with violating an ordinance prohibiting the use of “obscene or opprobrious language” toward police officers.<sup>12</sup> The Court deemed the ordinance unconstitutionally overbroad.<sup>13</sup> In a concurring opinion, Justice Lewis Powell wrote that “a properly trained police officer may reasonably be expected to ‘exercise a higher degree of restraint’ than the average citizen, and thus be less likely to respond belligerently to ‘fighting words.’”<sup>14</sup>

The Supreme Court reached a similar result in *City of Houston v. Hill*,<sup>15</sup> a case involving a man who was arrested for protesting the arrest of a friend. The police arrested the individual for violating a city ordinance that prohibited individuals from interfering with officers’ official duties.<sup>16</sup> After being acquitted in municipal court, the man filed a civil rights lawsuit against the city.<sup>17</sup> The city argued that the ordinance prohibited “core criminal conduct.”<sup>18</sup>

The High Court disagreed with Justice William Brennan, famously writing: “The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.”<sup>19</sup> The Court concluded that the Houston ordinance “criminalizes a substantial amount of constitutionally protected speech, and accords the police unconstitutional discretion in enforcement.”<sup>20</sup>

A couple years later, the Supreme Court also rejected the idea that a Texas flag desecration law could be justified under the fighting words doctrine in *Texas v. Johnson*.<sup>21</sup> The five-member majority emphasized that Gregory Lee Johnson did not engage in fighting words when he burned an American flag in connection with the

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<sup>10</sup> *Id.*

<sup>11</sup> *Lewis v. New Orleans*, 415 U.S. 130 (1974).

<sup>12</sup> *Id.* at 132.

<sup>13</sup> *Id.* at 131-32.

<sup>14</sup> *Id.* at 135 (Powell, J., concurring).

<sup>15</sup> *City of Houston, Tex. v. Hill*, 482 U.S. 451, 453-54 (1987).

<sup>16</sup> *Id.* at 454-55.

<sup>17</sup> *Id.* at 455.

<sup>18</sup> *Id.* at 469.

<sup>19</sup> *Id.* at 462-63.

<sup>20</sup> *Id.* at 466.

<sup>21</sup> *Texas v. Johnson*, 491 U.S. 397, 409 (1989).

Republican National Convention in Dallas, Texas.<sup>22</sup> Texas officials argued that burning the flag constituted fighting words.<sup>23</sup> But Justice Brennan wrote that “[n]o reasonable onlooker would have regarded Johnson’s generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange fisticuffs.”<sup>24</sup>

A few years later, the Court invalidated the conviction of a juvenile who was prosecuted for burning a cross in the yard of a neighboring African-American family.<sup>25</sup> The law prohibited burning crosses or other hate symbols “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.”<sup>26</sup>

The Minnesota Supreme Court upheld the law, reasoning that it applied only to fighting words.<sup>27</sup> However, the U.S. Supreme Court—in an opinion by Justice Antonin Scalia—reasoned that the state committed viewpoint discrimination by choosing to punish only certain types of fighting words.<sup>28</sup>

The fighting words doctrine has always been controversial, as it allows for the punishment of individuals for engaging in offensive, obnoxious, and repugnant expression.<sup>29</sup> The doctrine has been vigorously criticized. Professor Burton Caine termed it a “tragedy for the jurisprudence of Freedom of Speech.”<sup>30</sup> Many other scholars have questioned the vitality of the doctrine, frequently noting that post-*Chaplinsky* the Court has never sustained a conviction in a fighting words case.<sup>31</sup>

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 407-08.

<sup>24</sup> *Id.* at 409.

<sup>25</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 379-80 (1992).

<sup>26</sup> *Id.* at 380.

<sup>27</sup> *Id.* at 380-81.

<sup>28</sup> *Id.* at 391.

<sup>29</sup> David L. Hudson, Jr., *Connecticut High Court Reverses Woman’s Conviction for Profanity Uttered at Store*, FREEDOM F. INST., July 27, 2017, <https://www.freedomforuminstitute.org/2017/07/26/connecticut-high-court-reverses-womans-conviction-for-profanity-uttered-at-store/> [<https://perma.cc/GC3Z-JUV3>] (noting that “[t]he fighting words doctrine is a controversial aspect of free-speech jurisprudence, because it allows for the punishment of individuals for intemperate, offensive speech.”).

<sup>30</sup> 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, 443 (2004).

<sup>31</sup> ERWIN CHEMERINSKY & HOWARD GILLMAN, *FREE SPEECH ON CAMPUS* 40 (2017) (noting that the U.S. Supreme Court hasn’t sustained a fighting words conviction in more than seventy years); Kevin Francis O’Neill, *A First Amendment Compass: Navigating the Free Speech Clause with a Five-Step Analytical Framework*, 29 SW. U. L. REV. 223, 256 (2000) (“*Chaplinsky* is the first and last decision in

But the fighting words doctrine is alive and well in the lower courts.<sup>32</sup> The first part of this article briefly has explained how the fighting words doctrine fared in the U.S. Supreme Court. These results would seem to indicate that it would be rare indeed for a defendant's words to fall under the fighting words exception. That is not always the case. The next part of this article provides a sampling of decisions in which lower courts have rejected First Amendment-based defenses to disorderly conduct, breach of the peace, or similar charges based on the fighting words doctrine. The final part of the essay then explains the specific factors or facts that cause lower courts to find that certain expression constitutes unprotected fighting words rather than protected speech.

## I. LOWER COURT CASES FINDING THAT SPEECH CONSTITUTES FIGHTING WORDS

### A. *State v. Harvey*<sup>33</sup>

In November 1998, a special response team with the Marion, Ohio Police Department executed an arrest warrant on an individual.<sup>34</sup> When the police emerged from the home with the individual arrested, a neighbor, Marcus G. Harvey, came out to the scene and began shouting at the arresting officers.<sup>35</sup> He yelled "F you guys," "Let me see an F'ing search warrant," "This is a declaration of war," and "This means war."<sup>36</sup> The police then arrested Harvey who had his hands in his pocket.<sup>37</sup> Harvey had his hands on his key fob and refused to let go.<sup>38</sup> The officers

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which the Supreme Court has ever affirmed a fighting words conviction."); Linda Friedlieb, Comment, *The Epitome of an Insult: A Constitutional Approach to Designated Fighting Words*, 72 U. CHI. L. REV. 385, 389 (2005) (noting that the "Supreme Court has never affirmed another fighting words conviction"); Aviva O. Wertheimer, Note, *The First Amendment Distinction Between Conduct and Content: A Conceptual Framework for Understanding Fighting Words Jurisprudence*, 63 FORDHAM L. REV. 793, 795 (1994) ("Yet, in the half century following the Supreme Court's articulation of the doctrine, no convictions in cases in which a defendant was prosecuted under a fighting words statute have been upheld.").

<sup>32</sup> Chris Demaske, *Social Justice, Recognition Theory and the First Amendment: A New Approach to Hate Speech Restriction*, 24 COMM. L. & POL'Y 347, 368 n.102 ("While the Supreme Court has moved away from the fighting words doctrine, it continues to be used vigorously by the lower courts.").

<sup>33</sup> *State v. Harvey*, No. 9-19-34, 2020 Ohio App. LEXIS 283, at \*1 (Feb. 3, 2020).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at \*2.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at \*2-3.

<sup>38</sup> *Id.* at \*3-4.

eventually tased Harvey and took him into custody.<sup>39</sup>

A “jury found Harvey guilty of one count of resisting arrest and one count of persistent disorderly conduct.”<sup>40</sup> On appeal, the Ohio Court of Appeals affirmed his convictions.<sup>41</sup> With regard to the persistent disorderly conduct charge, the appeals court analyzed whether Harvey had engaged in fighting words.<sup>42</sup> The appeals court noted that a key factor in such cases was whether the defendant engaged in “hostile or threatening” conduct when making the profane statements.<sup>43</sup> Another key factor noted by the appeals court was whether the defendant continued uttering profane statements after being ordered to stop.<sup>44</sup>

The appeals court emphasized that Harvey’s conduct was crucial to the decision to arrest him: “The testimony of the police officers indicates that Harvey’s conduct alongside his profane utterances and aggressive demeanor were the impetus for the police to arrest him for disorderly conduct.”<sup>45</sup> The appeals court also focused on the fact that “Harvey approached the police in an aggressive and agitated manner.”<sup>46</sup> Ultimately, the appeals court concluded that Harvey’s statements constituted fighting words and affirmed his conviction.<sup>47</sup>

**B. *State v. Hale***<sup>48</sup>

In October 2016, Jason Hale and his wife entered a gas station in Oak Harbor, Ottawa County, Ohio.<sup>49</sup> Hale was employed by the Ottawa County Sheriff’s Department.<sup>50</sup> Hale encountered Officer Eric Parker and Sergeant Joshua Coutts who were employed by the Oak Harbor Police Department.<sup>51</sup> Hale allegedly yelled “Fuck you, Parker” at Officer Parker and then yelled “Suck my dick, Parker” as he

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<sup>39</sup> *Id.* at \*4.

<sup>40</sup> *Id.* at \*5.

<sup>41</sup> *Id.* at \*1.

<sup>42</sup> *Id.* at \*19.

<sup>43</sup> *Id.* at \*10.

<sup>44</sup> *Id.* at \*10-11.

<sup>45</sup> *Id.* at \*13.

<sup>46</sup> *Id.* at \*18.

<sup>47</sup> *Id.* at \*19.

<sup>48</sup> *State v. Hale*, No. OT-17-023, 2018 Ohio App. LEXIS 1576, at \*1 (April 13, 2018).

<sup>49</sup> *Id.* at \*1-2.

<sup>50</sup> *Id.* at \*2.

<sup>51</sup> *Id.* at \*1-2.

came near the cashier.<sup>52</sup> Hale then yelled “you’re a coward” at Parker as he left the store.<sup>53</sup>

At the time that Hale yelled these profanities, there were women with small children in the convenience store.<sup>54</sup> A store employee testified that Hale was “very loud” and that it unnerved her.<sup>55</sup> Hale was later charged with disorderly conduct.<sup>56</sup> Following a bench trial, the court found Hale guilty.<sup>57</sup>

On appeal, the Ohio Court of Appeals affirmed the conviction.<sup>58</sup> The appeals court noted that Hale repeatedly directed “obscene remarks” at Officer Parker in a manner that was “provoking.”<sup>59</sup> The court noted that the words “would reasonably incite the average person to retaliate.”<sup>60</sup>

### C. *State v. Krueger*<sup>61</sup>

Defendant Chad Harold Krueger was sitting at a bar when he saw his sister-in-law, with whom he had an acrimonious relationship.<sup>62</sup> He told his friend that his sister-in-law was a “f-cking c-nt.”<sup>63</sup> He then began to scream various profanities at her over and over.<sup>64</sup> The sister-in-law left the bar; but Krueger continued to shout at her, telling her she “was so f-cking stupid that he couldn’t even believe [she] was alive.”<sup>65</sup> A police officer approached and Krueger continued yelling at his sister-in-law.<sup>66</sup>

The officer arrested Krueger for disorderly conduct, and a jury later found him guilty.<sup>67</sup> On appeal, the Minnesota Court of Appeals affirmed, noting that several

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<sup>52</sup> *Id.* at \*2-3.

<sup>53</sup> *Id.* at \*3.

<sup>54</sup> *Id.* at \*4.

<sup>55</sup> *Id.* at \*4-5.

<sup>56</sup> *Id.* at \*1.

<sup>57</sup> *Id.* at \*5.

<sup>58</sup> *Id.* at \*1.

<sup>59</sup> *Id.* at \*8.

<sup>60</sup> *Id.* at \*8-9.

<sup>61</sup> *State v. Krueger*, A17-00081, 2017 Minn. App. Unpub. LEXIS 1047, at \*1 (Dec. 18, 2017).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at \*1-2.

<sup>64</sup> *Id.* at \*2.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at \*2, \*7.

witnesses testified to Krueger’s profane and loud statements to his sister-in-law.<sup>68</sup> The court concluded, “Krueger’s statements were likely to provoke violence for several reasons: his extreme volume and vulgarity, he leaned in toward [the sister-in-law] as he spoke, and he followed [her] outside of the bar and continued to yell vulgar and taunting remarks.”<sup>69</sup>

**D. *State v. Nelson***<sup>70</sup>

Jeffrey Kevin Nelson entered a liquor store and had a heated verbal confrontation with the store clerk working behind the cash register.<sup>71</sup> Nelson, who had prior altercations with the clerk and the clerk’s wife, called the clerk a “f--king a--hole” and a “piece of sh-t” in the presence of about ten to fifteen customers.<sup>72</sup> The clerk told Nelson to leave, but Nelson continued to curse and refused to leave.<sup>73</sup>

A police sergeant received a report of a “customer harassing an employee or causing a disturbance at the liquor store.”<sup>74</sup> The officer arrested Nelson for disorderly conduct and a trial court found Nelson guilty.<sup>75</sup>

On appeal, Nelson argued that the fighting words doctrine was “archaic” and that his speech was protected by the First Amendment.<sup>76</sup> The Minnesota Court of Appeals rejected that argument, writing that “[t]he ‘fighting words’ category of unprotected speech remains good law and is appropriate for application in this case.”<sup>77</sup>

The appeals court determined that Nelson’s profanities at the store clerk were the type of face-to-face personal insults that fall within the ambit of the fighting words doctrine.<sup>78</sup> The appeals court explained: “A store clerk at his place of work should not be expected to tolerate the same level of abuse as a trained police officer who often deals with intoxicated or mentally ill persons.”<sup>79</sup>

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<sup>68</sup> *Id.* at \*1, \*16-17.

<sup>69</sup> *Id.* at \*18.

<sup>70</sup> *State v. Nelson*, No. A14-0356, 2014 Minn. App. LEXIS 1305 (Minn. Ct. App. Dec. 22, 2014).

<sup>71</sup> *Id.* at \*1-2.

<sup>72</sup> *Id.* at \*1-2.

<sup>73</sup> *Id.* at \*2.

<sup>74</sup> *Id.* at \*3.

<sup>75</sup> *See id.* at \*3.

<sup>76</sup> *Id.* at \*4-5.

<sup>77</sup> *Id.* at \*5.

<sup>78</sup> *Id.* at \*7-8.

<sup>79</sup> *Id.* at \*9-10.

**E. *In Re J.K.P.***<sup>80</sup>

The Kansas Court of Appeals upheld a juvenile court's finding of delinquency for disorderly conduct when a juvenile yelled the N-word at another juvenile.<sup>81</sup> The court noted that the recipient of the communication was offended by the use of the racial slur.<sup>82</sup> The court also quoted the North Carolina Supreme Court's following language: "No fact is more generally known than that a white man who calls a black man a 'nigger' within his hearing will hurt and anger the black man, and often provoke him to confront the white man and retaliate."<sup>83</sup>

**F. *Rebel v. Rebel***<sup>84</sup>

The North Dakota Supreme Court determined that a couple engaged in disorderly conduct when they approached the husband's former spouse and used vulgar and abusive language.<sup>85</sup> Jesse and Brandi Rebel, a married couple, were upset at Jesse's former spouse, Wendy Rebel.<sup>86</sup> They believed that Wendy lied about Jesse being the father of her two children.<sup>87</sup>

Jesse and Brandi Rebel approached Wendy Rebel in her car and began shouting at her.<sup>88</sup> Brandi called Wendy a "fucking liar" and told her "she was not brave enough to get out of the car."<sup>89</sup> Brandi later posted on Facebook that Wendy was "shaking so bad I thought she was having a seizure and I'm positive she pissed herself!"<sup>90</sup>

The North Dakota Supreme Court affirmed a disorderly conduct restraining order against Jesse and Brandi, who argued that their speech was constitutionally protected.<sup>91</sup> The state high court disagreed, writing that the district court did not err in finding that "Wendy Rebel's safety, security, and privacy were compromised

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<sup>80</sup> *In re J.K.P.*, No. 108,617, 2013 Kan. App. LEXIS 185 (Kan. Ct. App. Mar. 8, 2013).

<sup>81</sup> *Id.* at \*5-6, 13.

<sup>82</sup> *Id.* at \*8.

<sup>83</sup> *Id.* at \*8-9 (quoting *In re Spivey*, 480 S.E.2d 693, 699 (N.C.1997)).

<sup>84</sup> *Rebel v. Rebel*, 837 N.W.2d 351 (N.D. 2013).

<sup>85</sup> *Id.* at 353.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 356.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 359.

by the Rebels’ threatening actions and that the language used to get her out of the vehicle constituted ‘fighting words’ with no legitimate First Amendment purpose.<sup>92</sup>

**G. *In Re H.K.***<sup>93</sup>

Juvenile H.K. and two others followed T.K., an African-American girl, into a bathroom at a teen center in Valley City, North Dakota.<sup>94</sup> H.K. started yelling at T.K. and called her a “nigger” on multiple occasions.<sup>95</sup> H.K. allegedly told T.K. she better watch out because she did not want her kind in this town.<sup>96</sup> After this incident, T.K. also ran into H.K. at a local restaurant where H.K. once again referred to her by the same racial slur.<sup>97</sup>

Authorities charged H.K. with disorderly conduct.<sup>98</sup> Her attorney argued that the state was attempting to criminalize the use of the racial slur.<sup>99</sup> The juvenile court adjudicated H.K. delinquent.<sup>100</sup> On appeal, the North Dakota Supreme Court affirmed.<sup>101</sup> The court noted that H.K. did more than utter a single racial epithet but “repeatedly” uttered the racial slur.<sup>102</sup> The court reasoned that “an objectively reasonable person would find the totality of H.K.’s statements constituted explicit and implicit threats that were likely to incite a breach of the peace or violent reaction and alarm the listener.”<sup>103</sup>

**H. *McCormick v. City of Lawrence***<sup>104</sup>

A federal district court in Kansas determined that two individuals who filmed police activity at traffic stops and yelled at officers during those stops uttered

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<sup>92</sup> *Id.*

<sup>93</sup> *Cruff v. H.K. (In re H.K.)*, 778 N.W.2d 764 (N.D. 2010).

<sup>94</sup> *Id.* at 767.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 770.

<sup>103</sup> *Id.*

<sup>104</sup> *McCormick v. City of Lawrence*, 325 F. Supp. 2d 1191 (D. Kan. 2004).

fighting words.<sup>105</sup> In one instance, the police conducted a traffic stop of a driver.<sup>106</sup> The plaintiff filmed the police at a McDonald's about thirty to forty feet away.<sup>107</sup> As the police were conducting the stop, the plaintiff filmed them and unleashed a torrent of profanity, such as "Mother F\*\*\*ers," "F\*\*\*ing pigs," and "Leave her the f\*\*\* alone."<sup>108</sup> The plaintiff then approached within ten to fifteen feet of the officers, causing one of the officers to ask whether the plaintiff was interfering with his investigation.<sup>109</sup> The officers then arrested the plaintiff for interfering with their official duties.<sup>110</sup>

Another similar incident that occurred involved one of the same plaintiffs, who saw an officer conducting a sobriety checkpoint.<sup>111</sup> This time, the plaintiff approached the officer, once again filming the police activity.<sup>112</sup> The officer warned the plaintiff not to come closer and interfere with a police investigation.<sup>113</sup> During the course of the interaction, the plaintiff yelled the following profanities at the officers: "oppressive, sick a \*\* holes,' 'jack-booted thugs,' 'Gestapo,' 'pieces of sh\*t,' 'sick, oppressive a \*\* holes,' and 'sick a \*\* holes,' among other epithets."<sup>114</sup>

The plaintiffs challenged their arrests with a civil rights lawsuit.<sup>115</sup> The officers responded by pleading qualified immunity as a defense.<sup>116</sup> The federal district court ruled in favor of the officers, finding that the police officers were entitled to qualified immunity because the plaintiffs did not engage in protected speech.<sup>117</sup> Instead, the court determined that the plaintiffs engaged in fighting words.<sup>118</sup> The court explained: "Although the facts regarding the proximity of Plaintiffs to Defendants and the volume of Plaintiffs' remarks are controverted, the court concludes as a matter of law that Plaintiffs' speech was 'inherently likely to produce

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<sup>105</sup> *Id.* at 1197–98, 1201.

<sup>106</sup> *Id.* at 1196.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 1197.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 1198.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 1198–99.

<sup>114</sup> *Id.* at 1199.

<sup>115</sup> *Id.* at 1195.

<sup>116</sup> *Id.* at 1199.

<sup>117</sup> *Id.* at 1201–02.

<sup>118</sup> *Id.* at 1201.

a violent reaction.”<sup>119</sup> The court emphasized that the plaintiffs “were not only showing their disapproval of police activity, but also making repeated personal attacks on the officers.”<sup>120</sup>

**I. County of Milwaukee v. Kiernan**<sup>121</sup>

John P. Kiernan took his wife to Mitchell International Airport in Wisconsin.<sup>122</sup> Kiernan’s wife set off the metal detector as she passed through security.<sup>123</sup> Kiernan yelled at his wife to tell the security personnel that it was because of the screws in her hip.<sup>124</sup> When Kiernan went to assist his wife, he crossed over the red-line tape.<sup>125</sup> A security officer told Kiernan to get back across the line, which caused Kiernan to respond that the officer ought to get back over the line.<sup>126</sup> Kiernan allegedly cursed at the officers and put his hands on one of them.<sup>127</sup>

The officers issued a citation to Kiernan for disorderly conduct.<sup>128</sup> A trial court found him guilty.<sup>129</sup> On appeal, the Wisconsin Court of Appeals affirmed, noting witness testimony that Kiernan had told a police officer he would “kick [his] ass” and called him a “son of a bitch.”<sup>130</sup> The appeals court reasoned that this language “clearly falls under the scope of ‘fighting words’ that could have incited a breach of the peace and have little social value.”<sup>131</sup>

**J. State v. Ovadal**<sup>132</sup>

Ralph Ovadal was part of a group that protested nudity at Mazomanie Beach in

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> County of Milwaukee v. Kiernan, No. 02-1269, 2002 Wis. App. LEXIS 1994 (Wis. Ct. App. Nov. 5, 2002).

<sup>122</sup> *Id.* at \*1–2.

<sup>123</sup> *Id.* at \*2.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at \*3.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at \*6–7.

<sup>131</sup> *Id.* at \*7.

<sup>132</sup> State v. Ovadal, No. 03-377-CR, 2003 Wis. App. LEXIS 947 (Wis. Ct. App. Oct. 7, 2003).

Dane County, Wisconsin.<sup>133</sup> The group generally protested in the beach parking lot located about a mile and a half from the beach.<sup>134</sup> In May 2001, Ovadal and a group of others were protesting when they saw a woman get out of her car.<sup>135</sup> A member of Ovadal's group handed her a gospel tract.<sup>136</sup> The woman responded with profanity.<sup>137</sup> The group then formed a semi-circle around the woman and started yelling at her to repent and called her names such as "whore," "harlot," and "Jezebel."<sup>138</sup>

The woman filed a complaint against Ovadal and the police later charged him with disorderly conduct.<sup>139</sup> He pled not guilty and had a bench trial.<sup>140</sup> The judge determined Ovadal was guilty of disorderly conduct.<sup>141</sup>

On appeal, the Wisconsin Court of Appeals affirmed the conviction.<sup>142</sup> The appeals court noted that "Ovadal repeatedly shouted at [the woman] that she was a whore, harlot, and Jezebel" and that "in just over six minutes, he used these terms over thirty times."<sup>143</sup> The appeals court concluded, "Ovadal's statements had nothing to do with an exposition of ideas. Instead, they were abusive fighting words and are not protected by the First Amendment."<sup>144</sup>

#### **K. *State v. C.D.***<sup>145</sup>

A 16-year-old juvenile, known in court papers as "C.D.," faced juvenile delinquency charges for disorderly conduct for an incident that occurred at a shopping mall in Tukwila, Washington.<sup>146</sup> A mall security guard, who was also a reserve police officer, heard several individuals yelling and saw C.D. on a bench

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<sup>133</sup> *Id.* at \*1-2.

<sup>134</sup> *Id.* at \*2.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at \*2, \*5.

<sup>139</sup> *Id.* at \*3.

<sup>140</sup> *Id.* at \*3.

<sup>141</sup> *Id.* at \*3.

<sup>142</sup> *Id.* at \*1.

<sup>143</sup> *Id.* at \*8.

<sup>144</sup> *Id.* at \*8-9.

<sup>145</sup> *State v. C.D.*, No. 018011911, 2002 WL 450467 (Wash. Ct. App. Mar. 25, 2002).

<sup>146</sup> *Id.* at \*1.

yelling at four other individuals.<sup>147</sup> C.D. then called the officer “a nigger” and exhibited an aggressive demeanor.<sup>148</sup> He also asked the officer “what the fuck are you doing” and called him “boy.”<sup>149</sup>

The officer smelled alcohol on C.D.’s breath and asked him repeatedly to leave the mall.<sup>150</sup> C.D. approached the officer with clenched fists, causing the officer to push C.D.<sup>151</sup> The officer, then accompanied by another security officer, took C.D. into custody.<sup>152</sup> The mall guards then called the police.<sup>153</sup> In the mall security office, C.D. continued to be loud and argumentative.<sup>154</sup> He was charged with disorderly conduct and a minor in possession.<sup>155</sup>

A juvenile court adjudicated C.D. delinquent on both charges.<sup>156</sup> On appeal, the Washington Court of Appeals affirmed the adjudication.<sup>157</sup> The appeals court emphasized that context was key in determining whether the speech constituted fighting words.<sup>158</sup> The appeals court also noted that C.D.’s language caused the mall security guard to push him.<sup>159</sup> The court wrote, “Fighting words are no less offensive because they engender only the fear of violence and the possibility that the threatened violence will occur.”<sup>160</sup> The appeals court also emphasized that C.D. had clenched his fists and uttered racial slurs.<sup>161</sup>

**L. *State v. Deloreto***<sup>162</sup>

On June 9, 2000, Dante Deloreto was driving in his vehicle when he passed a

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at \*2.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at \*2.

<sup>157</sup> *Id.* at \*1.

<sup>158</sup> *Id.* at \*3.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *State v. Deloreto*, No. CRO00190119S, 2002 WL 316991 (Conn. Super. Ct. Jan. 30, 2002).

jogger who he knew was a police officer.<sup>163</sup> He called the officer “an asshole” and flipped the officer off.<sup>164</sup> He also told the officer, “Faggot, pig, I’ll kick your ass.”<sup>165</sup> Deloreto said he had a problem with the officer and others, who he had sued in a federal lawsuit.<sup>166</sup> Deloreto then opened the door and jumped out of the car and yelled, “I’m going to kick your ass.”<sup>167</sup>

A second incident occurred between Deloreto and another officer six days later at a convenience store.<sup>168</sup> Deloreto approached the officer and raised his fist.<sup>169</sup> He told the officer, “I’ll kick your ass, punk” several times.<sup>170</sup> The officer did not arrest him on the spot, preferring to let the situation de-escalate.<sup>171</sup>

Later, authorities charged Deloreto with two counts of breach of the peace for the two incidents.<sup>172</sup> The Connecticut Superior Court wrote:

The language used by the defendant in both incidents which threatened violence against the police officers, together with the threatening gestures by the defendant of raising and pumping his fist, were sufficient to support an inference that the defendant wished to provoke the policemen to violence, thereby removing his words and actions from first amendment protection.<sup>173</sup>

#### **M. *In Re S.J.N-K***<sup>174</sup>

The South Dakota Supreme Court found that a juvenile committed disorderly conduct when he—in a car driven by his brother—flipped off and repeatedly yelled “fuck you” to his middle-school principal.<sup>175</sup> The court emphasized that the juvenile unleashed a torrent of profanity and repeatedly made the profane gesture: “This was not merely the use of one profane word or one obscene gesture, it was an ongoing

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<sup>163</sup> *Id.* at \*1.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at \*2.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at \*3.

<sup>172</sup> *Id.* at \*3.

<sup>173</sup> *Id.* at \*4.

<sup>174</sup> *In re S.J.N-K*, 647 N.W.2d 707, 709 (S.D. 2002).

<sup>175</sup> *Id.* at 709.

aggression that falls outside free speech protection.”<sup>176</sup>

**N. *In Re John M.***<sup>177</sup>

The Arizona Court of Appeals sustained a juvenile court’s delinquency adjudication for disturbing the peace when the juvenile yelled a racial slur at an African-American female and threw a soda can at her.<sup>178</sup> The Arizona appeals court determined that the racial slur—the use of the N-word—was so inflammatory that it constituted fighting words.<sup>179</sup> The appeals court explained: “We agree with the State that few words convey such an inflammatory message of racial hatred and bigotry as the term ‘nigger.’”<sup>180</sup> The court also characterized the juvenile’s speech as “an unprovoked, personal attack on an innocent bystander.”<sup>181</sup>

**II. WHAT FACTORS CAN LEAD A COURT TO FIND THAT SPEECH IS FIGHTING WORDS?**

**A. *Aggressive Conduct In Addition to Speech***

If the defendant engages in aggressive conduct in addition to profane or intemperate speech, a reviewing court may focus on the conduct alone or consider the speech in conjunction with the unprotected conduct. This implicates an important doctrine in First Amendment law—sometimes referred to as the speech-conduct dichotomy.<sup>182</sup> Under this doctrine, there is a significant difference between protected speech and unprotected conduct.<sup>183</sup> However, the doctrine is disfavored by First Amendment scholars because oftentimes activity involves both speech and conduct and to try to combine the two can undervalue speech.<sup>184</sup>

The reality is that in a fighting words case, the government often will focus on the aggressive conduct, while the individual will assert that he or she engaged in pure speech. Take the example of spitting—if a defendant curses at an officer and

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<sup>176</sup> *Id.* at 712.

<sup>177</sup> *In re John M.*, 201 Ariz. 424 (Ariz. Ct. App. 2001).

<sup>178</sup> *Id.* at 425.

<sup>179</sup> *Id.* at 428-29.

<sup>180</sup> *Id.* at 428.

<sup>181</sup> *Id.* at 428.

<sup>182</sup> David L. Hudson, Jr. *FREEDOM OF SPEECH: DOCUMENTS DECODED* 91 (1st ed. 2017).

<sup>183</sup> *Id.*

<sup>184</sup> See John Hart Ely, Comment, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1488, 1495-96 (1975).

spits at the officer, a reviewing court is far more likely to find that the defendant engaged in disorderly conduct.<sup>185</sup>

The conduct could be waving one's hands, clenching one's fists, or anything categorized as "hostile or threatening" conduct. Recall the case of *C.D. v. State*, where the slur-uttering juvenile also had his fists clenched as he cursed at the mall security guard.<sup>186</sup> In *State v. Deloreto*, the court emphasized that alongside the profanity, the defendant had engaged in "threatening gestures" of "raising and pumping his fist" when approaching the officer.<sup>187</sup> Similarly, in *State v. Harvey*, the Ohio Court of Appeals focused on Mr. Harvey's "hostile or threatening" conduct in finding that his speech was fighting words.<sup>188</sup> Furthermore, Mr. Harvey approached the police in "an aggressive and agitated manner."<sup>189</sup>

### **B. Volume of the Speech**

The louder the speech, the more likely that a court may use that fact to support a disorderly conduct conviction based on the fighting words doctrine. In *State v. Hale*, the Ohio Court of Appeals emphasized the witness testimony that Mr. Hale was "very loud" when he uttered his profanities.<sup>190</sup> The Minnesota Court of Appeals also emphasized the "extreme volume" of Mr. Krueger, the man who repeatedly cursed at his sister-in-law, in upholding his disorderly conduct conviction.<sup>191</sup>

### **C. Repeated Profanities**

Profanity generally is protected speech under First Amendment jurisprudence.<sup>192</sup> However, the sheer number and intensity of the profanities may cause a reviewing court to find that the intemperate speech crosses the line into unprotected fighting words. Recall that in *State v. Hale*, the off-duty sheriff's deputy

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<sup>185</sup> See *State v. York*, 732 A.2d 859, 860 (Me. 1999) (noting that "Defendant's conduct included not just speech, but also the physical acts of declining obstreperously to leave the building . . . and attempting to spit [on the recipient].")

<sup>186</sup> *State v. C.D.*, No. 018011911, 2002 WL 450467 at \*1 (Wash. Ct. App. Mar. 25, 2002).

<sup>187</sup> *State v. Deloreto*, No. CR000190119S, 2002 WL 316991 at \*4 (Conn. Super. Ct. Jan. 30, 2002).

<sup>188</sup> *State v. Harvey*, No. 9-19-34, 2020 WL 525933 at \*5 (Ohio Ct. App. Feb. 3, 2020).

<sup>189</sup> *Id.* at \*7.

<sup>190</sup> *State v. Hale*, 110 N.E.3d 890, 893 (Ohio Ct. App. 2018).

<sup>191</sup> *State v. Krueger*, No. 14-CR-16-1342, 2017 WL 6418219 at \*1, \*7 (Minn. Ct. App. Feb. 28, 2018).

<sup>192</sup> See David L. Hudson, Jr., ANTI-PROFANITY LAWS AND THE FIRST AMENDMENT, 42 T. MARSHALL L. REV. 203, 203 (2018) ("Profanity generally should be protected by the First Amendment.")

was found to have engaged in fighting words when he repeatedly cursed at a local police officer in a convenience store.<sup>193</sup> Similarly, the Wisconsin Court of Appeals upheld Mr. Ovadal's disorderly conduct conviction in part because he called his victim "whore," "harlot," and "Jezebel" thirty times in about six minutes.<sup>194</sup> The South Dakota Supreme Court emphasized that a juvenile engaged in an "ongoing aggression" of repeated profanities.<sup>195</sup> The federal district court in Kansas in the *McCormick* case listed all of the various profanities uttered by the plaintiffs and emphasized the "repeated personal attacks" the plaintiffs made against the police officers.<sup>196</sup>

#### **D. Recipient of the Communication**

The recipient of the communication matters in many fighting words cases. Many courts do follow the principle that Justice Powell advocated in his concurring opinion in *Lewis v. New Orleans*—that police officers are expected to exercise greater restraint when confronted with hostile words.<sup>197</sup>

But if the recipient of the hostile expression is not a police officer, a court is more likely to find that the speech constitutes fighting words. For example, the Minnesota Court of Appeals emphasized that store clerks—unlike police officers—should not be expected to "tolerate the same level of abuse."<sup>198</sup> Furthermore, courts are seemingly more willing to find that a defendant engaged in fighting words when the recipient is someone with whom the defendant has a familial relationship, as opposed to law enforcement.<sup>199</sup>

#### **E. Racial slurs—especially the "N-word"**

Racial slurs can constitute fighting words.<sup>200</sup> Scholar William C. Nevin explains

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<sup>193</sup> *Hale*, 110 N.E.3d. at 894.

<sup>194</sup> *State v. Ovadal*, No. 03-377-CR, 2003 LEXIS 947, at \*8 (Wis. Ct. App. Oct 7, 2003).

<sup>195</sup> *In re S.J.N.-K*, 647 N.W.2d 707, 712. (S.D. 2002).

<sup>196</sup> *McCormick v. City of Lawrence*, 325 F.Supp.2d 1191, 1197, 1201 (D. Kan. 2004).

<sup>197</sup> *Lewis v. City of New Orleans*, 415 U.S. 130, 135 (U.S. 1974) (J. Powell, concurring).

<sup>198</sup> *State v. Nelson*, No. 13-CR-13-107, 2014 WL 7237043, at \*4 (Minn. Ct. App. Dec. 22, 2014). However, the Connecticut Supreme Court recently held that store managers are in the same position as police officers when it comes to fighting words – they are expected to be used to hostile situations. *See State v. Baccala*, 163 A.3d 1, 14 (Conn. 2017).

<sup>199</sup> *See, e.g., Rebel v. Rebel*, 837 N.W.2d 351 (N.D. 2013).

<sup>200</sup> William C. Nevin, *Fighting Slurs: Contemporary Fighting Words and the Question of Criminally Punishable Racial Epithets*, 14 FIRST AMEND. L. REV. 127, 158 (2015).

that sometimes courts hold racial slurs to be protected speech, sometimes they hold them to be fighting words, and sometimes racial slurs are fighting words depending on the specific context.<sup>201</sup>

Of all the racial slurs, the N-word carries the most significance in fighting words cases. Harvard Law Professor Randall Kennedy has explained the special nature of the N-word in American law and society.<sup>202</sup> Kennedy, in an earlier piece of scholarship, explains:

Any person in the United States should be aware of the N-word. Ignorance could be very costly. Failing to recognize it as the signal of danger that it often is could well lead to injury, just as using it unaware of its effects and consequences could well cost a person his reputation, his job, or even his life.<sup>203</sup>

The N-word represents the ultimate fighting word. In the words of one scholar, “it carries the force of generations of racial tyranny.”<sup>204</sup> The North Carolina Supreme Court accurately wrote years ago: “No fact is more generally known than that a white man who calls a black man ‘a nigger’ within his hearing will hurt and anger the black man, and often provoke him to confront the white man and retaliate.”<sup>205</sup> In many juvenile adjudication cases, courts have affirmed the finding of delinquency for those juveniles who uttered the N-word at their victims.<sup>206</sup>

### III. CONCLUSION

The fighting words doctrine remains a vibrant and controversial part of First Amendment law. While the U.S. Supreme Court has not affirmed a fighting words conviction since that of Walter Chaplinsky’s in 1942, the doctrine remains alive and well in the lower courts. Courts that affirm a disorderly conduct or breach of the peace conviction are more likely to emphasize a defendant’s aggressive conduct, a defendant’s loud volume, the repeated profanities of the defendant, the reaction of the recipient of the communication, and noxious racial slurs.

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<sup>201</sup> *Id.*

<sup>202</sup> Randall Kennedy, *NIGGER: THE STRANGE CAREER OF A TROUBLESOME WORD* (1st ed. Pantheon, 2002).

<sup>203</sup> Randall Kennedy, *‘Nigger’ as a Problem in the Law*, 2001 U. ILL. L. REV. 935, 937 (2001).

<sup>204</sup> Kindaka J. Sanders, *Defending the Spirit: The Right to Self-Defense Against Psychological Assault*, 19 NEV. L.J. 227, 240 (2018).

<sup>205</sup> *In re Spivey*, 345 N.C. 404, 414 (1997).

<sup>206</sup> *In re J.K.P.*, No. 108,617, 296 P.3d 1140 (table) at \*5 (Kan. Ct. App. Mar. 2013); *State v. C.D.*, No. 018011911, 2002 WL 450467 at \*2-3 (Wash. Ct. App. Mar. 25, 2002); *In re John M.*, 201 Ariz. 424, 429 (Ariz. Ct. App. 2001).